

Cartel Regulation 2021

In association with
Dechert LLP



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

Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020
No photocopying without a CLA licence.
First published 2001
Twenty-first edition
ISBN 978-1-83862-310-4

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



Cartel Regulation 2021

Contributing editor

Neil Campbell
McMillan LLP

Lexology Getting The Deal Through is delighted to publish the twenty-first edition of *Cartel Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 new chapters on Argentina, Bulgaria, France and Spain.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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, Neil Campbell of McMillan LLP, for his continued assistance with this volume.



London
November 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Foreword	5	Finland	111
Neil Campbell McMillan LLP		Mikael Wahlbeck, Antti Järvinen and Niko Hukkinen Frontia Attorneys Ltd	
Global overview	6	France	120
Roxann E Henry, Lisa M Phelan, Megan E Gerking and Robert W Manoso Morrison & Foerster LLP		Lionel Lesur and Anna Sacco Franklin	
Argentina	9	Germany	128
Miguel del Pino and Santiago del Rio Marval O'Farrell Mairal		Markus M Wirtz and Silke Möller Glade Michel Wirtz	
Australia	16	Hong Kong	137
Fiona Crosbie, Rosannah Healy and Ted Hill Allens		Marcus Pollard and Kathleen Gooi Linklaters	
Austria	26	India	144
Andreas Traugott and Anita Lukaschek Baker & McKenzie, Diwok Hermann Petsche Rechtsanwälte LLP & Co KG		Anima Shukla and Subodh Prasad Deo Saikrishna & Associates	
Belgium	32	Japan	153
Laure Bersou and Pierre Goffinet Daldewolf		Eriko Watanabe and Koki Yanagisawa Nagashima Ohno & Tsunematsu	
Brazil	41	Malaysia	164
André Cutait de Arruda Sampaio and Onofre Carlos de Arruda Sampaio OC Arruda Sampaio – Sociedade de Advogados		Nadarashnaraj Sargunraj and Nurul Syahirah Azman Zaid Ibrahim & Co	
Bulgaria	50	Mexico	173
Anna Rizova and Hristina Dzhevlekova Wolf Theiss		Rafael Valdés Abascal and Agustín Aguilar López Valdes Abascal Abogados	
Canada	61	Portugal	182
William Wu, Guy Pinsonnault and Neil Campbell McMillan LLP		Mário Marques Mendes and Alexandra Dias Henriques Gómez-Acebo & Pombo	
China	74	Singapore	194
Ding Liang DeHeng Law Offices		Lim Chong Kin and Corinne Chew Drew & Napier LLC	
Denmark	90	Slovenia	205
Frederik André Bork, Olaf Koktvedgaard and Søren Zinck Bruun & Hjejle		Irena Jurca, Katja Zdolšek and Stojan Zdolšek Odvetniska družba Zdolšek	
European Union	100	South Korea	213
Mélanie Thill-Tayara and Marion Provost Dechert LLP		Hoil Yoon, Chang Ho Kum and Yang Jin Park Yoon & Yang LLC	

Spain	225	United Kingdom	283
Andrew Ward, Irene Moreno-Tapia, Carlos Alberto Ruiz and Marta Simón Cuatrecasas		Elizabeth Morony, Samantha Ward, Ben Jasper and Alexandra Buckley Clifford Chance	
Sweden	236	United States	295
Johan Carle, Fredrik Sjövall and Stefan Perván Lindeborg Mannheimer Swartling		Steven E Bizar and Julia Chapman Dechert LLP	
Switzerland	246	Vietnam	305
Mario Strebel and Fabian Koch CORE Attorneys Ltd		Nguyen Anh Tuan, Tran Hai Thinh and Tran Hoang My LNT & Partners	
Turkey	259	Quick reference tables	314
Gönenç Gürkaynak and K Korhan Yıldırım ELIG Gürkaynak Attorneys-at-Law			
Ukraine	272		
Nataliia Isakhanova, Yuriy Prokopenko and Andrii Pylypenko Sergii Koziakov & Partners			

Foreword

Neil Campbell

McMillan LLP

This 21st edition of *Cartel Regulation* is the most current and comprehensive source of information about cartel laws and enforcement around the world.

During the first two decades of the 21st century, there has been enormous growth and development in competition laws and enforcement activity. The International Competition Network (ICN) has played a significant role in fostering this expansion through its Cartel Working Group.

Anti-cartel provisions are a core pillar of every competition law regime. This reflects the broad consensus 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.

The global pandemic has prompted competition law enforcement agencies to reconsider priorities and how they discharge their mandates. Most are adapting quickly and effectively. Many agencies have signalled a willingness to exercise discretion not to enforce cartel laws against competitor collaborations that have genuinely positive health objectives. However, in most cases, this has been accompanied by clear warnings that attempting to use covid-19 as a cover for conduct that is not in the public interest would not be accepted and those cartel laws would be vigorously enforced in such situations.

Despite the 'soft convergence' regarding the importance of cartel enforcement, there are significant differences in the design and operation of individual regimes. Differences related to institutional design, enforcement processes, legal standards and sanctions generate substantial complexity in cross-border cases. The criminal liability exposure for corporations and individuals in some but not all jurisdictions and the expanding civil damages exposures add further challenges for parties under investigation and their advisors, as well as for enforcement agencies. While inter-agency cooperation occurs among some

jurisdictions, the extent and depth of coordination is not nearly as significant as in merger reviews.

Cartel Regulation 2021 provides a detailed explanation 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 30 of the most active jurisdictions, this essential reference includes a global overview prepared by Morrison & Foerster LLP. *Cartel Regulation 2021* also includes new chapters on Argentina, France, Germany, Spain and the United States.

The deskbook is structured using a template that ensures consistent presentation and ready access to the relevant information about each subject in each 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. The increasing scope for private, collective or class actions by affected direct or indirect purchasers, and how they interface with agency proceedings, are addressed as well. This year's volume also summarises changes in laws or enforcement policies arising in response to the challenges caused by the coronavirus pandemic.

The chapters in *Cartel Regulation 2021* have been prepared by leading experts in each jurisdiction. We deeply appreciate their efforts to provide thorough reports on their regimes, which include practical advice on how enforcement really works and tips for 'getting the fine down'. I would also like to thank the *Lexology Getting The Deal Through* team for all the work they do to produce this excellent annual volume, especially during this year's challenging conditions.

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

Global overview

Roxann E Henry, Lisa M Phelan, Megan E Gerking and Robert W Manoso*

Morrison & Foerster LLP

The global cartel environment has largely tracked developments in the geopolitical world with lots of excitement and talk of new directions, but a lack of international cartel enforcement actions. We explore here a few undercurrents and emerging issues in enforcement efforts around the world, many of which reflect a decline in the international cartel investigations that have defined recent years.

Similar to the retraction from globalism in the political sphere, jurisdictions around the world have shown a greater focus on domestic, more localised collusion. This includes the application of cartel rules to labour markets and 'no-poach' agreements, as well as increased enforcement efforts against collusion targeted towards government procurement. One significant exception to the trend of inward-looking enforcement is the digital marketplace. Enforcers have turned to look more closely at the borderless world of digital markets, and not just for dominance. The review of several high-profile mergers and major investigations of technology companies by agencies around the world further increase the risk of uncovering collusion.

The decline in international cartel investigations by government agencies has been counter-balanced by a significant rise in private actions for damages in the US and increasingly in Europe and elsewhere. Enforcement agencies have admitted to a decline in leniency applications, which previously fuelled investigations in a number of industries. Multiple jurisdictions, including for the first time the US, are offering increased benefits to companies with comprehensive anti-trust compliance programmes, up to and including the potential for a declination in prosecution. The jury is still out on the impact these incentives may have on reducing cartel conduct, and interestingly, whether they will increase leniency applications (because more problematic conduct will be detected if strong compliance programmes are in place) or further decrease leniency applications (because a non-prosecution option may still be available, even for companies that forego seeking leniency but have robust compliance programmes in place). In contrast to the enforcement decline, private actions for alleged cartel conduct continue to flourish in the US and to grow in other jurisdictions, with one decision in the UK creating the broadest application possible for collective actions.

Domestic cartels come into focus as international cartel enforcement declines

After nearly two decades of multijurisdictional cartel enforcement, there has been a conspicuous lull in global investigations. Many of the international cartels, such as auto parts, electronics, and shipping that dominated the agenda for years, have largely run their course. Regulators have emphasised that cartel enforcement remains a central priority and some analysts predict that the second half of 2019 may see domestic investigations turn into multijurisdictional cases.

In the interim, jurisdictions appear to be more heavily focused on domestic cartels. Across the EU, 2019 has seen a series of domestic enforcement actions, both by the European Commission (EC) and by individual countries' enforcement agencies. For example, in September, the

EC imposed fines totalling €31.6 million against a Dutch food processor and French farming group, stemming from a 13-year conspiracy to fix the price of a variety of canned vegetables. The cartel centred on France's food services industry but impacted the entire European market. With respect to national enforcers, in August 2019, the Italian Competition Authority (AGCM) fined 23 corrugated cardboard makers a total of €287 million for fixing the prices of corrugated cardboard sheets and packaging. The cartel, which also ensnared the country's paper trade association Gruppo Italiano Fabbricanti Cartone Ondulato, operated from 2004 through to 2017. Elsewhere in Europe, the Finnish Competition and Consumer Authority imposed €9 million in fines against bus companies for hindering competition in the bus market and the Austrian Federal Competition Authority continued to pursue an investigation into a sugar cartel, including fining a German sugar company and its Austrian subsidiary for operating a sugar cartel in Austria from 2004 to 2008.

This trend is also present outside of Europe. In the US, the Department of Justice (DOJ) Antitrust Division has been working with both federal and state law enforcement agencies to prosecute price fixing in the US generic pharmaceutical industry, announcing its third charge in its ongoing investigation in May 2019. Other domestic investigations include tax foreclosure auctions, bid-rigging in the construction industry, a recently announced probe into the broiler chicken industry, and car companies allegedly agreeing with the state of California regarding car emission standards. The latter action provides one example of how the political divisiveness that has engulfed much of the geopolitical landscape is suspected of having crept into cartel enforcement. Other examples of domestic-focused enforcement from around the globe include Mexico's competition authority's (COFECE) investigation into potential no-poaching activity among soccer clubs, which COFECE anticipates will take two years or more to complete, and the Japan Fair Trade Commission's (JFTC) action against several manufacturers of steel and aluminium cans as well as an earlier action against domestic asphalt manufacturers.

It remains to be seen whether these or any other recent domestic actions will be the thread that leads to the next wave of multijurisdictional investigations. In the meantime, firms must continue to be wary of the cartel enforcement efforts of their local competition authorities.

Labour markets face increased scrutiny from multiple enforcers

While fair treatment of workers has long been a political agenda around the world, cartel-related initiatives have recently focused on the ability of workers to move from job to job without their employers colluding to impair that freedom. These types of arrangements, referred to as no-poach agreements, have increasingly come under investigation, often with corollary wage-fixing agreements. In addition to the COFECE soccer investigation referenced above, in 2017, a trio of PV and linoleum floor covering manufacturers were fined more than €300 million by the French Competition Authority in connection with a gentleman's agreement not to solicit each other's employees. The companies also

agreed to exchange salary and bonus information with one another. Similar enforcement actions have taken place in Italy (modelling agencies), Spain (freight forwarding), and the Netherlands (hospitals). Both the JFTC and Hong Kong Competition Commission published guidance in 2018 explaining that no-poach agreements would violate those jurisdictions' competition laws, although no enforcement actions have been publicly announced. More recently, competition enforcers in France and Portugal have called for a renewed focus on no-poach agreements but, again, without any corresponding announcement of active investigations.

In the US, the Antitrust Division has acknowledged open criminal investigations into the conduct of employers agreeing not to solicit or hire each other's workers. While it historically treated such agreements civilly, the Antitrust Division in 2016 warned that going forward, it would consider 'naked' no-poach agreements as criminal violations of the anti-trust laws. However, currently, and despite purportedly active investigations, no charges have been filed. The political divide has also surfaced in this area, as the state of Washington has sued to stop franchisors putting no-poach clauses into franchise agreements, while the Antitrust Division has responded by submitting briefs in the litigation to explain its view that those agreements are vertical and thus are not per se cartel conduct. The Antitrust Division's interest has focused on horizontal no-poach agreements, but it also recently sponsored a roundtable to look more closely at how anti-trust and labour markets intersect more broadly.

As the demand for highly skilled workers continues to grow and the pool of qualified employees seemingly shrinks, some firms may respond by attempting to reduce or eliminate hiring and wage competition. Enforcers have made it clear that they are watching for these types of practices in labour markets across multiple industries.

Enforcers continue to crack down on collusion in government procurement

While cartel treatment of no-poach agreements is a relatively recent phenomenon, bid-rigging has long been considered one of the 'hardcore' violations that anti-cartel rules are intended to police. Unsurprisingly, the government procurement process is often a prime target of bid-rigging schemes. In recent years, numerous jurisdictions have undertaken concerted efforts to root out bid-rigging among government contractors, often as a corollary to broader anti-corruption enforcement. These schemes have been uncovered in a variety of industries, including railway infrastructure (Belgium), asphalt paving (Brazil), playground construction (Slovakia) and cemetery maintenance services (Lithuania).

In most jurisdictions, cartel fines serve as the primary deterrent against bid-rigging schemes. However, in the US, the Antitrust Division in 2018 announced an increased reliance on section 4A of the Clayton Act, 15 USC section 15a, which allows the government to recover treble civil damages when it is injured as the result of a violation of the anti-trust laws, in addition to criminal fines. The statute has been on the books for a number of years but has been rarely used until now. To highlight its renewed focus on this statute, the Antitrust Division announced settlements with three South Korean fuel companies for their role in a long-running bid-rigging conspiracy that targeted fuel-supply contracts with US military bases. In 2019, two additional companies pleaded guilty and several individual defendants were charged in connection with their role in the conspiracy. In addition to agreeing to criminal fines, each of the five corporate defendants who pleaded guilty also agreed to pay civil penalties to settle parallel civil section 4A claims pursued by elements of the DOJ's Civil Division.

The Antitrust Division has expressed hope that increased reliance on both criminal fines and civil penalties will serve as a more effective deterrent against anti-trust conspiracies that target government agencies. At the same time, the involvement of two or more government

agencies could delay resolution of investigations and create additional complications for companies attempting to reach a global settlement. This is similar to concerns that often surface in jurisdictions where separate agencies (one with a competition law focus and one with authority to bring criminal charges) may be investigating the same conduct.

Digital markets increasingly in crosshairs of enforcers

Anti-trust enforcers have increasingly turned their attention to the borderless world of digital markets as a source for potential cartel conduct. Their efforts have involved both newer cartel concerns, such as the use of algorithms, and traditional cartel concerns applied in new settings.

When it comes to the digital economy, the EC has been more concerned with anti-trust policy and abuse of dominance cases than with the enforcement of cartel cases to the data. The Von der Leyen Commission decided that Margrethe Vestager will remain as commissioner for competition and will additionally serve as executive vice-president for the digital agenda to make Europe fit for the digital age. This dual role for Vestager emphasises the growing importance of the link between anti-trust law and digital markets within the European Union.

This connection includes the use of price-setting algorithms using artificial intelligence, an area of scrutiny that will likely continue in Vestager's next term. Until now, the Commission's stance has been that, where a company uses algorithms, it is accountable for any resulting harm to competition – no matter if the algorithm's action was foreseeable or not. As Vestager has made clear 'businesses . . . need to know that when they decide to use an automated system, they will be held responsible for what it does. So they had better know how that system works'. To date, however, the Commission has not pursued a cartel resulting from price-setting algorithms.

Enforcers have also monitored digital companies' contracts, including the use of most-favoured-nation clauses. The Dutch hotel-booking portal Booking.com recently scored a court victory in Germany over hotel reservation clauses. The Federal Cartel Office found Booking's contract clauses requiring that the booking portal offered the lowest price were anti-competitive. The regional court in Düsseldorf found that certain narrowly applied pricing clauses are not anti-competitive, but necessary to ensure a fair and balanced exchange of services between portal operators and hotels. Over the summer, the JFTC reportedly conducted raids of Booking.com and several other online travel agencies as part of its probe into their use of similar contract clauses. In the UK, the Competition and Markets Authority (CMA) established guidelines for booking portals; among other requirements, booking portals are prohibited from giving a false impression of the availability or popularity of a hotel or hiding compulsory charges in the headline price.

In the US, the Antitrust Division and Federal Trade Commission have announced investigations into the technology sector, but criminal cases to date have involved defendants using new technology for old-school collusion. For example, the Antitrust Division has announced a number of charges stemming from its investigation into e-commerce companies conspiring to fix prices for customised promotional products. The products at issue were sold exclusively online, and the co-conspirators used social media platforms and encrypted messaging applications to reach and implement their agreement. In addition, the Antitrust Division has just recently charged a second individual in connection with bid-rigging of online auctions for computers and other used equipment being sold by the General Services Administration. According to the Antitrust Division, the co-conspirators agreed who would submit bids for particular lots for sale and which co-conspirator would be designated. Thus, the past year has taught us that policing the digital markets remains a high priority for enforcers.

Leniency applications down, credit for compliance up

One reason cited for the current ebb in global cartel investigations is the reduction in leniency applications. The boom of 'amnesty plus' leniency applications that have grown large trees of cartel enforcement appears to be dwindling. Across the globe, international cartel leniency applications have shrunk. While in some countries, domestic, smaller collusive schemes continue to spark leniency applications; in others, leniency applications have become rare altogether. One possible explanation for this trend (other than a reduction in cartel conduct) is the heightened procedural hurdles companies must clear when coordinating leniency across multiple jurisdictions. Although more jurisdictions offer leniency, policies can vary greatly and be unpredictable from country to country. Navigating multiple leniency applications can be difficult and costly. Another explanation for the decline is the threat of significant exposure from private civil actions for damages, which are increasingly common in the US, Europe and elsewhere. While some leniency programmes offer some protection from civil exposure, others do not, and even where protection is available, it is less than certain. Thus, for many firms, the risk calculus on leniency has changed.

As leniency applications continue to decline, many jurisdictions have explored alternative ways to incentivise compliance and self-reporting, including by awarding credit for compliance programmes even after cartel conduct is discovered. In October 2018, Italy's AGCM released its Guidelines on Antitrust Compliance, in which it explained that a company could receive a fine reduction ranging from 5 per cent up to 15 per cent depending on when the compliance programme was adopted and its effectiveness at detecting violations. In the UK, the CMA will consider a discount of up to 10 per cent from a penalty when a company can demonstrate the adequacy of its compliance programme. Australia, Canada, Chile, France, Hong Kong, India and Israel similarly consider the existence of a compliance programme as a mitigating factor. The mechanics of presenting a company's compliance programme and the requirements for receiving credit vary from jurisdiction to jurisdiction, not unlike leniency programmes themselves.

In the US, the Antitrust Division also recently announced that it would consider a company's competition compliance programme at both the charging and sentencing stages in criminal anti-trust investigations. At the charging stage, companies with comprehensive compliance programmes could receive a deferred prosecution agreement, under which a company may eventually have charges dropped in exchange for meeting certain requirements. At the sentencing phase, an effective compliance programme can result in a lower corporate fine and impact the recommendation for probation or a corporate monitor. Unlike the percentages used in other jurisdictions, the precise boundaries of when and in what amount compliance credit is available are yet to be drawn. This leaves uncertainty as to how high the bar has been set and how the policy will be applied in a consistent fashion going forward.

While the US has joined a growing number of jurisdictions willing to credit imperfect compliance programmes, crediting compliance is far from universal. The EC has indicated that it has no plans to change its policy of refusing to credit compliance programmes in the near future, and countries such as Spain similarly do not provide such credit. One of the potential arguments against doing so is to preserve the value of jurisdictions' leniency programmes and the benefits afforded leniency applicants. It remains to be seen what effect, if any, sentencing credit has on leniency applications, given that compliance programmes can both enable a company to seek leniency and motivate a company to avoid the burden often associated with leniency if it can still receive credit for a robust compliance programme.

As criminal investigations decline, private litigation thrives

Lest companies feel complacent in the absence of large-scale government investigations, private litigation into alleged cartel conduct continues to flourish in jurisdictions spanning the globe. A recent report published by the University of San Francisco estimated private anti-trust settlements in the US totalled more than \$19 billion between 2013 and 2018. These private lawsuits frequently follow criminal investigations. For example, in the wake of the Antitrust Division's investigation into the packaged seafood industry, which resulted in significant fines against StarKist Co and Bumble Bee Foods, LLC, the two companies now face multidistrict litigation comprised of more than 70 consolidated cases. Both companies have already agreed to civil settlements with some plaintiffs. The Antitrust Division's long-running investigation into the financial industry has similarly resulted in significant settlements with private plaintiffs. More recently, however, the trend has started to work in reverse, as the Antitrust Division initiated a criminal probe into the broiler chicken industry several years after the first claims in private litigation were filed.

Private litigation claims much of the cartel agenda in other countries as well, especially as other jurisdictions develop collective actions. In 2018, John Pecman, the then-Commissioner of Competition for Canada, noted that damages suits following criminal investigations had become the biggest growth area in anti-trust litigation in the country. This is in part explained by Canada's more permissive class certification requirements, as a result of which certification has become practically available just for asking. In the UK, one of the first cases to be filed under the country's new class-action regime was an anti-trust consumer class action against MasterCard over its swipe fees. In April, the Court of Appeal issued a ruling that would open the door to a sweeping collective action encompassing the entire universe of people using credit cards. Britain's Supreme Court announced in July that it will hear the case, meaning it will likely weigh in on the legal test for what kind of competition claims are eligible to use the UK's collective action regime and the correct approach to quantifying the distribution of an aggregate award when a party is applying for collective proceedings status, making this a key case to follow. The Netherlands is also developing as a favourable jurisdiction for broad private claims, and the outcome of Brexit will be closely watched to see whether the UK or the Netherlands takes greater precedence.

Conclusion

Any apparent calm in global cartel enforcement should not be construed as a time for corporate counsel to be any less vigilant. Counsel should have greater motivation than ever to make investments in comprehensive competition compliance that involves a clearly defined and written competition policy, frequent training at every level (and in every department) of the company, and periodic assessments that evaluate the company's business practices for compliance. Each of these compliance components will become increasingly critical in the evolving enforcement landscape, both to reduce the risk of government (or private) allegations of a company's involvement in cartel conduct, and as a valuable tool to seek a reduction in penalties should enforcement action be considered.

* *The authors would like to thank Mary Kaiser and Theresa Oehm for their contributions to this chapter*

Argentina

Miguel del Pino and Santiago del Rio

Marval O'Farrell Mairal

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation for cartel prosecution is set out in Antitrust Law No. 27,442 (the Antitrust Law) enacted on 24 May 2018. Anticompetitive conduct is also regulated by Decree No. 480/2018 (the Decree) and Resolution No. 359/2018 of the Secretary of Domestic Trade.

Relevant institutions

2 | 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 Antitrust Commission is the enforcement agency responsible for prosecuting anticompetitive conduct and issuing recommendations to the Secretary of Trade, the ultimate ruling body. For this guide, all references to the Antitrust Commission will encompass the Secretary of Trade, unless expressly stated.

The Antitrust Law created a new antitrust authority, the National Competition Authority, a decentralised and separate body within the Executive Branch. However, the existing double-tier system comprising the Antitrust Commission and the Secretary of Trade will remain in force until the appointment of the members of the new antitrust authority, which will include three divisions:

- the Antitrust Tribunal;
- the Anticompetitive Conduct Secretariat; and
- the Merger Control Secretariat.

Changes

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

Since the enactment of the Antitrust Law in 2018, there have been no changes to the regime.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The substantive law on cartels in Argentina is the Antitrust Law.

Section 1 of the Antitrust Law prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify or distort competition, or if they constitute an abuse of a dominant position, provided that, in either case, they cause or may cause harm to the general economic interest. Most of these conducts are neither unlawful as such, nor must they cause actual damage; it is enough that the conduct is likely to, or may potentially, cause harm to the general economic interest.

Likewise, section 2 of the Antitrust Law sets out that certain collusive conducts are deemed anti-competitive per se and harmful to the general economic interest without further analysis. This behaviour includes the agreements among competitors in which their purpose or effect is:

- price-fixing;
- to establish obligations of:
 - manufacturing, distributing, buying or commercialising a limited amount of goods;
 - to provide a limited number, volume or frequency of services; and
- market or customer allocation; or
- bid rigging.

Importantly, under section 29 of the Antitrust Law, companies interested in entering into an agreement that could be considered as anti-competitive per se, have the possibility of consulting the Antitrust Commission about its legality, demonstrating that the agreement will not cause any harm to the general economic interest and obtain an authorisation to enter into it. Although there are no precedents of the application of this mechanism so far, it is in force and regulated by Decree No. 480/2018.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures or strategic alliances between competitors are potentially subject to cartel provisions if they fall under some of the conducts prohibited by the Antitrust Law.

The Antitrust Commission does not have specific guidelines on collaboration agreements between competitors. As such, the following elements should be considered when assessing these activities:

- Antitrust Commission precedents and general rules of the Antitrust Law;
- specific guidelines under section 29 of the Antitrust Law; and
- foreign regulations referred to by the Antitrust Commission.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Under section 4 of the Antitrust Law, all of its provisions apply to any individual or corporation, public or private, for-profit or not-for-profit, engaged in economic activities within all or part of the country and those engaged in activities abroad so long as their actions and agreements affect Argentina.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes, the provisions set out in the Antitrust Law apply to conduct taking place abroad to the extent that they affect the Argentine market.

While there are no specific precedents regarding extraterritorial antitrust investigations, analysis of the effects in merger control cases could be used as a guideline.

In this regard, the Antitrust Commission has established a special test to measure the effects that the parties to a foreign-to-foreign transaction have in Argentina. This test may be only be applied if the parties involved in the foreign-to-foreign transaction have sales or imports into Argentina. According to this test, the effects in the local market of a foreign-to-foreign transaction must be substantial, normal and regular, but there is no precise rule to determine the matter. According to the Antitrust Commission precedents the effects have been considered substantial if the exports into Argentina represent a significant percentage of the total relevant market in Argentina of that specific product. The effects are regular and normal if the imports have been constant during the preceding three years. However, the matter must be analysed on a case-by-case basis.

Applied to anticompetitive practices, those acts carried out abroad, but with substantial, normal and regular effects in Argentina, could be investigated and punished by the Antitrust Law.

Export cartels

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

Although it could be argued that export cartels do not fall under the scope of the Antitrust Law, there is no specific case-law confirming this approach.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

No, there are not.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

As a rule, the Antitrust Law does not distinguish between infringers. In that sense, a state-owned enterprise might be prosecuted for conducting anticompetitive conducts. However, certain conducts might fall outside the scope of the Antitrust Law if they are regulated by another law invoking a public interest standard (eg, legal monopolies set out by regulation).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The procedure may be initiated either ex officio or by a claim filed by any physical or legal, private or public, person. Once the claim has been filed before the Antitrust Commission, the claimant will be summoned to ratify or rectify it. The claim shall include:

- the name and domicile of the claimant;
- a specific description of the claim's purpose;

- the facts that support the claim;
- a summary of the applicable law; and
- evidence for analysing the claim.

Claims may be dismissed in limine if the Antitrust Commission concludes that the alleged infringement does not fall within the legal description of restrictive practices. Otherwise, the accusation must be notified to the alleged infringer, who must submit explanations and comments within 15 business days.

If the explanations are regarded as conclusive or if there is no enough evidence for the claim, the docket may be archived. Otherwise, the Antitrust Commission must continue the investigation and formally notify the alleged infringers, who must file their defence and offer the evidence to be produced within 20 business days.

The Antitrust Commission will fix a term to produce evidence and, afterwards, appraise it. Decisions about the evidence produced are final and may not be challenged. The evidence period is 90 business days and may be extended for the same period. The Antitrust Commission must issue its final decision within 60 business days.

Up to the issuance of the decision, the alleged infringer may propose a settlement entailing the immediate or gradual cessation of the actions which originated the accusation. If the proposal is accepted by the Antitrust Commission, the investigation is archived.

The Antitrust Commission may allow third-party intervention, such as the affected parties, consumer associations and commercial chambers, public authorities and any other person that may hold a legitimate interest in the investigated facts.

Further, the Antitrust Commission may request non-binding opinions on the investigated facts to physical or legal persons, either public or private.

Also, anyone filing a false or scam claim may be subject to the penalties provided under the Antitrust Law.

Notwithstanding the timeframes set out above, proceedings for antitrust investigations currently have an average delay of five years, excluding the appeal process before the courts.

Investigative powers of the authorities

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

The Antitrust Law provides the Antitrust Commission with several standard investigative powers, such as:

- the ability to summon witnesses for hearings;
- examination of books and documents;
- the issuance of requests of information to other regulators;
- the initiation of ex officio investigations; and
- the execution of dawn raids with a court order.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Antitrust Commission has a close relationship in terms of cooperation with antitrust agencies in other jurisdictions. It has recently signed a joint statement with Brazil, Chile, Mexico and Peru regarding the advantages of the Leniency Programme, which follows the best practices submitted by the United Nations Conference on Trade and Development and the Organization for the Cooperation and Economic Development.

Interplay between jurisdictions

14 | 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 cross-border cases, the Antitrust Commission has historically had significant interplay with Latin American countries such as Brazil, Chile and Peru.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

A cartel proceeding is the same as for other antitrust violations. The Antitrust Commission is the enforcement agency responsible for prosecuting them and issuing recommendations to the Secretary of Trade.

Burden of proof

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

According to section 2 of the Antitrust Law, hardcore cartels are presumed to be anticompetitive by themselves. For this to be the case, there is a reversal of the burden of proof, and defendants must demonstrate that the cartel was not implemented or had no effect. Also, they must demonstrate the lack of damages to the general economic interest.

Regarding other anticompetitive conduct, the Antitrust Commission analyses them under the 'rule of reason' criteria, weighing the pro-competitive benefits of the practice under analysis against the anticompetitive damages that they may generate. For this conduct, the burden of evidence lies on the claimant or the Antitrust Commission or both if the investigation was initiated ex officio.

Circumstantial evidence

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

The Antitrust Commission can determine an infringement using any kind of relevant evidence including indirect evidence. However, there are precedents in which an Antitrust Commission's decision was overturned by the courts because it determined the infringement using solely indirect evidence such as testimonial evidence.

Appeal process

18 | What is the appeal process?

Regarding the appellate body, the Antitrust Law creates the Special Antitrust Room corresponding to the Civil and Commercial Federal Court of Appeals that will decide on the issue. Currently, any room of the Civil and Commercial Federal Court of Appeals is competent given that the Special Antitrust Room is yet to be constituted. According to the Antitrust Law, the appellate body must apply the National Code of Criminal Procedure to the appeal process.

An appeal can be brought against any decision issued by the Antitrust Commission when they order:

- the imposition of sanctions;
- the cessation or abstention of an anticompetitive practice;
- the conditioning or rejection of the approval of a transaction;
- the rejection of the claim;
- the rejection of the application of the Leniency Programme; and

- the cessation or abstention of conduct to prevent damage, or to reduce its magnitude, its continuance or aggravation.

The notice of appeal must be filed and based with the Antitrust Commission within the 15 working days after the decision has been served to the parties. The Antitrust Commission must submit the claim and its answer to the judge within 10 days it was first filed.

When an undertaking appeals to dispute a fine, the fine becomes definitive only after it is confirmed.

The judicial review is protracted, with an average delay of five years.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions in the Antitrust Law.

Section 300 of the Argentine Criminal Code sets out imprisonment from six months to two years for price-fixing. We are unaware of any conviction regarding this crime.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

According to the Antitrust Law, if an infringement is proved, the cessation of the infringing conduct will be ordered and a fine could be imposed on the perpetrators comprising:

- up to 30 per cent of the volume of business related to the products or services involved in the unlawful conduct committed, during the last fiscal year, multiplied by the number of years that the conduct has lasted, which may not exceed the national consolidated volume of business registered by the economic group of the parties during the last fiscal year; or
- up to twice the economic benefit produced by the unlawful conduct committed.

If both are applicable, the highest will be imposed. However, if none of them is applicable, the fine could be of up to 200 million Adjustable Units. All the amounts set out by the Antitrust Law are fixed in Adjustable Units, adjusted on an annual basis. The latest update of the Adjustable Unit stands at 40.61 Argentine pesos.

The fine amount is calculated considering:

- the losses suffered by the parties harmed by the anticompetitive behaviour;
- the benefit obtained by all involved parties in the anticompetitive conduct;
- the deterrence effect, the value of the involved parties' assets at the time of the infringement;
- the size of the affected market;
- the duration of the anticompetitive conducts; and
- the infringer's background and economic capacity.

In determining the fine, the Antitrust Law sets that it should consider circumstances that lead to an increase or a reduction of the basic amount, considering aggravating and mitigating circumstances on that amount. If the infringer cooperates with the Antitrust Commission during the antitrust proceedings, the cooperation may be considered a mitigating circumstance in the calculation of the fine. The commonest aggravating circumstance is recidivism, which can reach up to 100 per cent of the amount of the penalty, to dissuade companies.

The fine can also be set up jointly with the directors, managers, administrators and supervisory members of the infringing company or

its parent company that had caused the anticompetitive conduct either by their action or inaction.

Under the Antitrust Law, infringers may also be excluded from the National Register of State Suppliers for a maximum period of five years. In the case of bid rigging, the exclusion may be ordered for up to eight years.

Section 64 of the Antitrust Law contemplates a civil fine (punitive damages) in favour of the injured party that will be determined by the competent judge and that will be graduated according to the seriousness of the event and other circumstances of the case, regardless of other corresponding compensation.

Guidelines for sanction levels

21 | 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 guidelines regarding penalties.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There is no specific provision and this has not been analysed in a public precedent.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The court may order a disqualification from doing business for a term of one to 10 years against the individuals involved in cartel activity.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

The Antitrust Law does not establish debarment from government procurement in response to cartel infringements.

Parallel proceedings

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

Yes, parallel proceedings (criminal and civil) may be pursued in respect of the same conduct.

According to Argentine civil legislation, any person who has suffered damage arising from anticompetitive practices prohibited by the Antitrust Law is entitled to file a suit for damages before the competent court.

To be entitled to file a suit for damages arising from anticompetitive practices, the prior intervention of the Antitrust Commission is not necessary. However, in those cases where the regulator has already analysed the matter, the resolution issued by the Antitrust Commission once it becomes final acts as *res judicata*.

The Antitrust Commission is not part of the proceedings generated by the private action unless expressly requested by the court. If, however, the Antitrust Commission has investigated the anticompetitive

practice and issued an opinion, courts have relied on the findings of the regulator, and have only focused on the link between the already proven conduct and the claim for damages rather than retracing the investigation.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

According to section 62 of the Antitrust Law, any individual or legal entity suffering damage from any conduct or act prohibited under the Antitrust Law has the right to file a private action for damages under the civil law provisions.

Damages can be requested under the provisions outlined in article 1716 of the Civil and Commercial Code, which states that a violation of the duty of not causing damage to another person gives rise to compensation for the damage. The basic rule derived from the provision is that whoever causes damage intentionally or due to negligence is liable to the damaged party. Those actions are ruled by the Civil and Commercial Code and must be filed before the competent courts (civil and commercial federal courts at a national level or federal court in the provinces) within the jurisdiction of the defendant's domicile.

Therefore, private damages claims are available for both direct and indirect purchasers, including final consumers.

The Antitrust Law does not expressly regulate the existence of pass-on defences; however, the matter has been analysed by the courts in one precedent so far (*Auto Gas SA c/ YPF SA y otro s/ ordinario*, 2009). In that case, the appellate court contemplated the pass-on defences invoked by the accused party and only accepted 30 per cent of the alleged damages regarding that specific matter because it considered that the remainder had been borne by the final customers.

The affected parties of illegal conduct under the Antitrust Law may request three types of damages compensation that is not mutually exclusive, namely:

- actual damages;
- recovery for loss of goodwill; and
- moral hardship.

In principle, the injured party is only able to request full compensation from the party that causes the damage through an anticompetitive practice. The link between the damage and the anticompetitive practice must be proved for compensation to be granted.

Under section 65 of the Antitrust Law, all responsible companies will be jointly liable for the payment of the damages or fines. Therefore, infringers are responsible regarding victims for the whole harm caused by the antitrust violation, regardless of the recovery actions that may apply. However, infringers who obtained immunity from fines as a result of the Leniency Programme will be liable to its direct or indirect buyers or suppliers, and any other injured parties, only when the full reparation of the damages of the conduct could not be obtained from the other companies involved in the same anticompetitive conduct.

Class actions

- 27 | Are class actions possible? If so, 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 section 43 of the Argentine Constitution, class actions may be submitted by the affected person, the ombudsman and associations authorised by law. Both active and passive legitimation in these cases is quite broad and covers both victims and consumer associations.

Even in the presence of typically individual rights, collective actions will also be available when there is a strong public interest in their protection, either because of their social relevance or because of the special characteristics of the affected parties.

The Argentine Supreme Court, in a leading case in this matter, identified the requirements that must be met to bring a collective action, namely:

- the existence of a common factual cause that causes injury to a significant number of individual rights;
- the claim must be focused on the collective effects of the cause and not on what each individual might seek; and
- a demonstration that individual actions are not justified, which could affect access to justice.

COOPERATING PARTIES

Immunity

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

The Antitrust Law establishes the Leniency Programme, setting out two different scenarios for infringing parties; namely, an exemption scenario and a reduction scenario, both based on a race-to-the-door structure.

For the full exemption to apply, the petitioner must:

- be the first among those involved in the conduct to apply and provides the Antitrust Commission with information and evidence;
- immediately cease the performance of the infringing conduct;
- cooperate with the Antitrust Commission during the proceedings;
- not destroy evidence of anticompetitive behaviour; and
- not disclose its intention to adhere to the benefit.

Subsequent cooperating parties

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

If the petitioner is not the first to apply for the Leniency Programme, it may be eligible for a reduction of between 50 per cent to 20 per cent of the fine if it provides additional evidence to the investigation. The filing can be made at any time until the Statements of Objections is served on the parties.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The Antitrust Law includes a 'leniency plus' provision, meaning those parties not complying with the Leniency Programme requirements, but during the proceedings disclose or recognise another different coordinated conduct, can obtain an exemption on the latter, and a one-third

reduction of the sanction or fine that would otherwise be applicable for being part of the first anticompetitive conduct.

Additionally, the Antitrust Law specifically sets out that there cannot be a joint application to the Leniency Programme by two infringing parties involved in the same anticompetitive conduct. However, the infringing legal entity and its directors, managers, administrators, trustees or members of the Supervisory Board, agents or legal representatives may apply jointly if each of them complies with the Leniency Programme requirements. Provided that the Antitrust Commission granted immunity or leniency according to the requirements set out in the Antitrust Law, immunity will be extended for the criminal prosecution of current or former employees and directors for committing anticompetitive conduct.

Approaching the authorities

- 31 | 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 applicants can complete their applications for immunity during a pre-trial stage, before being served with the Statement of Objection. Markers are available and the Antitrust Commission will determine the reduction amount taking into consideration the chronological order in which the request was filed.

Cooperation

- 32 | 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 that are seeking partial leniency?

Cooperation must be full, continuous and diligent. The applicant must cooperate from the moment of application submission until the end of the investigation and is required for both the first petitioner and subsequent cooperating parties.

Confidentiality

- 33 | 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 Antitrust Commission assures the confidentiality of the identity of the leniency applicant. Judges in the judicial proceedings that may be initiated under the provisions of the Antitrust Law, cannot order the disclosure of the statements, acknowledgements, information or other means of evidence submitted to the Antitrust Commission.

If the judges reject the application for the Leniency Programme, the application could not be considered as recognition or confession by the applicant of the illegality of the conduct or the facts disclosed. Rejected requests cannot be disclosed.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Before the Antitrust Commission issues its final decision, the alleged infringer may commit itself to the immediate or gradual cessation of the actions for which it is being investigated or to the amendment of

the aspects related to it. The commitment must be approved by the Antitrust Commission for the procedure to be suspended. The Antitrust Law also provides that the docket will be archived if, after three years of the fulfilled commitment, there is no relapse.

Corporate defendant and employees

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

Current and former employees involved in the infringement to be benefited by the Leniency Programme must also apply to it and comply with its requirements together with the legal entity. The compliance of these requirements shall each be analysed to receive the benefit.

Dealing with the enforcement agency

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

Under the Antitrust Law, the procedure must comprise four stages, namely:

- marker request;
- a leniency application;
- preliminary qualification of the benefit; and
- definitive granting of the benefit.

Currently, the Antitrust Commission is drafting guidelines regarding the implementation of the Leniency Programme.

DEFENDING A CASE

Disclosure

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

Under the Antitrust Law, all the dockets pending before the Antitrust Commission are secret, and only the parties can access them.

When a private claim is filed before the courts and the opinion of the Antitrust Commission is used, it should not contain sensitive information, and parties can request confidentiality if any trade secret or other confidential information is disclosed in the opinion. The request should provide the reasons, and a non-confidential version of the submitted information should be included.

Further, according to section 6 of Law No. 23,187, it is a specific obligation for lawyers to preserve the attorney-client privilege unless otherwise authorised by the interested party (ie, the client). Likewise, section 7 provides that it is a right of the lawyers to keep confidential information protected under attorney-client privilege. Likewise, section 444 of the Argentine Civil and Commercial Procedural Code provides that a witness may refuse to answer a question if the answer would entail revealing information protected under a professional secret (ie, including attorney-client privilege).

Representing employees

38 | 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 or representation?

There is no provision that forbids counsels to represent both employees and the corporation that employs them.

Multiple corporate defendants

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

Yes, counsel may represent multiple corporate defendants regardless of whether they are affiliated.

Payment of penalties and legal costs

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

Neither the Antitrust Law nor its regulation forbids a company to pay either the fines imposed on its employees or their legal costs.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Under section 227 of the Regulatory Decree of the Income Tax Law, administrative fines and penalties are not deductible from income tax.

Tax-deduction for private damages payments must be analysed on a case-by-case basis.

International double jeopardy

42 | 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 Antitrust Law has not introduced any provisions to prevent international double jeopardy.

Getting the fine down

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

The optimal way is applying to the Leniency Programme. Also, the Antitrust Law establishes as a mitigating circumstance the cooperation with the investigation during the proceedings, outside the scope of application of the Leniency Programme and beyond its legal obligation to cooperate.

Likewise, a solid defence based on economic analysis (eg, economic reports by independent consultants) may work as a powerful argument to convince the Antitrust Commission to get the fine down.

Importantly, several cartel cases are dismissed because of the expiration of the five-year statute of limitations.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The most relevant currently ongoing cartel case is *Notebooks*. Mr Centeno, who worked with high-level government officials, kept a record of an organised corruption scheme in his notebooks that included details of bribes and locations, which included several businessmen from large companies benefitting from large public contracts between 2005 and 2015.

As a result of the criminal investigation, the Antitrust Commission initiated an investigation on bid rigging allegations and requested the involved parties to provide explanations, which are still under review.

Because of this case, the Organization for the Cooperation and Economic Development issued guidelines and recommendations in 2019 to fight bid rigging in the procurement of public works in Argentina.

Regime reviews and modifications

- 45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The only ongoing guidelines concern the implementation of the Leniency Programme.

Coronavirus

- 46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

Regarding antitrust regulations, there is no substantial emergency legislation or guidelines in response to the covid-19 pandemic.

There has been no official communication about a possible inapplicability or suspension of the Antitrust Law. Conversely, the measures dictated by the government tend to reinforce controls and its enforcement in health-related industries.

In this regard, companies should review their business practices and agreements to avoid possible anticompetitive risks and be subject to further investigations by the authority.

**Miguel del Pino**

mp@marval.com

Santiago del Rio

sdr@marval.com

Alem 882
Ciudad Autónoma de Buenos Aires
Argentina
Tel: +54 11 4310 0100
www.marval.com

Australia

Fiona Crosbie, Rosannah Healy and Ted Hill

Allens

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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 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.

Changes

3 | 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 exception to cartel conduct by:
 - extending the exception so it more clearly applies to joint ventures for the acquisition of goods or services (in addition to joint ventures 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 joint venture, a party is now required to demonstrate that:

- the cartel provision is reasonably necessary for undertaking the joint venture; and
- the joint venture 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, in which case the onus would switch to the ACCC or prosecution).

Prior to its repeal, subsection 51(3) of the CCA provided a limited exemption for certain conduct relating to intellectual property rights, including conditional licensing and assignment of patents, registered designs, trademarks and copyright (Treasury Laws Amendment (2018 Measures No. 5) Act 2019). With effect from 13 September 2019, this exemption ceased. This means that conduct associated with intellectual property rights is treated in the same way as other conduct.

Substantive law

4 | 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 or acquired 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, suppliers or territories supplied or acquired 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. The prosecution must, however, prove that:

- the parties made and/or gave effect to a contract, arrangement or understanding intentionally; and
- the parties knew or believed that the contract, arrangement or understanding contained a cartel provision (which requires that they have knowledge or belief of the facts making up each of the elements of the cartel provision).

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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are subject to the cartel laws unless they can rely on the joint venture exception or one of the other cartel exceptions. The joint venture exception to the prohibition on cartel conduct applies where:

- the joint venture is for the production of goods or the supply or acquisition of goods or services;
- the cartel provision is for the purposes of, and is reasonably necessary for undertaking, the joint venture;
- the joint venture is carried on jointly by the parties to the contract, arrangement or understanding containing the cartel provision; and
- the joint venture is not carried on for the purpose of substantially lessening competition.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The prohibitions against cartel conduct apply to individuals and corporations. The Competition and Consumer Act 2010 (Cth) (CCA) also applies to government entities to a certain extent, where they carry on a business.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Australian competition law applies to conduct that occurs outside Australia only if that conduct is carried on by:

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

The law in relation to carrying on business in Australia is 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 an 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.

In addition, the prohibition on cartel conduct will only be breached where the parties are in competition with each other in trade or commerce within Australia, or between Australia and places outside Australia.

Export cartels

8 | 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 Australian Competition and Consumer Commission (ACCC) within 14 days of the relevant contract, arrangement or understanding being entered into.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

A class exemptions power was introduced into the CCA in November 2017 under section 95AA. This power enables the ACCC to specify that one or more provisions of Part IV of the CCA do not apply to certain conduct, in effect providing a 'safe harbour' for the businesses covered by the exemption. The ACCC must be satisfied that the specified conduct does not substantially lessen competition or that it is likely to result in a net public benefit.

The first class exemption being proposed by the ACCC would allow eligible small businesses to collectively negotiate with customers or suppliers. This proposal is still under consideration with a consultation open on the draft legislative instrument.

The ACCC also recently commenced consultation on a class exemption for ocean carriers providing international liner cargo shipping services. Currently, exemptions apply to registered liner shipping agreements under Part X of the CCA however the introduction of a class exemption would allow for certain classes of conduct to be exempt without the need for application or registration.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Part IV of the CCA binds the Crown in right of the Commonwealth and the States and Territories and local government bodies insofar as they carry on a business.

However, the Crown in the right of the Commonwealth and the States and Territories cannot be found liable for pecuniary penalties or be prosecuted criminally.

In addition, there is a general exemption for conduct specified in and authorised by federal, state or territory legislation. In effect, this enables governments to approve specific activities as exempt from competition laws by passing legislation.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Australian Competition and Consumer Commission (ACCC) is responsible for investigating both civil and criminal cartel conduct (although the decision to prosecute criminal cartel activity is a matter for the Commonwealth Director of Public Prosecutions (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 Competition and Consumer Act 2010 (Cth) (CCA).

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.

Investigative powers of the authorities

12 | 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 matter that constitutes or may constitute a 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 from a magistrate 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 from a magistrate 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 and such like stored on equipment operated by a telecommunications company or internet service provider in a criminal or civil investigation.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such 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, Fiji, India, Japan, Korea, New Zealand, Papua New Guinea, Philippines, the United States, 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.

Interplay between jurisdictions

14 | 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

Decisions

15 | 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 the 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.

Criminal proceedings are commenced when the CDPP lays charges and a court attendance notice or summons is sent to the defendant and filed with the court. From there, a pre-trial committal process takes place before a magistrate. The committal process differs between jurisdictions in Australia. In some jurisdictions, the magistrate decides if there is sufficient evidence for the matter to proceed to a criminal trial. In other jurisdictions, the matter can proceed to trial on the basis of a prosecution certification. In either case, at the end of the committal, a defendant will enter a formal plea of guilty or not guilty. During the committal process, the CDPP will provide the defendant with a brief of evidence containing both material on which the CDPP proposes to rely and other material relevant to the defence.

If the defendant pleads guilty, the matter is committed for sentencing in the Federal Court or the Supreme Court of the relevant state or territory. The defendant would be sentenced by the judge taking into account a range of factors.

If the defendant pleads not guilty, the matter is committed for trial in the Federal Court or the Supreme Court of the relevant state or territory. The CDPP then files an indictment listing the relevant charges. The next step involves the CDPP filing a notice of the prosecution's case. In response, the defendant would file a notice of the accused's case. The CDPP is subject to ongoing duties of disclosure. In most cases, a number of pre-trial hearings may occur. The trial will be conducted before a jury and evidence from the prosecution and any defence witnesses will be given orally. If the defendant is found guilty by the jury, the judge would then sentence the defendant.

Burden of proof

16 | 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.

Circumstantial evidence

17 | 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.

Appeal process

18 | 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 a re-examination of the facts.

In criminal cartel cases, the defendant may appeal:

- on a point of law;
- if the jury verdict is unreasonable or unable to be supported by the evidence; or
- if there was a substantial miscarriage of justice.

SANCTIONS

Criminal sanctions

19 | 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 in the preceding 12 months.

The court can also impose injunctions.

There have been three criminal cartel convictions in Australia since the criminal provisions were introduced in 2009:

- in 2017, Japanese cargo shipping liner NYK plead guilty to criminal cartel conduct and was fined A\$25 million;
- in 2018, another Japanese shipping company, Kawasaki Kisen Kaisha (K-Line), plead guilty to criminal cartel conduct and was fined A\$34.5 million; and
- in 2020, Wallenius Wilhelmsen Ocean AS, a Norwegian-based global shipping company, plead guilty to criminal cartel conduct, however, is yet to be sentenced.

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;
- the Construction, Forestry, Maritime, Mining and Energy Union, as well as a divisional branch secretary; and
- Vina Money Transfer, a money transfer business, as well as five individuals involved in the business.

Civil and administrative sanctions

20 | 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 criminal cartel provisions.

In August 2019, the Australian Competition and Consumer Commission (ACCC) chairman stated that the ACCC's desire for more significant penalties as an active deterrent for both companies and individuals, has been a long standing one.

The highest penalty imposed under the cartel laws was a A\$46 million penalty paid by Japanese-based automotive parts supplier Yazaki Corporation in 2018, 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 United States 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.

Guidelines for sanction levels

21 | 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, the 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.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

In Australia, one of the factors relevant to the court's decision to impose civil penalties for an infringement of the CCA is whether the company has a corporate culture conducive to compliance with the CCA and takes corrective measures in response to an acknowledged contravention. Accordingly, the existence and scope of implementation of a compliance programme will be a relevant factor in considering the level of a civil penalty to be imposed on a company for a contravention of the CCA. There is no rule about the required components of the policy or the extent to which this will be taken account in setting or discounting the penalty (ie, the quantum or the percentage of any discount) – rather, the assessment will depend on the surrounding facts.

The court will examine whether there is a substantial compliance programme in place which was actively implemented and whether the implementation was successful (ie, whether the contravention was an isolated incidence). That is, was the compliance policy 'one to which mere lip-service' was paid. Other relevant factors include:

- whether the programme was regularly updated and involved employees attending training in regular intervals including in the period covering the contravention;
- whether the compliance programme required attendance by key staff involved in the contravention (ie, those with exposure to competition law risk);
- evidence of lack of commitment by senior executives; and
- whether the company voluntarily addressed any deficiencies in the compliance programme when the contravention came to its attention.

The factors applicable to the imposition of a criminal penalty for a contravention of the cartel prohibition do not explicitly include a reference to

a compliance programme or culture of compliance by the company. However, in the recent case of *ACCC v Nippon Yusen Kabushiki Kaisha* (NYK), NYK was fined \$25 million for its involvement in an international cargo shipping cartel. The fine of \$25 million incorporated a significant discount of 50 per cent which in part reflected the fact that NYK demonstrated that it had rehabilitated itself (or demonstrated prospects of rehabilitation) including by changing its corporate culture of compliance, showing contrition, demonstrating a commitment to comply fully with competition law and policy, and establishing systems, programmes and structures to prevent reoffending (eg, resignations and salary reductions for those involved in the contravention).

There is no regulation or case law precedent on the extent to which a compliance culture or programme will be relevant in determining third party damages actions in competition law cases.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Competition and Consumer Act 2010 (Cth) (CCA) allows the court to make an order disqualifying an individual from managing a corporation when they have been involved in a cartel. Both the ACCC and the Commonwealth Director of Public Prosecutions (CDPP) can seek the imposition of a disqualification order.

In assessing the length of the disqualification, the court will consider:

- whether the conduct was of a serious nature (such as those involving dishonesty);
- the likelihood that the individual will re-offend; and
- the level of harm that may be caused to the public.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 often require disclosure of regulatory breaches or convictions and these matters may be taken into account by government in evaluating the suitability of bidders.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 are 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

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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.

Most class actions in Australia have been settled so there is limited case law dealing with damages awards in this context.

Class actions

27 Are class actions possible? If so, 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

Immunity

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

The ACCC Immunity and Cooperation Policy sets out the policies of the Australian Competition and Consumer Commission (ACCC) 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 Commonwealth Director of Public Prosecutions (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 for serious cartel offences.

Civil immunity

The criteria for conditional civil immunity are:

- the applicant admits it is engaging in, or has engaged in, cartel conduct;
- the applicant is the first party 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 undertakes 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 while making the application, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate its admissions, and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
- the applicant has entered into a cooperation agreement, and
- the applicant has maintained and agrees to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.

Generally, the ACCC will not grant conditional immunity if, at the time an application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA (whether civil or criminal), arising from the cartel conduct.

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 is also granted to the applicant. The CDPP will exercise its own discretion when considering the recommendation.

Where the CDPP is satisfied 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 determine whether to grant to 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.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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.

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.

Approaching the authorities

31 | 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.

Cooperation

32 | 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 that are seeking partial leniency?

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. 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.

Confidentiality

33 | 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 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 a party to proceedings, the ACCC is not required to produce protected cartel information to a court or tribunal except with the 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 the 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.

Settlements

- 34 **Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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. The defendant is permitted to make submissions to the court as to the appropriate penalty range and the prosecution can respond to the range proposed and indicate whether in the prosecution's submission it would be open to the court to impose a sentence within that range, or whether imposing a sentence within that range might lead to appellable error. 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.

While there is currently a bill before the Federal Parliament to establish a deferred prosecution agreement regime in Australia in relation to a specific set of serious corporate criminal offences, it is not intended to apply to cartel offences. In August 2020, the Australian Law Reform

Commission provided feedback on this proposal as part of its report into Australia's corporate criminal responsibility regime and recommended some revisions.

Corporate defendant and employees

- 35 **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.

Dealing with the enforcement agency

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

In order to satisfy the criteria for both conditional civil and criminal immunity, the immunity applicant would need to:

- admit it is engaging in, or has engaged in, cartel conduct;
- be the first party to apply for immunity in respect of the cartel;
- demonstrate that it has not coerced others to participate in the cartel;
- demonstrate that it has either ceased its involvement in the cartel or undertake to the ACCC that it will cease its involvement in the cartel;
- demonstrate that its admissions are a truly corporate act (corporations only);
- provide full, frank and truthful disclosure, and cooperate fully and expeditiously while making the application, including taking all reasonable steps to procure the assistance and cooperation of witnesses and provide sufficient evidence to substantiate its admissions, and agree to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
- enter into a cooperation agreement; and
- maintain, and agree to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.

Parties who are not eligible for 'first-in' immunity can nonetheless cooperate with the ACCC in relation to its investigations. Where the ACCC brings civil proceedings or the CDPP brings criminal proceedings against the participants to a cartel, the cooperating party may be required by the ACCC or the CDPP to make admissions, agree to a statement of facts or give evidence against the remaining cartel participants.

DEFENDING A CASE

Disclosure

- 37 **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 Australian Competition and Consumer Commission (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 'Statement on Disclosure in Prosecutions by the Commonwealth', sets out the materials that the Commonwealth Director of Public Prosecutions (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.

Representing employees

38 | 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 or representation?

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.

Multiple corporate defendants

39 | 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.

Payment of penalties and legal costs

40 | 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 in which the person is found to have such a liability.

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.

While not prohibited under statute, an indemnification against fines resulting from a criminal conviction is unenforceable at common law.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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).

International double jeopardy

42 | 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.

Getting the fine down

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

Case law suggests that the key factors that could reduce the fine after the commencement of a cartel investigation include:

- an early guilty plea by the contravener;
- cooperating and assisting the authorities with their investigation; and
- implementing a compliance programme with appropriate antitrust compliance structures, guidelines and systems so as to prevent the repetition of any similar anticompetitive conduct.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The appeal by the Australian Competition and Consumer Commission (ACCC) on its first alleged 'hub and spoke' cartel case against PZ Cussons was dismissed by the Full Court of the Federal Court on 24 May 2019. The proceedings were in relation to an alleged agreement between laundry detergent suppliers to stop supplying standard concentrate detergent in favour of ultra-concentrate detergent. At first instance, the trial judge found that there was insufficient evidence to establish an arrangement or understanding between the suppliers. The Full Court dismissed all 10 grounds of the ACCC's appeal.

On 30 May 2019, the Federal Court ordered PT Garuda Indonesia Ltd (Garuda) to pay a penalty of A\$19 million for its collusive arrangement on fees and surcharges for air freight services ending the ACCC's long running case against Garuda which commenced in 2009. However,

Garuda has since appealed the A\$19 million penalty, which is yet to be heard.

On 2 August 2019, the Federal Court ordered Kawasaki Kisen Kaisha Ltd (K-Line) to pay a fine of A\$35.5 million for criminal cartel conduct, the largest ever criminal fine being imposed under the Competition and Consumer Act 2010 (Cth) (CCA). The court also found that, but for K-Line's early guilty plea and past cooperation, the fine would have been A\$48 million. The significant sentencing discount demonstrates that an early guilty plea and cooperation are important factors that could reduce the fine when pleading guilty to cartel charges.

Criminal cartel charges against another member of the cartel, Wallenius Wilhelmsen Ocean AS (WWO), were laid in August 2019, and WWO entered a guilty plea in the Federal Court on 18 June 2020. WWO is yet to be sentenced.

On 30 August 2019, the ACCC commenced civil cartel proceedings against BlueScope Steel Limited and one of its former general managers in relation to alleged attempts to induce various steel distributors in Australia and overseas manufacturers to enter into price-fixing agreements. On 1 September 2020, the former general manager pled guilty in relation to one charge of criminal obstruction related to his actions during the ACCC investigation.

On 4 September 2019, the Full Court of the Federal Court dismissed the ACCC's appeal in relation to alleged bid rigging between Cascade Coal Pty Ltd and Paul and Moses Obeid in the market for coal exploration licences. The Full Court upheld the Federal Court's first instance decision dismissing the ACCC's case in July 2018, agreeing that Cascade and other respondents were not competitors. The Full Court also agreed that, in any event, the joint venture exception would have applied.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The ACCC has updated its Immunity and Cooperation Policy for cartel conduct that came into effect on 1 October 2019.

Under the revised policy, the applicant will be required to enter into a cooperation agreement which sets out steps that the applicant agrees to undertake to satisfy the obligations under the policy. In addition, the policy will no longer apply to parties engaged in concerted practices. As a result, if the ACCC forms the view that the conduct reported by an applicant is not cartel conduct but would otherwise be an anticompetitive concerted practice, conditional immunity would not be granted under the policy and the applicant would need to seek to cooperate under the ACCC Cooperation Policy for Enforcement Matters instead. In these circumstances, the ACCC may nonetheless use the information provided by the applicant in limited circumstances, including using the information provided indirectly to further its investigation and gather evidence that could be used against the applicant.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

Since March 2020, the ACCC has granted a range of authorisations to allow competitors to coordinate during the covid-19 pandemic. These authorisations have sought to address a range of social, health and economic impacts, including:

- to ensure the ongoing supply of essential goods and services such as groceries and pharmaceuticals;

Allens < Linklaters

Fiona Crosbie

fiona.crosbie@allens.com.au

Rosannah Healy

rosannah.healy@allens.com.au

Ted Hill

ted.hill@allens.com.au

Level 28, Deutsche Bank Place
126 Phillip Street
(Corner Hunter & Phillip Streets)
Sydney NSW 2000
Australia
Tel: +61 2 9230 4000
www.allens.com.au

- to facilitate the national health response, including the manufacturing of medical devices and integrating public and private hospitals; and
- to enable competitors to co-ordinate on certain terms of pandemic related customer relief packages, including in relation to home loans, telecommunications and energy.

Like other authorisations, covid-19 related authorisations are only granted where the proposed conduct will result in a net public benefit. The ACCC has typically imposed conditions on these authorisations, including requirements to provide regular reports to the ACCC.

As authorisations cannot be granted retrospectively, businesses who wish to coordinate with competitors in response to the effects of the pandemic should obtain legal advice as to whether ACCC authorisation is required.

Austria

Andreas Traugott and Anita Lukaschek

Baker & McKenzie, Diwok Hermann Petsche Rechtsanwälte LLP & Co KG

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Cartel Act 2005 and the Competition Act 2002.

Relevant institutions

2 | 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 Competition Authority (BWB) and the Federal Cartel Prosecutor (FCP) are the prosecutory competition authorities. They do not have decision-making powers.

Decisions (eg, on whether a sanction for cartel conduct should be imposed) must be made by the Cartel Court, on request of the BWB, or the FCP, or the Cartel Supreme Court, which hears appeals of the Cartel Court's decisions.

Moreover, criminal prosecution authorities – namely, the police, the Federal Bureau of Anti-corruption, and the public prosecutor – may also prosecute cartels if they carry out criminal offences (eg, bid rigging).

Changes

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

There have been no significant recent changes to cartel legislation, in terms of substantive provisions.

In 2018, BWB introduced a Whistleblower System, that allows informants to provide the BWB with information on suspected cartel activities via a secured anonymous mailbox. The mailbox is designed so that the supplier of the information cannot be traced by Austrian Federal Competition Authority or other third parties.

A number of changes are expected in connection with the implementation of the EU Directive 2019/1 (ECN+ Directive), which is to be implemented by February 2021.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Section 1, paragraph 1 of the Austrian Cartel Act is equivalent to article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU).

It prohibits agreements between undertakings, concerted practices and decisions of associations of undertakings which aim to or effectively prevent, restrict or distort competition.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The cooperation between undertakings in the framework of joint ventures and strategic alliances are generally subject to the Austrian and EU cartel laws.

The creation of joint ventures may be subject to Austrian merger control scrutiny, if a full-function joint venture is created, or parts of an undertaking, relevant business activities or assets are brought into the joint venture, and the relevant merger control thresholds are met. However, general antitrust rules (including the prohibition of cartels) may apply to elements of joint ventures that are not covered by merger control approval requirements.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Cartel Act applies to legal entities and to individuals acting as sole entrepreneurs. Individuals may also be held accountable to the extent that the conduct in question constitutes a criminal offence (eg, bid rigging).

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Austrian competition legislation applies if the conduct affects the domestic market, irrespective of whether the conduct took place in Austria.

Export cartels

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

Austrian competition legislation generally only applies if the conduct affects the domestic market.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements.

Industry-specific exemptions exist for certain types of agreements between agricultural producers and for certain re-sale price restrictions in the distribution of books and comparable products.

There are no sector-specific cartel offences.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Generally, there is no specific exemption under Austrian cartel law for government-approved or regulated conduct.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

An investigation by the Federal Competition Authority (BWB) is often triggered by a complaint or a tip off (eg, information received via the BWB's Whistleblower System or a leniency application).

The BWB does not issue a formal decision when it opens or closes an investigation. It initiates the investigation by taking investigation measures (eg, inspections or requests of information).

The timeframe for investigations varies significantly, ranging from several months to several years. This depends on the specific circumstances of the case (eg, complexity and evidence), as well as other factors such as the enforcement priorities and resources of the BWB.

Investigative powers of the authorities

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

The BWB may, by request or by decision, ask undertakings and associations of undertakings to provide all necessary information. It may also conduct inspections and take witness statements.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The BWB closely cooperates with the competition authorities of other EU member states within the legal framework of the European Competition Network (ECN). The BWB also cooperates on a bilateral basis with the competition authorities of non-EU member states.

Interplay between jurisdictions

14 | 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?

There is a significant interplay with a number of different jurisdictions, in particular with other European Union member states, and especially with Germany, for which cross-border coordination plays an important role. Such interplay impacts investigations, in particular their timeframes, as the agencies endeavour to coordinate their actions in order to not put at risk the effectiveness of the respective investigations. There is also an intense cooperation with the EU Commission (within the framework and based on article 22 Regulation 1/2003) with respect to the assistance in carrying out inspections.

Regarding the enforcement of cartel law in cross-border cases, the Cartel Court recently decided in a sugar cartel case, that – because of the *ne bis in idem* principle – the Court lacked jurisdiction to decide on or fine a cartel member that had already been subject to a decision of Germany's Federal Cartel Office. The BWB appealed this decision,

and the Austrian Supreme Cartel Court has referred the matter to the European Court of Justice for a preliminary ruling (case C-151/20 – *Nordzucker and others*).

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Federal Competition Authority (BWB) may resolve a cartel investigation by closing the investigation or filing a request with the Cartel Court (the decision-making institution) to impose fines or to issue an order to terminate the alleged infringement.

Settlements are available. In case of a settlement, a formal decision is issued by the Cartel Court on the basis of the terms (in particular, the amount of the fine) negotiated beforehand between the company and the BWB.

A request for the imposition of fines or an order to terminate the alleged infringement may also be filed by the Federal Cartel Prosecutor (FCP) (the second prosecution agency for competition law in Austria).

The BWB, the FCP and the defendant are parties to a Cartel Court proceeding.

After hearing the parties' arguments and taking evidence (eg, witnesses and expert opinions), the Cartel Court issues its decision. It may reject the BWB's request as unfounded or follow the request and:

- impose fines (the Court may impose a lower fine than was requested by the BWB, but not a higher one);
- order the termination of the infringement;
- adopt a commitment decision, which makes commitments offered by the defendant addressing the competition concerns identified by the BWB binding on the defendant but does not establish an infringement; or
- adopt a declaratory decision on the infringement (a formal finding on the infringement, that does not impose a fine or decide on remedies).

Burden of proof

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

The BWB or FCP must prove that an infringement has taken place.

In this respect, it has to be established with a sufficient degree of certainty that an infringement took place.

Circumstantial evidence

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

Under Austrian civil procedural law, which is also relevant in cartel proceedings, there are no explicit statutory limitations as to the types of evidence. However, the relevant criterion is that the infringement has to be established with a sufficient degree of certainty. All evidence has to be taken into account by the court when weighing the evidence, carefully taking into consideration the circumstances of the case.

Appeal process

18 | What is the appeal process?

Decisions issued by the Cartel Court may be appealed to the Supreme Cartel Court by the decision's addressee (the infringing party) and the enforcement agencies (BWB and FCP) within four weeks of being issued.

The appeal can be based on questions of law. Appeals based on facts are rarely allowed; only in cases where there are serious doubts

as to the correctness of the facts underlying the decision of the Cartel Court. This criterion is interpreted very narrowly by the Supreme Cartel Court.

The opposing party or parties to an appeal have four weeks to respond. There is no oral hearing – the Supreme Cartel Court forms a decision based on the case file. The timeframe for the decision varies significantly, depending on the complexity of the question at issue and the general workload of the relevant Supreme Court senate, and may range from several months to more than a year. The decision-making process may even take longer, if the Supreme Cartel Court decides to refer the legal question to the European Court of Justice for a preliminary ruling.

SANCTIONS

Criminal sanctions

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

Potential penalties for individuals under Austrian criminal law include imprisonment and fines. The maximum term of imprisonment that may be imposed for the specific criminal offence of bid rigging is three years. If the cartel offence also qualifies as a severe fraud, imprisonment of up to 10 years could be imposed. Both individuals (eg, employees involved in cartel activities) and companies can be subject to criminal prosecution, the latter based on the Austrian law on Criminal Corporate Liability (*Verbandsverantwortlichkeitsgesetz*).

In recent years, the criminal prosecution agencies have become increasingly active in prosecuting cartel offences (eg, in the context of the pending investigations of cartel activities in the construction sector).

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Penalties under competition law include fines of up to 10 per cent of the total annual group turnover of the company (including affiliated companies).

Penalties are regularly levied, if the cartel enforcement authorities investigate cartel activities and bring the case to the Cartel Court. The level of fine largely depends on the concrete circumstances of the case, in particular if the infringing company cooperates with the authority or – as is frequently the case – agrees on a settlement.

Guidelines for sanction levels

21 | 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 guidelines in place for penalties. However, the Cartel Act establishes some basic criteria, which are relevant for the calculation of the fine, including:

- the duration and seriousness of the infringement;
- the economic situation of the company;
- the level of cooperation of the company during the proceedings; and
- aggravating (eg, repeated offences) and mitigating factors (eg, the undertaking took a subordinate role in the infringement).

In practice, the calculation of fines also makes reference to the European Commission's fining guidelines (to the extent that these build on the same criteria as those established by Austrian competition law).

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There is no formal recognition of compliance credit in Austria. However, the Austrian Cartel Act's list of mitigating circumstances is non-exhaustive and authorities could accept compliance programmes as a mitigating factor based on current rules. As regards to case law, in one published decision the Cartel Court identified an undertaking's 'zero tolerance policy' as present in 'in a bundle' of mitigating circumstances. Compliance programmes can play a role in settlement negotiations with the Federal Competition Authority (BWB), when it comes to determining the settlement sum. Even though there is a lack of formal recognition or settled case law on compliance credit in Austria, there are indications – such as public statements by the BWB's director general – that the BWB is considering adopting a new, formal, approach in the future.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is no legal basis in the relevant Cartel legislation providing for the imposition of orders prohibiting individuals involved in cartel activity from serving as corporate directors or officers.

However, the Austrian law that details conditions an individual must meet to be issued a business licence to operate in certain business areas provides that an individual who receives a criminal conviction leading to a term of imprisonment exceeding three years may not receive such licences.

Similar rules exist under the public procurement laws, according to which a company's prior conviction or the prior conviction of person having a managing or controlling function within the company (eg, the managing director or a member of the board) could lead to the company being excluded from public tenders.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

According to section 78(1) Austrian Federal Procurement Act, undertakings are to be excluded from public procurement proceedings in the event of a final conviction for specific criminal offences, which could raise doubts on the company's reliability. This decision is to be taken by the respective contracting (public) institution.

Parallel proceedings

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

Competition and criminal law enforcement agencies regularly pursue the same conduct (and cooperate in their investigations), although with a different focus. Whereas criminal law enforcers focus on the prosecution and sanctioning of the individuals involved, competition law agencies may only pursue and sanction undertakings for their involvement in cartel activities. It is being debated, but has not yet been subject to a Supreme Court decision, whether an undertaking's involvement in cartel activities that qualifies as infringements of cartel and criminal law, may – in light of the *ne bis in idem* principle – be pursued and

sanctioned by both cartel law enforcers (based the Cartel Act 2005 and the Competition Act 2002) and criminal law enforcers (based on criminal law, in the framework of corporate criminal liability).

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Yes, any party that has suffered harm may assert damage actions, including generally direct and indirect purchasers. The relevant provisions of EU Directive 2014/104/EU (the Damages Directive) have been transposed into national law (the Cartel Act 2005).

The Austrian Supreme Court has already twice referred questions regarding legal standing (and, more generally, on the scope of liability and the requirements of causal link and adequacy), to the European Court of Justice (ECJ).

In 2014, the ECJ dealt with the question whether customers of the infringing companies had the right to claim so-called 'umbrella damages' (case C-557/12 – *Kone and Others*). In a more recent decision, issued in December 2019, the ECJ specifically dealt with the question whether persons or entities not acting as a supplier or a purchaser in the market affected by the infringements, but claiming an indirect harm (in the specific case (case C-435/18 – *Land Oberösterreich/Otis et al*): through the granting of loans at favourable financial terms), are entitled to claim damages. The ECJ found that the claimant had the right to request damages, but would still to prove that he or she actually suffered such loss and that causal connection between that loss and the infringement existed.

Single damages are awarded. There are no punitive damages under Austrian law. However, a successful claimant is entitled to interest and the recovery of its procedural costs.

Currently, there are a number of cases pending in the Austrian courts with considerable claims for damages.

Class actions

27 Are class actions possible? If so, 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 in the strict sense may be brought in Austria. However, potential claimants may be able to accumulate their claims (eg, by way of assignment of claims to a special purpose claims vehicles).

COOPERATING PARTIES

Immunity

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

An immunity and leniency programme operated by the Federal Competition Authority (BWB) is available for companies under Austrian competition legislation. Only the company which is 'first in' to cooperate within the framework of the leniency programme may benefit from full immunity, provided that all other conditions are fulfilled. If the company is not the first company to file such a request, it may qualify for a reduced fine under the leniency programme. As regards the potential benefits

for leniency applicants in private litigation, the relevant provisions of EU Directive 2014/104 (the Damages Directive) have been transposed into national law (the Cartel Act 2005). Accordingly, the specific leniency documents (in particular the leniency statement) are protected from production or disclosure in private litigation. Also, there are benefits in terms of limitations to the joint and several liability.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 (ie, the second, third and further applicants) will generally not qualify for full immunity, but may still qualify for a reduction of fines, if they provide evidence constituting a 'significant added value' and all other general conditions under the Austrian leniency programme are met. According to the Federal Competition Authority's *Leniency Manual*, the following reductions can be granted:

- 30 to 50 per cent for the second undertaking;
- 20 to 30 per cent for the third undertaking; and
- up to 20 per cent for every subsequent undertaking.

There are no specific provisions or general policies on 'immunity plus' or 'partial immunity', a similar concept has already been applied in practice (granting immunity for a specific element of the infringement that has not been reported by the first, but only the second applicant).

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

According the Federal Competition Authority's *Leniency Manual*, the second applicant may benefit from a wider reduction range (30 to 50 per cent) for the fines to be imposed, compared to subsequent applicants.

There are no specific provisions or general policies on 'immunity plus' or 'partial immunity', but a similar concept has already been applied in practice (ie, granting immunity to the second applicant for providing information regarding a specific element of the infringement that was not been reported by the first applicant).

Approaching the authorities

31 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 applicant may also apply for a marker to secure its position for a period determined by the BWB. An applicant must provide some essential information on the scope and nature of the infringement before a deadline set by the BWB that will be within eight weeks of the application.

Cooperation

32 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 that are seeking partial leniency?

All leniency applicants (irrespective of their position) are required to fully and genuinely cooperate throughout the whole procedure in order to benefit from the programme (ie, full immunity or a reduction in fines).

The cooperation obligation includes, among other things, an obligation to present all available evidence and information and to treat the leniency application in strict confidence.

Confidentiality

33 | 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?

As a matter of principle, the competition authorities will aim to protect the identity of the leniency applicant to the extent possible during the investigation. Prior to the initiation of Cartel Court proceedings, the identity of the leniency applicant (and other related information) will so be revealed only if it is indispensable for the purposes of the investigation.

The leniency statement is expressly protected by the Cartel Act from disclosure in the context of private damage claims.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Settlements are available. In cases of a settlement, a formal decision is issued by the Cartel Court on the basis of the terms (in particular, the amount of the fine) negotiated between the company and the BWB. This decision can be appealed to the Supreme Court sitting as the Supreme Cartel Court.

Corporate defendant and employees

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

Pursuant to section 209b of the Criminal Code, employees who are subject to criminal liability may benefit from a specific criminal immunity programme that links the immunity of individuals (eg, employees) from criminal charges to the cooperation of companies within the framework of the competition law leniency programme.

Dealing with the enforcement agency

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

The immunity applicant or subsequent cooperating parties must provide all available information and evidence on the alleged infringement, and promptly inform the enforcement agency about any relevant circumstances and other further information it becomes aware of in the course of the proceedings. It needs to take adequate measures to safeguard confidentiality and ensure that the infringement has been terminated. With regard to the latter, the applicant first has to liaise with the enforcement agency to ensure that the measures taken with regard to the termination do not jeopardise the confidentiality, and therefore the effectiveness, of the enforcement agency's investigations.

DEFENDING A CASE

Disclosure

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

During an investigation by the Federal Competition Authority (BWB), only limited information or evidence will be disclosed to the (future) defendant. If the BWB conducts investigations, such as inspections, the company will receive information about the pending investigation in the reasoning given in the search warrant. The company will be provided with the warrant at the beginning of the inspection.

Before filing a request to the Cartel Court to open proceedings to issue a decision, the BWB has to inform the defendant about the findings of its investigations.

In the Cartel Court proceedings, the defendants have full access to all information and evidence in the Court file (ie, all information and evidence that has been submitted by the BWB to the Cartel Court in the course of these proceedings).

Representing employees

38 | 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 or representation?

This depends on whether there might be a conflict of interest between, which is likely to occur in this scenario.

Multiple corporate defendants

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

Representation of multiple corporate defendants in a cartel case will generally be excluded, as a conflict of interest may occur in such a scenario.

Payment of penalties and legal costs

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

The cost of an employee's legal representation can be covered by the corporation employing them. However, under certain circumstances the payment of an employee's fine may not be allowed.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

In the meantime, it has been clarified that fines imposed by the competition authorities are in principle not deductible (since it would contravene the effect of the sanction). A deduction is only possible to the extent the fine reflects an enrichment of the infringer. Since a fining decision does usually not contain a clearly defined portion, which allows for the quantification of an enrichment component (and the infringer has normally no interest to quantify such a component), there are not many cases in practice which may qualify for a tax deduction.

Since damages are compensatory (and not punitive) in Austria, damages paid out to private claimants are in principle deductible.

International double jeopardy

42 | 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 question of double jeopardy is subject to a pending proceeding before the European Court of Justice (case C-151/20 – *Nordzucker and others*), essentially regarding the question whether the (allegedly) same conduct can be pursued or sanctioned by two national competition agencies in parallel or whether this is prevented by the *ne bis in idem* principle.

Generally, as based on a general principle of international law, the Austrian Cartel Court will only take into account effects on the domestic Austrian market and calculate fines based on the domestic revenues that have been generated in the business area affected by cartel activities.

As regards to private damage claims, subject to such a claim being reasonable and supported by relevant evidence, a civil court would take into account if damages have already be awarded, in full or partially, by another civil court, in Austria or another jurisdiction, to avoid overcompensation.

Getting the fine down

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

There are different ways of avoiding or minimising fines. Ideally, the infringing company is the first in to cooperate within the framework of the leniency programme, or manages to secure a significant reduction of fines as subsequent applicant in the context of this programme.

In parallel or alternatively – if immunity is not available anymore – the infringing company may still endeavour to cooperate and reduce the fine by negotiating and agreeing to a settlement with the BWB that is then confirmed by a Cartel Court decision.

Finally, compliance programmes may be taken into account by the Cartel Court as a mitigating factor, when determining the concrete level of fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The Federal Competition Authority (BWB) and the criminal law enforcement agencies are still investigating a major cartel case in the construction sector that dates back to 2017. At the end of October 2020, the BWB issued an announcement on its website that it had filed an application with the Cartel Court to impose fines on four companies – a parent company and three subsidiaries – following these investigations.

Due the pandemic, investigations – in particular on-site inspections and witness interviews – by the BWB have become more difficult, which will impact some pending investigations, depending on the stage and the specific circumstances of the investigation). However, the BWB's investigatory powers, also with regard to inspections, have not been suspended. Accordingly, it may immediately resume its activities as soon as the situation stabilises.

Baker McKenzie.

Andreas Traugott

andreas.traugott@bakermckenzie.com

Anita Lukaschek

anita.lukaschek@bakermckenzie.com

Schottenring 25
1010 Vienna
Austria
Tel.: +43 1 24 250 266
Fax: +43 1 24 250 600
www.bakermckenzie.com

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The EU Directive 2019/1 (the ECN+ Directive) must be implemented in Austria by February 2021. Austrian cartel law already largely corresponds to the required minimum harmonisation, so the need for amendments should be limited.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

There are no measures related to covid-19 or specific legislation that limited the application of cartel law.

In March 2020, the BWB issued a statement on the impact of the covid-19 crisis on competition law in Austria. It referred to the joint statement by the EU competition authorities, briefly addressed the issue of necessary and temporary cooperation to avoid shortages of supply or products amid the crisis, and announced to prioritise complaints about health products of importance in the fight against the virus.

Against this background, if there are any specific competition law issues that need to be assessed against the background of the pandemic (eg, in the area of horizontal cooperation between undertakings with regard to supply chains or any other issues), it is advisable to seek the competition enforcement agencies' guidance and opinions about such matters.

Belgium

Pierre Goffinet and Laure Bersou

Daldewolf

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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 a 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.

Relevant institutions

2 | 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 a legal personality. The BCA is directed by a managing board (the Board). The Board is responsible for daily management of the BCA's work, the identification of priorities and management of terms, and the preparation of guidelines in antitrust matters. The Board is composed of a president, a Competition General Prosecutor, a chief economist and a general counsel.

The BCA comprises of the Investigation and Prosecution Service (IPS), a prosecution authority, and a decision-making body, 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 nor settled by the IPS.

The Market Court of 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 (eg, 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.

Changes

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

The New Belgian Competition Act of 2 May 2019 entered into force on 3 June 2019. This new Act has mainly clarified the role of the different bodies of the BCA and streamlined the different procedures. As regards to cartel regulation, the new Act has brought an increase of the fine cap of 10 per cent of consolidated turnover within Belgium (for details about this cap, see below) to 10 per cent of the worldwide consolidated turnover. This may change the incentives for companies to apply for leniency in Belgium. Moreover, the scope of the prohibition for individuals to conclude a cartel agreement has been clarified and enlarged. It is no longer limited to individuals who have a mandate to represent the concerned company but it also concerns individuals who act in relation to the business activity of the company.

Substantive law

4 | 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 anti-competitive 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.

Joint ventures and strategic alliances

- 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances will be subject to cartel laws provided that they do not amount to a concentration (ie, an operation where a change of control in the undertakings concerned occurs on a lasting basis). For new joint ventures, it is also necessary that the newly created joint venture is full-function (ie, it has sufficient resources to operate independently on a market, activities beyond one specific function for the parents and operating on a lasting basis).

Non-concentrative alliance area agreements which fall under anti-trust rules and, in particular, under article IV.1 CEL.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

Article IV.1 of the Belgian Code of Economic Law (CEL) applies to any undertaking (including an association of undertakings), either individuals (ie, those acting in the course of a company's activities) or companies.

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

Individuals engaged in cartel activities acting in relation to the business activity of the undertaking 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. Individuals can only be fined if the Belgian Competition Authority (BCA) found that the undertaking concerned infringed article IV. 1 CEL or article 101 Treaty on the Functioning of the European Union (TFEU).

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 or the 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 United States, 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). The parties reached a settlement in January 2017. Following a new complaint on November 2017, the BCA adopted interim measures. The Brussels Court of Appeal annulled the decision of the BCA imposing interim measures due to an inadequate assessment. The BCA then decided to reject the request for interim measures. The FEI submitted new commitments that were accepted by the BCA.

Export cartels

- 8 | 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).

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There is no industry-specific infringement, defence or exemption in Belgian law.

Government-approved conduct

- 10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

In line with EU law, a distinction should be made according to whether a national legislation excludes or notes the possibility of competition between companies which could still be prevented, restricted or distorted by the autonomous behaviour of companies. If a state action, government-approved activity or regulated conduct excludes the possibility of competition that would still be likely to be prevented, restricted or distorted by autonomous behaviour of companies, it constitutes a justifying cause exempting the companies from all consequences of a violation of antitrust rules, both vis-à-vis the public authorities (fines of up to 10 per cent of the turnover) and other economic operators (actions for damages). But, if the state actions, government-approved activity or regulated conduct only favours the conclusion of agreements in breach of antitrust rules or reinforces the effect of such an agreement, the companies remain liable under antitrust law.

INVESTIGATIONS

Steps in an investigation

- 11 | What are the typical steps in an investigation?

The Investigation and Prosecution Service (IPS) of the Belgian Competition Authority (BCA) is in charge of investigating cartels. It may initiate an investigation following a complaint, ex officio or at the request of a ministry, or regulators in charge of supervising an economic sector 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 was following 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.44 Belgian Code of Economic Law (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 a month 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. 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 two months and may access the non-confidential

version of the case 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 one month. 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.

Investigative powers of the authorities

12 | 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 that 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.40(2) or article IV.40(1) 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).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Belgian Competition Authority (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.

Interplay between jurisdictions

14 | 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 national competition authorities (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, should a neighbouring NCA previously penalise the 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 *Brabomill(s)*). The guidelines on the calculation of fines adopted by the BCA on 25 May 2020 also provide that the amount of a fine may be increased where the companies continue or repeat the same or a similar infringement after the European Commission, an NCA of a neighbouring country of Belgium (as listed above), or the NCA of the United Kingdom makes a finding of an infringement of article 101 Treaty on the Functioning of the European Union (TFEU).

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition College of the Belgian Competition Authority (BCA) will adjudicate a cartel case following Belgian or EU antitrust rules.

It shall decide on the merits of the case based on a draft decision prepared by the BCA's Investigation and Prosecution Service (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 adopt interim measures intended to suspend the effects of an allegedly anticompetitive practice under investigation. Interim measures will 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.

Burden of proof

16 | 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.

Circumstantial evidence

17 | 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.

Appeal process

18 | 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:

- the undertaking or the individual concerned;
- the complainant;
- any party with a sufficient interest and authorised to be heard by the Competition College; or
- the Ministry of Economy.

The IPS cannot appeal the decisions of the Competition College.

The Market Court of the Brussels Court of Appeals 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 Treaty on the Functioning of the European Union (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).

An appeal does not suspend the effects of a contested decision; however, the parties can request the Market Court suspend these effects. 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 imminent damage which is serious and difficult to repair, if not irreparable (eg, 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

Criminal sanctions

19 | 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 improper use of information obtained in the course of an investigation or for breaking seals affixed by the Belgian Competition Authority (BCA) can also face criminal sanctions.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

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

The BCA's Competition College may impose fines of up to 10 per cent of the worldwide consolidated turnover (depending on whether the infringement took place before or after the entry into force of New Belgian Competition Act (3 June 2019)). Upon a request from the BCA's Investigation and Prosecution Service (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.

Guidelines for sanction levels

21 | 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 3 September 2020, the BCA adopted new guidelines on the calculation of fines. They are based on the guidelines on the method of setting fines adopted by the European Commission in 2003, which have been adjusted to account for Belgian specificities. They are not binding on the BCA. However, varying for them requires a strong and well-reasoned justification.

According to the BCA's 2020 guidelines, the BCA shall apply the European Commission's guidelines on the method of setting fines. However, the BCA's guidelines contain 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 an undertaking undertook the 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 worldwide consolidated turnover in the preceding business year of the company or association of corporate undertakings participating in the antitrust infringements.

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).

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Compliance programmes are not considered to constitute a mitigating circumstance taken into account in the setting of fines.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Belgian Corporate Code provides that directors and officers may be held liable for fault made in the management of the company. In such a case, they could be suited both by the company for damages under contractual liability and victims for damages under tort law (extra-contractual liability). However, there is no prohibition for involved individuals to serve as directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 (like self-cleaning measures).

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 to bid rigging of public procurements, parallel proceedings are possible by 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

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 of the Belgian Code of Economic Law (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 were passed on the victims' customers).

Purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid.

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.

Class actions

27 | Are class actions possible? If so, 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 it is not limited to antitrust matters).

Class actions may only be filed by accredited consumers' protection associations acting as a group representative. The Brussels Courts have 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 (an opt-out mechanism). For consumers not based in Belgium, they should express their willingness to be part of the collective action (an 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.

COOPERATING PARTIES

Immunity

28 | Is there an immunity programme? If so, 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.54 of the Belgian Code of Economic Law (CEL) and the Leniency Guidelines of the Belgian Competition Authority (BCA) of 6 May 2020. The leniency programme is only applicable to cartels (including hub-and-spoke infringements).

Under the leniency programme, companies and associations of corporate undertakings and individuals can obtain immunity for infringement of the cartel prohibition found by the BCA.

For companies and associations of corporate undertakings that apply first, full immunity (Type 1) from fines is available. 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;
 - the BCA did not have sufficient evidence to find an infringement in connection with the cartel; and
 - no undertaking or association of undertakings is already granted full immunity (Type 1A) in connection with the same infringement.

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 its participation in the 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.

Subsequent cooperating parties

- 29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 been made, partial immunity (Type 2) can be obtained. They should 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, the 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.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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.

Approaching the authorities

- 31 | 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 by placing 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 an immunity or 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.

Cooperation

- 32 | 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 that are seeking partial leniency?

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.

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

Confidentiality

- 33 | 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. Consequently, 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 national competition authorities (NCAs) under the conditions of the European Competition Network (ECN) Notice, and if the receiving NCA guarantees the same level of protection against disclosure as the BCA.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 BCA's Investigation and Prosecution Service (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.

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.

Corporate defendant and employees

35 | 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.

Dealing with the enforcement agency

36 | 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:

- the name and address of the leniency applicant and of the other companies that participated in the cartel;
- name and functions of the employees involved in the cartel activities; and
- 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; and
 - 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 with 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).

DEFENDING A CASE

Disclosure

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

A defendant may access the case file of the Investigation and Prosecution Service (IPS) of the Belgian Competition Authority (BCA). 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 and 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.

Representing employees

38 | 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 or representation?

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

Multiple corporate defendants

39 | 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 are no conflicts of interests.

Payment of penalties and legal costs

40 | 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 defences.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

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

International double jeopardy

42 | 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 a national competition authority (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 the Court of Appeals of 12 March 2014 in case 2013/MR/6 *Brabomills*).

Moreover, in case of settlements, the IPS may take into account a commitment from the cartel participant to grant compensation for the damage inflicted on 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.60(1) Belgian Code of Economic Law (CEL)).

Getting the fine down

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

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.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 8 May 2019, the Market Court of the Brussels Court of Appeals dismissed as inadmissible the appeal lodged by the Great Circle against a decision of the Belgian Competition Authority (BCA) rejecting its request for interim measures. The Great Circle complained to the BCA that the Royal Meteorological Institute of Belgium abused its dominant position and requested interim measures.

This case specifies the Market Court's power to review the decisions adopted by the BCA. The Market Court should first decide that the contested decision is irregular or illegal (*sensu lato*) before substituting its own assessment. The Market Court shall limit its review to questions as to whether the procedural requirements and the conditions for the statement of reasons are complied with, and shall review the regularity and legality of the decision, including compliance with the general principles of sound administration *sensu lato*. As for the merits of the case, the court limits its review to the question of whether the facts are reproduced accurately and whether there is no manifestly inaccurate assessment of the facts and whether the legal characterisation of the facts is correct (full jurisdiction implies the possibility of establishing, reviewing and rectifying any errors committed when they are established). The court considers whether the reasons invoked by the BCA constitute a framework of relevant facts in order to be able to lead to the challenged decision and these facts and factual elements *sensu lato* may serve as a basis for the conclusions drawn therefrom. Based on those principles, the Market Court decided that it could only grant interim measures provided that it has found *prima facie* an illegality, which it had not in this particular case.

In two decisions adopted in 2019, the BCA imposed a fine of more than €1 million on the Professional Organisation of Pharmacists for infringement of article IV.1 Belgian Code of Economic Law (CEL) and article 101 Treaty on the Functioning of the European Union (TFEU). In the first decision, the BCA decided that the Professional Organisation of Pharmacists adopted exclusionary measures against MediCare-Market, which is a retailer of both medicines and health products. The Professional Organisation of Pharmacists attempted to prevent MediCare-Market from engaging in pharmacy and healthcare activities, including through disciplinary and judicial proceedings. The BCA noted the prices of medicines in Belgium were particularly high and that the Professional Organisation of Pharmacists could not invoke public

service obligations to justify anticompetitive practices. The BCA found that the Professional Organisation of Pharmacists engaged in restriction of competition by object, while it nevertheless concluded that the practices under scrutiny had adverse competition effects.

On 8 January 2020, the Market Court upheld the BCA's decision, while inviting the BCA to recalculate the fine. According to the Market Court, the applicable provisions at that time prevented the BCA from calculating the fine cap of 10 per cent by adding the turnover of the members of the Professional Organisation of Pharmacists. In the second decision, the BCA imposed a fine of €225,000 on the Professional Organisation of Pharmacists by adopting a code of conduct preventing advertising of non-pharmaceutical products. On 15 October 2019, the BCA accepted the commitments offered by the Professional Organisation of Pharmacists to meet the competition concerns, such as the adoption of a new Code of Ethics authorising advertising.

On 1 July 2020, the BCA's Competition College decided that the Commercial Service Agreement (CSA) concluded between Brussels Airlines and Thomas Cook Belgium at the time of the acquisition of Thomas Cook Airlines by Brussels Airlines in 2017 contained clauses which, read together and given the market position of the parties, constituted an infringement of article 101 TFEU (ie, requirements imposed on Thomas Cook to purchase from Brussels Airlines a certain amount of seats for specific destinations, a prohibition imposed on Brussels Airlines from selling to third-party tour operators seats on certain flights, and requirements imposed on Brussels Airlines to disclose new rotations and new destinations of third-party tour operators to Thomas Cook). However, the anticompetitive clauses have never been applied and the CSA has been terminated by Brussels Airlines following the insolvency of Thomas Cook Belgium. In view of the specific facts and the cooperation by Brussels Airlines during the proceeding, the College decided to not impose a fine.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The new Belgian Competition Act of 2 May 2019 entered into force on 3 June 2019.

The new Leniency Guidelines were adopted by the BCA on 6 May 2020 and entered into force on 22 May 2020.

The new Guidelines on the calculation of fines were adopted by the BCA on 25 May 2020.

Also on 25 May 2020, a notice regarding the possibility for the president of the BCA to issue informal opinion on the application of the competition rules to proposed practices or agreements that do not fall within the scope of the merger control rules was published in the Belgian Official Journal.

Therefore, except for light technical amendments, there is no ongoing review of the Belgian legal framework and neither is one anticipated.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The Belgian authorities have not adopted any specific legislation or regulation in competition law matters to tackle the consequences of the covid-19 outbreak.

DALDEWOLF

Pierre Goffinet

pgo@daldewolf.com

Laure Bersou

lbe@daldewolf.com

Avenue Louise, 81

1050 Brussels

Belgium

Tel: +32 2 627 10 10

Fax: +32 2 627 10 50

www.daldewolf.com

Brazil

André Cutait de Arruda Sampaio and Onofre Carlos de Arruda Sampaio

OC Arruda Sampaio – Sociedade de Advogados

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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 federal or state criminal prosecutors, who are completely independent from CADE. Criminal cases will be adjudicated by a criminal court.

Changes

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

There is a bill under discussion in the Congress that may introduce some changes on the Antitrust Act to stimulate private damages claims (eg, introducing a 'double damage' policy, longer civil statutes of limitations, inverting the burden of proof for pass-on defences). Furthermore, CADE has updated its Internal Rules, which became effective on 24 September 2019.

Substantive law

4 | 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 Antitrust Act, paragraph 3 of which exempts the types of conduct that result (or may result) in such effects.

Article 36 defines in general terms that conduct may be characterised as 'violation to the economic order' (antitrust violations), regardless

of fault, even if effects are not achieved (ie, even if anticompetitive effects are only potential) notwithstanding its form if it results 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.

Article 36, paragraph 3, contains examples of types of conduct that, if resulting (or potentially resulting) in any of the above effects, can 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.

Based on article 36, paragraph 3, CADE classifies a 'cartel' 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 Antitrust Act only establishes that the conduct that results in or may result in 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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

There is no generic exemption for joint ventures and strategic alliances. Article 36 of the Antitrust Act provides that an antitrust violation may be characterised regardless its form.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Law No. 12,529/2011 (the Antitrust Act) is applicable to individuals, public and private corporations, as well as to any associations of entities or individuals, whether de facto or de jure, even if temporary. Individuals are also criminally prosecuted.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Antitrust Act applies to antitrust violations (even if potential) that occur within Brazilian territory and to those that take place outside Brazil's 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 the jurisdiction of the Administrative Council for Economic Defence (CADE), even if no illegal conduct is carried out in Brazil.

Export cartels

8 | 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 Antitrust Law regarding export cartels.

It should be mentioned that on September 2018 CADE's Administrative Tribunal adjudicated a case in which the American Natural Soda Ash Corporation (ANSAC) was charged as an export cartel that allegedly violated the 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. The Tribunal concluded that ANSAC's exports to Brazil did not result in harmful effects to the competition on the Brazilian market and thus shelved the case.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements, defences or exemptions in the Antitrust Act.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no exemptions in the Antitrust Act.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Following the initiation of the administrative process, all defendants are served. The defendants shall provide their defences within 30 days. The 30-day deadline starts from the date that the last defendant is served. Exceptionally, in the event the records of the administrative processes are not exclusively electronic, the defence deadline may 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 the discretion of the Administrative Council for Economic Defence (CADE). After the filing of such defences and within 30 working days (this deadline is to be considered as a reference), the CADE's 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 and suchlike.

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 CADE's Administrative Tribunal for a final decision.

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

The Reporting Commissioner may also determine supplementary fact-finding steps at his or her discretion. After 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 Tribunal may only be challenged before the federal courts.

Investigative powers of the authorities

12 | 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 (RFI) 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 of the company. Such an agreement is necessary because according to the Brazilian Constitution, the same law that makes a home inviolable is extended to a company's offices or establishments. 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 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 as this is 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

Inter-agency cooperation

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

Yes. The Administrative Council for Economic Defence (CADE) has signed a number of cooperation agreements with other antitrust authorities in jurisdictions such as Argentina, Canada, Chile, Colombia, Ecuador, the European Union, France, Japan, Peru, Portugal, South Korea, the United States, and the other states referred to as 'BRICS' (ie, Russia, India, China and South Africa). By means of these agreements, the authorities may exchange non-confidential information regarding current antitrust investigations.

Interplay between jurisdictions

- 14 | 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

Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

A cartel proceeding is adjudicated by the Administrative Tribunal of the Administrative Council for Economic Defence (CADE) after CADE's General Superintendency concludes the investigation. 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 Tribunal, antitrust violation cases, such as cartels, will be adjudicated in a public adjudication session by the Tribunal's 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 Tribunal is composed of one president and six commissioners.

Criminal prosecutions are independent of administrative prosecutions. The criminal public prosecutor is responsible for criminal prosecutions, which are trials by a criminal court.

Burden of proof

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

CADE's General Superintendency holds the burden of proof and so must sustain the charge against the defendants. Such proofs can be collected through investigative powers of the authorities and also through leniency or settlement agreements (TCCs) 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 agreements and TCCs.

Circumstantial evidence

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

Yes, CADE uses circumstantial evidence to support condemnations.

Appeal process

- 18 | What is the appeal process?

CADE's Tribunal decision can be challenged 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 five 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.

Recently, in a lawsuit in which a defendant challenged its condemnation by CADE for cartel behaviour, the first panel of the Supreme Court declared the impossibility of a judicial review of the merit of the case adjudicated by the Tribunal. According to the decision, CADE is the entity defined by the law to define whether a conduct is capable of harming competition or not and the courts may not substitute CADE's interpretation regarding the merits of the case. This decision has been criticised for overtaking the constitutional rights of the plaintiffs to challenge administrative decisions before the courts and this matter might be submitted to the analysis of Supreme Court's Full Bench in the future.

SANCTIONS

Criminal sanctions

- 19 | 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 cartel activity is imprisonment from two to five years, plus a fine. Only individuals may be criminally prosecuted for cartel offences.

The administrative prosecution of cartels (performed by the Administrative Council for Economic Defence (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.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Administrative sanctions are 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 (eg, chief executives, directors and 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;
- breaking up the company or a divestiture of certain assets;
- the recommendation to the relevant public bodies to grant compulsory licences 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 Law No. 12,529/2011 (the Antitrust Act) expressly recognises the independence between administrative and civil liabilities, meaning that a civil damages recovery lawsuit does not depend on a previous 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 civil damages compensation must prove:

- the violation of the law;
- the fault of the agent;
- the effective damage; and
- the causal link between the violation and the damage.

Nonetheless, civil damages recovery lawsuits motivated by breach of the Antitrust Law remain uncommon in Brazil. There is a bill under discussion in the Congress that once approved will introduce relevant changes on the Antitrust Law to incentivise private damages claims (eg,

introducing a 'double damage' policy, longer civil statutes of limitations, inverting the burden of proof for the pass-on defence).

Guidelines for sanction levels

21 | 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 Antitrust Act, the 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 free competition, the national economy, consumers or 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 a recurrence.

However, there is no specific guideline regarding the interpretation of these criteria and they are assessed on a case-by-case basis by the Tribunal. However, recurrence is the main aggravating factor that can double the fine.

There are no specific mitigating factors in the Antitrust Act, other than cooperation through leniency agreements or leniency or settlement agreements (TCCs) that may result in full immunity or fine reduction, respectively.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

A compliance programme is not usually a reduction factor in the fine calculation.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Antitrust Act foresees the possibility of CADE imposing, as an additional penalty, a professional limitation of individuals involved in a cartel as follows: 'the prohibition of exercise a commercial activity in his own name or as a representative of the legal entity for a period of five years'.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 the Tribunal's discretion. There are some CADE precedents concerning bid rigging in which this was applied.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 practice, CADE's decision is the fastest, so it is often used as evidence in both the related criminal prosecutions and civil recovery lawsuits.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The Civil Code foresees the possibility of a damages claims to be brought by anyone affected by the violation. Additionally, article 47 of the Law No. 12,529/2011 (the Antitrust Act) defines that private claims are independent of an Administrative Council for Economic Defence (CADE) investigation.

Civil damages recovery is calculated by the extension of the effective damages suffered by the plaintiff (that may be the direct or indirect purchasers). The civil courts accept the pass-on defence as the right to recover is to the one that effectively suffered the damages.

There is no precedent of civil courts regarding umbrella purchasers of claims against cartel members based on alleged parallel increases in the prices they paid in products from non-cartel members, but the law does not exclude this possibility.

Defendants are jointly and severally liable and the claims are limited to single damages. However, as mentioned above, the bill under discussion in the Congress intends to include the double damages and to limit the joint liability in relation to the beneficiaries of the leniency agreement and of defendants that executed leniency or settlement agreements.

It is important to clarify that private damage claims in Brazil related to antitrust violations are still unusual and there are only a few cases under discussion in the civil courts.

Class actions

27 | Are class actions possible? If so, 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
- an association that has been legally incorporated for at least one year, which has among its institutional purposes, the protection of interests and rights within the Consumer Protection Code.

As mentioned previously, the 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 fault of the agent;
- the damage; and
- the causal link between the illegal act and the damage.

There is a trend that public prosecutors intensify civil damages lawsuits (class actions) related to cartel cases, especially regarding bid rigging cases.

COOPERATING PARTIES

Immunity

28 | Is there an immunity programme? If so, 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 administrative fines by Administrative Council for Economic Defence (CADE), or for the fines to be reduced by one-third to two-thirds, 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 a 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 for these other entities and employees to adhere to the leniency agreement to be protected, also committing to all the listed obligations. It is also noted that, should leniency be originally proposed by an individual rather than a company associated with that individual, such a company cannot adhere to the terms of the agreement.

After the leniency agreement is executed, the investigation shall be regularly carried out by CADE and the fulfilment of all commitments should be assessed when CADE's Tribunal issues its decision on the merits; should the Tribunal acknowledge such fulfilment, the case will be dismissed with relation to the applying defendant(s) and all other benefits will apply.

In Brazil, the eventual execution of a leniency agreement does not grant any benefits to the lenients in private litigations.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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, companies and individuals that apply subsequently may execute settlement agreements (TCCs) with the authority, qualifying for a reduction in their administrative fine.

According to the TCC programme, the companies and individuals that are defendants in an administrative proceeding may settle an anti-trust investigation if they:

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

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The leniency programme in Brazil is only applicable to the first applicant, therefore the second and subsequent applicants that approach CADE should apply for a settlement under the TCC programme.

Regarding the TCC programme, the main advantages are:

- a reduction in the expected fine;
- the administrative process will be suspended in relation to the applicant; and
- it does not have to pay the cost of a legal defence.

In contrast to the leniency agreement, a TCC does not grant criminal immunity for individuals.

The reduction of the expected fines in a TCC 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), within 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 CADE's Administrative Tribunal for adjudication.

In practice, for individuals in management positions, the pecuniary contribution is usually defined as up to 5 per cent of the pecuniary contribution applied to the company. 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'. Such an agreement 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.

The payment of the discounted contribution of the TCC, in such case, depends on the defendant's fulfilment of the leniency agreement regarding the new investigation. Should the defendant not comply with its leniency obligations, CADE will request the TCC contribution to be paid in full, according to the calculated applicable fine and the regular applicable TCC discount parameters.

Approaching the authorities

31 | 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 receive a reduction in its fine but not full immunity of CADE's fines. It is also important to state that the leniency agreement is executed at the General Superintendency's discretion and it will have a less incentive to do so 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.

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.

Cooperation

- 32 | 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 that are seeking partial leniency?

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 and suchlike may also be requested.

In a TCC, the cooperation will influence the amount of discount in the pecuniary contribution. In this sense, providing more evidence results in an increase in the discount.

Confidentiality

- 33 | 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 agreements and TCCs is confidential. After these agreements are executed, their confidentiality will be regulated by 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 agreements;
- those listed in articles 44, section 2º, 49, 85, section 5º e, and 86, section 9º of the Law No. 12,529/2011 (the Antitrust Act), 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 agreements or TCCs and not executed, while they have not been returned to the proponents or destroyed by CADE.

After the 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 agreements and TCCs, with CADE's consent.

It is important to mention that there is one precedent from the Superior Court of Justice determining the disclosure of a leniency agreement to the plaintiff in a Civil Damage Recovery Lawsuit. The Superior Court of Justice decided in this case that the confidentiality of such documents is only applicable during the administrative investigation. Once the investigation was adjudicated by the Tribunal, there is no confidentiality obstacle for a civil court to access such documents relevant to evidence the illegal conduct that may have resulted in damages to the plaintiff.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 may propose a TCC to the defendants of an administrative investigation. The negotiations shall be carried out either before the General Superintendency (within 60 days, extendable for another such period) or, if the case has already advanced to the Tribunal, with the appointed Reporting Commissioner (within 30 days, extendable for another such period).

Once a TCC is approved, and the settling defendant pays the corresponding contribution and fulfils the other agreed commitments, the case shall be suspended against such defendant and the fulfilment of all agreed terms shall be assessed by the Tribunal in its judgment on the merits of the main investigation. If the TCC was correctly fulfilled, the case before CADE is definitively dismissed with relation to the settling party (although liability remains in the civil and criminal spheres).

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, which can substantially reduce the originally applied fine.

In the criminal sphere, there is also the possibility of executing a plea bargain.

Corporate defendant and employees

- 35 | 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.

Dealing with the enforcement agency

- 36 | 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 Tribunal with consequent confirmation of immunity (such declaration of compliance will happen when the 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 the 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 the Tribunal casts its final decision regarding the administrative process.

DEFENDING A CASE

Disclosure

- 37 | 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 the full content of the leniency or settlement agreement (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.

Representing employees

- 38 | 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 or representation?

Counsel is 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 cases where conflicts of interests arise between the corporation and the current or past employee, the employee shall be represented by separate counsel.

Multiple corporate defendants

- 39 | 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.

Payment of penalties and legal costs

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

Law No. 12,529/2011 (the Antitrust Act) does not prevent the company from paying individuals' penalties or employees' legal costs.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and other penalties imposed by CADE and private damages awards are not tax-deductible.

International double jeopardy

- 42 | 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 an anticompetitive violation falls under Brazilian jurisdiction is whether it has, or has the potential to have, direct or indirect effects within Brazil.

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.

Getting the fine down

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

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 cooperate through a leniency agreement or a TCC.

UPDATE AND TRENDS

Recent cases

- 44 | What were the key cases, judgments and other developments of the past year?

Since September 2019, the Administrative Council for Economic Defence (CADE) has adjudicated 10 cases involving cartels, six in 2020, two of which related to international cartels with direct or indirect effects within Brazilian territory. Such cases involved the markets of ceramic substrates – where the investigation was dismissed due to lack of evidence against one defendant, while others were covered by leniency agreements or settlements – and subterranean/submarine cables – with fines imposed to the convicted companies ranging from 421,000 to 10.2 million reais each, and to individuals from 100,000 to 200,000 reais each.

Eleven leniency agreements were executed in 2019. In addition, at the time of writing, there were 16 settlement agreements (TCCs) in different industries issued during 2020, involving auto parts, hydrometers, salt, electronic components, capacitors, pipework connections and other industries.

Furthermore, during the past year, CADE has shelved four investigations because of a lack of evidence.

Regime reviews and modifications

- 45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

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

- 'double damage' granted to the parties affected by the antitrust violation (ie, victims' compensation is double that of the damage sustained), with the exception of defendants that executed leniency or settlement agreements (TCCs) which will only be liable to pay single-damage payments;
- the interruption of the civil statute of limitation during CADE's investigation;
- the civil statute of limitation will start only after the publication of CADE's final decision in the Official Gazette;
- no jointly civil liability to the defendants that executed TCCs;

- no presumption that an undertaking passed on increased costs to customers (passing-on) in cases of a cartel – the burden of proof to show passing-on had occurred is on the defendants;
- the possibility of the Federal Court granting injunctions to the affected parties in damage recovery lawsuits based on CADE's final decision; and
- the TCCs that contain the confession of participation in the investigated conduct shall include the defendants' obligation to submit itself to arbitration to repair damage suffered when an affected party takes the initiative to request arbitration.

Currently, the proposed bill is under discussion by Brazil's House of Representatives. At the time of writing, two commissions of representatives have analysed and voted in favour of the bill.

Coronavirus

46 | **What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?**

CADE has adopted a series of internal measures regarding the coronavirus pandemic. The most relevant are meetings and trial sessions by videoconference.

Regarding anticompetitive conducts, CADE has opened an investigation on alleged anticompetitive conduct in the medical-pharmaceutical product industry. According to CADE, it is necessary to investigate whether companies from the sector are increasing prices and profits in an arbitrary and abusive manner after an increase in the demand for such products during the pandemic.

Another highlight was CADE authorising the collaboration between seven competing companies from the food sector for a short period of time. The decision is based on the recommendations of entities such as the OECD and the International Competition Network due to the exceptional and urgent situation.

In addition, there are a few proposed laws in the Brazilian Congress, particularly regarding the freezing of prices of medicines, healthcare products and other items considered 'essential' during the pandemic. CADE has expressed its concerns on such measures through an economic study, noting that such price interventions may have considerable negative effects in the market. The authority has also expressed its concerns regarding other law projects interfering in different industries, such as transportation, educational services, funerals and liquified natural gas.

O. C. ARRUDA SAMPAIO
SOCIEDADE DE ADVOGADOS

André Cutait de Arruda Sampaio

andre@arruda-sampaio.com

Onofre Carlos de Arruda Sampaio

onofre@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

Bulgaria

Anna Rizova and Hristina Dzhevlekova

Wolf Theiss

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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).

Relevant institutions

2 | 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 in Bulgaria which may also affect competition in other EU member states.

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 Administrative Court for Sofia District.

Changes

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

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 antitrust 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 (SAC) to the Administrative Court

for Sofia District. This amendment entered into force as of 1 January 2019 and aims to reduce the duration of appeal procedures (which before SAC sometimes exceeded one year) and relieve the SAC from being overloaded. The Administrative Court for Sofia District has never before been involved in hearing competition cases, however, in the two years since the changes were brought in, in the duration and efficiency of appeal procedures has significantly improved: appeals in antitrust cases now take, on average, six months.

The LPC was last amended in April 2019 with a reference to the newly adopted Trade Secrets Protection Act (TSPA). The amendment prescribed that a CPC decision under the LPC provisions on trade secrets protection does not preclude the claimant to initiate separate court proceedings on the basis of the TSPA, thereby clarifying that LPC and TSPA procedures are independent of each another.

The Directive (EU) 2019/1 (ECN+ Directive) is yet to be implemented in Bulgaria, no draft bill is currently available. Considering the current powers of the CPC in cartel investigations, dawn raids and leniency process, the ECN+ Directive is expected to enhance the CPC competencies in these areas. For example, it enables the CPC to check personal premises during dawn raids, not only company-owned ones.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 15 of the LPC mirrors article 101 TFEU. The LPC prohibits horizontal and vertical agreements, and concerted practices between undertakings, that is decisions of associations of undertakings which have the objective or effect of preventing, restricting or distorting competition in 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 the 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 two or more undertakings to coordinate their competitive behaviour on the relevant market or to influence the relevant competition parameters through practices such as setting or coordinating purchase or sales prices or other trading conditions including intellectual

property rights, setting production or sales quotas, sharing markets and customers, including manipulating public auctions or competitions (bid rigging), restrictions on imports or exports or anti-competitive actions against other competitors.

The LPC does not set forth specific substantive law provisions for the separate cartel infringements, rather they are viewed in the overall legislative framework of article 15 of the LPC and article 101 TFEU. However, in its practice, the CPC – similarly to the EC – has constantly viewed cartels as one of the most serious infringements of competition law. Following the practice of the EC and ECJ, the CPC also considered that cartels – due to their direct negative result on competition – are to be treated as ‘restrictions by object’, rather than as ‘restrictions by effect’ (whereas, both qualifications are provided as alternatives under article 15 of the LPC). The CPC does not view the ‘object’ of the agreement or concerted practice subjectively (ie, through the viewpoint and intentions of the parties) but objectively (ie, as the logical result a cartel would produce on a competitive environment).

The ‘by object’ qualification further on defines the narrower scope of review by the CPC in cartel cases – namely, the CPC will not engage in competitive effects tests and investigate particular impacts (economic and others) produced by the cartel activity, and the limited defence of the infringing parties, which cannot rely on a lack of effects or insignificant effects to exempt their behaviour.

Most recently, in the cartel cases of the CPC against 24 construction companies for bid-rigging practices under the National Energy Efficiency Program (decision of the CPC No. 1312 and 1313 of 5 December 2019), the CPC re-affirmed its approach that fixing of prices and market allocation are abusive by their very object and nature. Consequently, the CPC rejected the defence of some of the cartel participants that their cartel activity has only helped them to get in the tender short-listed candidates, but the cartel did not extend to the second stage of the tender where particular prices were offered and thus, it did not produce actual abusive effects for the contracting authority.

Still, the CPC – just as the EC and the ECJ – do not treat cartels as per se infringements (ie, it follows a US concept which denies the possibility for an infringing entity to prove a cartel provides pro-competitive benefits). Although it is rare, it is possible for parties to demonstrate significant positive effects under article 17 of the LPC, similarly to article 101(3) TFEU. If successful, the cartel in question would not fall within the prohibited agreements under article 15 of the LPC.

The LPC provides a de minimis exemption for restrictive agreements, decisions and concerted practices that have an insignificant effect on competition (article 16 of the LPC). However, the de minimis exemption is explicitly excluded for cartel infringements as defined by LPC. A cartel will usually not fall in the available group exemptions for horizontal agreements – the CPC applies the same group exemptions for horizontal agreements as the EC (ie, group exemptions of certain categories of research and development agreements and specialisation agreements).

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

Joint ventures and strategic alliances

5 | **To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?**

Joint ventures that do not meet the requirements developed in ECJ and EC practice, and the EC Jurisdictional Notice on Concentration, for full-functioning joint ventures, are viewed as horizontal or vertical agreements under the general framework of article 15 of the LPC and article 101 TFEU. The EU test for full-functioning joint ventures aims

to distinguish between joint ventures that will participate as separate market players apart from their parent companies (and hence, shall be reviewed under merger control regulations), and dependent joint ventures that will mainly serve the commercial needs of their parent companies (and thus, represent a form of agreement or a concerted practice between them). In the latter case, depending on the type and scope of arrangements between the joint venture parent companies and whether they meet the above definition for cartels (eg, by fixing prices or limiting output), certain joint ventures may also qualify as prohibited cartel activities.

The CPC has on many occasions confirmed the approach to full and non-full functioning joint ventures during merger case analysis, and has explicitly referred to review under article 15 of the LPC and article 101 if the joint venture does not meet the criteria for full-functionality. To our knowledge, however, the CPC has not yet in practice reviewed a joint venture that is not full-functioning, as a horizontal agreement or concerted practice (and potentially – as a cartel) under article 15 of the LPC and article 101 TFEU.

We are also not aware of any practice of the CPC concerning strategic alliances. To the extent they may constitute an arrangement between (actual or potential) competitors, strategic alliances shall be equally reviewed as a horizontal agreement or concerted practice (and, as the case may be, as cartels).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | **Does the law apply to individuals, corporations and other entities?**

The Law on Protection of Competition (LPC) applies to all undertakings performing economic activities, irrespective of their legal and organisational forms. These could be corporations, partnerships, associations and professional organisations, public authorities and individuals performing an economic activity for profit, and so on.

The LPC also applies to individuals (in their personal capacity not as an undertaking) who have assisted in a breach under the LPC, including cartels.

Extraterritoriality

7 | **Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 on the Functioning of the European Union (TFEU) (Regulation No. 1/2003), the Commission for Protection of Competition (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. As part of its standard review under a cartel case, the CPC will ex officio assess the applicability of article 101 TFEU to the case and, if applicable, will follow the EU *acquis* (including European Competition Network (ECN) cooperation procedures) regarding cross-border cartels.

Where a material link between the 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.

Export cartels

8 | 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 of the LPC).

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Neither the LPC nor the secondary legislation provides for any industry-specific infringements, defences or exemptions. The general rules, defence strategies and available exemptions (group exemptions and de-minimis, as discussed above) would apply. It is expected that the CPC will broaden the scope of possible exemptions with the new guidelines expected at EU-level for sustainability agreements. These, however, are still being discussed between the European Commission (EC) and national competition authorities (NCAs).

In several cases, the CPC explicitly mentioned that it will not exempt or accept as a defence the existence of a 'crisis cartel'. Similarly to the approach of the EC, the mere fact that a particular industry is in collapse could not serve as an exemption or a mitigating factor for a cartel activity, unless the parties can demonstrate pro-competitive benefits under article 17 of the LPC, similar to article 101(3) TFEU.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Competition rules only apply to state actions – as well as the activities of public bodies (eg, agencies, public organisations etc) – if the latter constitute an economic activity and may qualify the state or public body as an 'undertaking' (ie, as an equal participant on the commercial scene). On the contrary, where a state or public body exercises its entrusted public powers and competencies, or executes a non-profit activity, they will not be treated as an undertaking and will not fall in the scope of the competition rules under the LPC or the TFEU. The CPC has already reviewed potential antitrust abuses by the National Health Insurance Fund (NHIF) and various other public authorities. It conducted the assessment on a case-by-case basis, with respect to each particular activity conducted by the public body, and in some instances, the same public body (eg, NHIF) was found to be acting as an undertaking, while in others it was not.

Apart from the above, the LPC does not contain a special defence for state actions, government-approved activity or regulated conduct. Infringing undertakings would be equally exposed to competition rules, regardless that they may have acted under law, public order or regulation. Yet, to aid state authorities in not issuing competition-abusive legislation, the CPC has adopted Guidelines for compliance of legislative acts with the competition law and a checklist for (potentially) abusive provisions.

The CPC may also assess a particular legislation for its effect on competition under its advocacy procedures. CPC decisions on advocacy, however, are not mandatory.

Where the CPC is competent to apply article 101 or article 102 of the TFEU, the parties might be able to invoke the 'regulated conduct defence', subject to the requirements developed in the EC and ECJ case law for that defence. We are not aware if a 'regulated conduct defence' has been ever brought before the CPC.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

A cartel investigation procedure is opened by the Commission for Protection of Competition (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 EC or upon written request by affected persons. Contracting authorities also notify the CPC about suspected bid rigging in public procurement tenders – in 2019-2020 the CPC started a number of bid rigging cases based on notifications from public authorities. One of 2020's most debated (but still pending) cartel investigations in the oil and petrol sector, regarding fixing wholesale and retail prices and output between the market's largest players, was initiated based on notification from prosecutors and media publications.

Although the CPC adopted and announced a leniency programme, the latter is rarely used. In fact, it was used for the first time in 2019 in a bid rigging investigation where three of the cartelists applied for leniency.

An investigation is opened by a ruling of the CPC's chairperson, whereby a working group (case handlers) and a supervisor from the CPC's members are appointed.

The working group compiles information and sends questionnaires for information (eg, market and financial data relevant to 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 those it contacts what the legal grounds for the investigation are, 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 itself, which is made publicly available on the CPC website. Confidential information is removed from the publicly available version of the decision.

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 a case (ie, the defendant, claimant and affected third parties) then has at least 30 days to make written submissions on the CPC's findings contained in the statement of objections and to present evidence. Parties are not given access to the full report of the working group; however, at this stage, they will have access to a version of the working group's file that has had confidential information removed.

Since the cartels, as defined by the LPC, are considered material infringements 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, during a closed session, the CPC shall, after consideration of all statements, arguments and objections, issue:

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

A version of the CPC decision that does not contain confidential information is published on the CPC website.

Investigative powers of the authorities

12 | 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, CPC case handlers are authorised to request information and evidence from the defendant, any third party, state authority, EU competent authorities 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 to 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 onsite inspections (dawn raids) in the premises of an undertaking suspected of cartel activity, including when assisting the CPC with collecting the 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.

In order to carry out a dawn raid at the premises of an undertaking under investigation, the CPC must obtain explicit authorisation from the Administrative Court in Sofia (city), based on which it may enter all of the undertaking's business premises irrespective of their location and means (eg, offices and motor vehicles). However, under Bulgarian law, private homes and equipment (eg, personal laptops) cannot be inspected by the CPC, even though they might contain data and documents belonging to the undertaking under investigation. The CPC case handlers and other specified persons (such as IT experts) are authorised to:

- enter and search premises (during unannounced inspections, the police usually assist CPC case handlers with entering properties);
- take possession of relevant documents (by making copies or seizing the original documents), or take the necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation of documents, or provide information, to the best of his or her knowledge and belief, where documents 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 and cloud-based data centres accessible by computers and other means of the undertaking, located on the premises and take forensic images of any digitally stored information (the CPC may demand access accounts and passwords to be disclosed by the undertaking's employees).

Bulgarian law recognises attorney-client privilege in communications between undertakings with their external legal advisers. However, advice from in-house legal counsel is not privileged so can be seized and used by the case handlers as evidence.

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

The CPC has the power to fine an undertaking up to 1 per cent of their annual turnover (as per its previous audited financial statement) and to fine individuals who do not assist or who impede a dawn raid. In 2020, the CPC sanctioned the Bulgarian Petrol and Gas Association (decision of the CPC No. 676 of 6 August 2020) for failing to disclose an internal email address regularly used for communication within the Association to it.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

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

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

The CPC also cooperates with the EC and other EU member states' national competition authorities (NCAs), by receiving and rendering assistance and exchanging information under the procedure set forth in Regulation No. 1/2003 and the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive) (which is yet to be implemented in Bulgaria). Based on this, the CPC may forward information obtained during the course of a cartel investigation to the European Commission (EC) and to 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 purposes under the LPC. As per Regulation No. 1/2003, the recipient of this confidential data must guarantee the same level of confidentiality as ensured by the NCA that forwarded it.

The CPC is also a party to inter-institution cooperation agreements – including with the Ministry of Interior, the Bulgarian National Audit Office, the National Revenue Agency, the Public Procurement Agency, the Communications Regulation Commission, Energy and Water Regulatory Commission (KEVR) – based on how the competition authority uses information and recourses for enforcement activity. For example, the police assist the CPC during dawn raids, the Public Procurement Agency notifies the CPC of potential examples of bid rigging in public procurement processes, and the National Revenue Agency provides market and financial data needed during the course of a cartel investigation.

Interplay between jurisdictions

14 | 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 member states' NCAs of any case that has cross-border effects and reviews information about the cases initiated by member states' NCAs to check if they affect competition in the Bulgarian market, so that cases may be reallocated within ECN members. So far, no cases have been reallocated from or to other NCAs.

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

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Commission for Protection of Competition (CPC) investigates and adjudicates cartel matters in Bulgaria. The CPC opens the proceedings for investigation of a cartel on legal grounds provided for in the LPC, and on its own initiative. Pursuant to the Law on Protection of Competition (LPC), a cartel investigation is carried out by case handlers – experts (lawyers and economists) nominated by the chairperson of the CPC – who are supervised by a member of the CPC. Members of the CPC make decisions on the case, based on the results of the investigation.

Burden of proof

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

The burden of proof lies with the competition authority. Despite the lack of clear legislator guidelines, the case law of the Supreme Administrative Court (SAC) indicates that the standard of proof expected by the CPC is that an alleged infringement must be proved 'beyond a reasonable doubt'.

If an undertaking refers to an individual exemption under article 17 of the LPC or article 101(3) of the Treaty on the Functioning of the European Union (TFEU), the undertaking must prove that the requirements laid down in those provisions are fulfilled.

Circumstantial evidence

17 | 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 such evidence 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).

Previously to this, the SAC, acting as the court of second instance, has accepted circumstantial evidence as sufficient proof where all such evidence, in its entirety, indicate 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).

In a recent bid rigging case (decision of the CPC No. 761 of 27 June 2019), the CPC undertook the same approach as SAC and took into consideration the following circumstantial evidence for the existence of coordinated behaviour of the participants in public procurement bid: the participant's offers were for the same amounts, were presented in the same way (eg, font, layout, etc) and contained the same technical errors.

Appeal process

18 | What is the appeal process?

CPC decisions were previously subject to appeal before the SAC, but as of 1 January 2019, the competency to hear such appeals was moved to the Administrative Court for Sofia District.

Parties involved in a cartel investigation are entitled to submit appeals against CPC decisions within 14 days of receiving notification of the CPC's decision. Any third party that can prove it has a direct legal interest is also entitled to appeal a CPC 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 Administrative Court for Sofia District. Any evidence and information marked as confidential is kept in separate files to which only the court's judges have access. The appellant, the CPC and all interested parties submit written statements regarding 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 Administrative Court for Sofia District 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 one year.

The judgment of the Administrative Court is subject to appeal before the SAC sitting on a panel of three judges.

The SAC's judgment may be appealed by the defendant, and by the CPC if its decision was overruled by the first instance court.

The SAC's three-panel judgment is final and binding. The appeal usually takes about six months to one year (depending on the difficulty of the case and the workload of the court, and the measures in place to prevent the spread of the coronavirus).

SANCTIONS

Criminal sanctions

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

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

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Civil sanctions

According to article 15, paragraph 2 of the Law on Protection of Competition (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 and pursuant to article 26 of the Law on Contracts and Obligations, these agreements do not have any legal effect.

Furthermore, cartel activity may give rise to private damages claims by the affected parties. The legal requirements, eligible parties and the rules for quantification of the damages have been set forth in the LPC in line with the Private Damages Directive.

Administrative sanctions

Under the LPC, the Commission for Protection of Competition (CPC) can impose administrative (pecuniary) sanctions on an 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 (based on last audited financial statement). The exact amount of sanctions is determined by the gravity and duration of the infringement, and the circumstances mitigating and aggravating the undertaking's liability which are outlined in the CPC methodology for the calculation of fines.

CPC decisions on cartel cases show that it is inclined to impose sanctions of almost the maximum amount provided in the law. For example, in 2012 the CPC imposed fines totalling 2,914,560 leva – the highest amount it has issued for horizontal anticompetitive cooperation. The fines were imposed on three Bulgarian companies for bid rigging in a public procurement process for supplying air tickets. One of the participants was sanctioned with the highest single fine ever imposed by the CPC on a one undertaking for horizontal cooperation – 2,818,800 leva. However, in 2016, the SAC annulled this decision and the fine issued to the undertaking.

In addition to the 10 per cent sanction, the CPC may impose a pecuniary sanction of up to 1 per cent of an undertaking's total turnover in the preceding financial year for:

- failing to assist the CPC during an investigation;
- damaging the integrity of or destroying seals placed during dawn raids; and
- providing incomplete, inaccurate, untrue or misleading information.

Most frequently, the CPC imposes sanctions of between 0.01 and 1 per cent on undertakings for non-cooperation (eg, not providing requested information) during the investigations. The appeal court usually upholds such sanctions. In a recent case (decision of the CPC No. 619 of 5 June 2018), the CPC imposed a sanction of 1 per cent of the global turnover of a company for delaying a CPC inspection by five hours, restricting the CPC's access to relevant digital files, providing a fake email address of a manager, and attempting to manipulate folders on the aforementioned manager's computer during the inspection. The company appealed the amount of the fine, arguing that its behaviour did not substantiate the maximum of 1 per cent. In two instances the appeal court and the SAC (final cassation instance) confirmed that any delay and impediment of a dawn raid process is a severe breach and may justify the maximum sanction being applied.

The CPC may also sanction an undertaking by up to 5 per cent of its average daily turnover of the preceding financial year for each day it fails to comply with a CPC order to terminate a cartel or a CPC ruling imposing interim measures.

In addition to monetary sanctions, the CPC is authorised to take all necessary measures to terminate a restrictive agreement, 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 to as it was before the infringement

Pursuant to article 102 of the LPC, the CPC can fine individuals who assist in a cartel between 500 leva and 50,000 leva. Individuals who fail to cooperate and assist the CPC during an investigation may be fined between 500 leva and 25,000 leva.

Guidelines for sanction levels

21 | 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-part approach: the basic amount of the sanction is set, which is then 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, as cartels are considered serious infringements, the basic amount is up to 10 per cent of the value of sales of the affected products. The basic amount may be increased or reduced by 10 per cent for each aggravating or mitigating circumstance, but cannot exceed 10 per cent of the undertaking's total turnover for the preceding financial year.

The 10 per cent fine is separate from the 1 per cent fine for obstructing a CPC investigation and the daily 5 per cent fine for not following a CPC order to terminate a cartel or to follow interim measures set by the CPC. Therefore, these fines are cumulative and do not exclude each other.

The CPC takes the following aggravating factors into account when setting a fine:

- the undertaking committed the same or a similar violation, as established by the CPC, another EU national competition authorities (NCA), or the European Commission (EC);
- the undertaking refused to cooperate with or hindered the CPC during its investigation, or opposed the investigation;
- the undertaking played the role of ring leader (ie, it initiated, led or incited the breach);
- the undertaking exercised coercion (ie, undue influence) upon another undertaking to participate in the infringement;
- the undertaking paid or offered to pay 'compensation' or 'damages' to other enterprises to include them in the violation;
- the cartel affected competition in related or neighbouring markets; and
- other factors, depending on the facts of the case.

The mitigating factors the CPC may consider include the undertaking or association:

- having taken a passive role in the cartel (eg, 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;
- having taken appropriate measures for restricting the infringement's detrimental consequences; and
- other factors, depending on the facts of the case.

In a recent case (decision of the CPC No. 761 of 27 June 2019), the defendants tried to claim that ending the infringement before the CPC intervention was a mitigating circumstance. However, this argument was rejected by the CPC, which considered that reason they ended the infringement was that it had fulfilled its purpose (ie, to manipulate the

tender procedure). In this case, the CPC reminded them that under the CPC's methodology for the calculation of fines, early termination of an infringement is not viewed as a mitigating circumstance in cartel cases (unless it is done in the context of the leniency procedure).

When determining the amount of the sanction, other factors, such as the duration of the cartel and its effectiveness, are also taken into consideration by the CPC.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CPC promotes the implementation of compliance programmes within organisations as a mean of increasing competition law awareness and internal compliance. The CPC has issued special guidelines for corporate compliance programmes containing various recommendations on how to structure such programmes.

However, in the guidelines and the methodology for the calculation of fines, the CPC explicitly stated that the existence of a compliance programme at the time of the infringement is not considered a mitigating circumstance and cannot lead a priori to a reduction of a sanction.

Depending on the circumstances of a case, under the methodology, particular measures undertaken by an undertaking that were facilitated by the existence of a compliance programme (eg, measures for early identification of an infringement) might be considered mitigating circumstances. If so, the CPC is generally allowed to reduce a fine by up to 10 per cent for each such mitigating circumstance.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There are no specific provisions under Bulgarian law prohibiting individuals involved in a cartel activity to be appointed as corporate directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Under the Bulgarian Public Procurement Act, which came into force on 15 April 2016, infringement of cartel prohibitions (whether under Bulgarian, other national competition law or article 101 of the Treaty on the Functioning of the European Union) may lead to an undertaking being excluded from public procurement procedures for a period of three years following the decision establishing an infringement. However, such a decision does not automatically lead to exclusion, as contracting authorities must include this as a criterion in a tender. If an undertaking provides sufficient evidence that all damages arising from its unlawful behaviour have been compensated, the contracting authority may allow the undertaking to participate in the tender process.

Parallel proceedings

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

Pursuant to Bulgarian law, cartel activity does not qualify as a crime, therefore administrative and civil consequences apply, in addition to the agreement being invalid from a provision in the law.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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. Under the Law on Protection of Competition (LPC), any direct or indirect purchaser (a natural person or a legal entity) may claim full compensation for damages caused by an infringement of respective provisions of European or Bulgarian competition law before competent civil courts. The liability for cartel infringements is limited to direct damages, where the compensation will cover actual losses, loss of profit and payments of interest from the time the harm occurred until payment of the compensation.

The Private Damages Amendment increases the role of the judge in determining the amount of damages. In addition, for assessment of the damages caused, judges are authorised to seek the assistance of the Commission for Protection of Competition for the amount of the damages. The involvement of administrative bodies in the process of determining damages and obtaining assessments 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.

There are no specific provisions under Bulgarian law on the 'umbrella purchaser claims'. However, based on the general principles of the LPC on private damages claims as well as on the European Court of Justice practice (Case C-557/12 *Kone AG and others v ÖBB-Infrastruktur AG (Kone)*), such claims would be possible. However, we are not aware of any umbrella purchaser claims brought under the LPC since the adoption of the Private Damages Amendment in 2018.

Class actions

27 | Are class actions possible? If so, 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

Immunity

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

The Law on Protection of Competition (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 Commission for Protection of Competition (CPC) in 2011.

There are two options for granting full leniency to a participant in a secret cartel. The undertaking may benefit from full immunity if, before any other participant, it submits evidence that is a sufficient ground for the CPC to ask for a court's authorisation to carry out an on-site inspection (a 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 first option are not present, the cartel participant may still apply for full leniency, provided that it, ahead of any other participant in the cartel, presents sufficient evidence to allow 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 application and should not have had at its disposal, sufficient evidence to decide there was a cartel infringement.

In both cases, the applicant must not have coerced any other undertaking to participate in the cartel and must have ceased its participation in the cartel at the time of the application, unless instructed otherwise 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.

The full immunity applicant is also granted additional protection in subsequent private damages cases. The LPC retained the narrower scope of possible claimants from the Private Damages Directive, therefore only the direct and indirect customers of the first immunity applicant itself make sue it for damages, limiting the principle of solidarity with other cartel participants.

In addition, as envisaged in the Private Damages Directive and implemented in the LPC, claimants in private damages claims against cartels are not given access to the leniency applications of full or partial immunity applicants. The CPC only provides the court with access to immunity applications and for the purpose of the court verifying whether the documents constitute immunity applications and so whether the whole of the document is protected. This restricted access is an additional protection to encourage immunity applications, which may otherwise lead to undertakings exposing themselves to private damages claims.

Subsequent cooperating parties

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

The CPC Leniency Programme allows the CPC to grant partial leniency (ie, a fine reduction) to a cartel member after it a cartel investigation has begun, despite an immunity application being made by another cartel member. An undertaking is eligible for such reduction if:

- it provides evidence that is of material importance for proving the infringement, voluntarily and at its own initiative, prior to the completion of the investigation (ie, a statement of objections being issued); and

- it complies with the conditions for granting full leniency as set out in the Rules for Application of the Leniency Programme.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Fine reductions are done at the discretion of the CPC discretionary and depend on the order of evidence submitted to the CPC and its significance to the cartel investigation.

The second applicant, provided it presents evidence of material significance for proving the cartel infringement at its own initiative and voluntarily, can benefit from a reduction of between 30 per cent and 50 per cent of the penalty for the cartel infringement. The fine for a third cooperating party may be reduced by 20 per cent and 30 per cent. For subsequent applicants, it is reduced by 10 per cent and 20 per cent. Any evidence to support a partial leniency application must be submitted before the completion of the investigation (ie, the statement of objections being issued).

The CPC leniency programme provides incentives for applicants to come forward with information about other cartels they are involved in. If during an investigation, a cartel participant provides information regarding its involvement in another cartel, the CPC may reduce the fine for participating in the first cartel by an additional 10 per cent ('leniency plus'). If an undertaking provides information disclosing the existence of more cartels, the CPC may reduce the fine for participating in the first cartel by 10 per cent for each cartel revealed, up to a maximum of 30 per cent. Reductions in fines from providing information under 'leniency plus' and full or partial leniency applications are cumulative.

Approaching the authorities

31 | 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?

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 for full leniency. Applications submitted when the proceeding has already started should be well considered and only filed when the undertaking possesses evidence of material significance.

If a cartel 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. A leniency application to the EC will not be considered as an application to the CPC or any national competition authority (NCAs) 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 an undertaking, the CPC may, at its discretion, grant a grace period to an undertaking that has filed an application for leniency but lacks the data and evidence to present with its application. The grace period can be extended at the CPCs discretion. In a marker application, the undertaking should provide, at a minimum:

- information concerning the participants;
- affected products or services;
- affected territories;
- the nature of the infringement (eg, client and market allocation);
- the duration of the agreement; and
- a description of the functioning of the cartel (including telephone calls and emails).

Cooperation

32 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 that are seeking partial leniency?

According to the leniency programme and Rules on the Application of the Leniency Programme, 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.

A leniency applicant must provide at their own initiative, or at the CPC's request, all information and evidence at their disposal. In particular, the applicant should provide the authority with all non-legally privileged information, available documents and evidence regarding the existence and activity of the reported cartel, and, where appropriate, make its current employees and managers, members of its management board and, as far as is possible, its former employees and managers available for hearings or witness statements.

The applicant should not destroy, conceal or fabricate any information. It must not disclose, in any way, the fact that it intends to participate in a leniency programme or the content of its application, except to other authorities.

The applicant should comply with instructions of the CPC regarding ceasing or continuing its participation in the cartel. Failure to comply with these requirements could lead to the loss of all protection under the leniency programme.

There are no specific requirements under Bulgarian law regarding applicants for partial leniency, therefore they are subject to the same requirements as those applying for full leniency.

Confidentiality

33 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 first leniency application was made in mid-2019, therefore many aspects of the implementation of the Leniency Programme have not been developed in detail.

The CPC does not reveal the level of cooperation provided by or the identity of cooperating undertakings. The application and evidence provided can only be used by the CPC to evaluate the leniency application and apply for judicial authorisation for a dawn raid.

An applicant should keep its intention to participate in the leniency programme confidential, as well as the content of its application it submits to the CPC confidential. The leniency programme and the rules for applying to it require this confidentiality to be kept.

Access to a version of the CPC file containing non-confidential information is given to the relevant parties after the CPC serves a statement of objections to the alleged infringing parties or after it issues a decision that there was no infringement. Therefore, any documents marked as confidential are not accessible to the other parties.

Furthermore, the leniency application is not disclosed to plaintiffs in private damages claims.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 and when the CPC is yet to determine the existence of a cartel, another option for relief or reduction of a penalty is for the cartel participant to offer commitments to the CPC once the cartel is discovered. The CPC does not allow the commitments procedure to be applied to harsh infringements of competition law (which cartels are usually considered as). But, in practice, it has been applied to several cartel cases – most recently, to a cartel case in the retail fuel market, as summarised below.

After being served with the CPC's statement of objections, the LPC gives the option for the infringing party, within a term of not less than 30 days, to offer the CPC commitments that it will immediately cease the infringing (cartel) activity and execute adequate changes in the behaviour which have led to it. Both behavioural and structural commitments can be offered; in practice, the CPC has shown preference to structural ones (where possible under the particularities of the case).

The CPC has the discretion to assess the adequacy of the commitments and either accept or reject them. If accepted, the CPC issues a decision approving them and it may also impose a term during which the cartel participant may be monitored and sanctioned for not complying with the agreed commitments.

The benefits to a cartel participant of making commitments are that the CPC will end the cartel investigation without finding an infringement, which makes any private damages claim more difficult to prove, and the CPC may reduce sanctions or not impose any at all.

There are several cases where the CPC has refrained from imposing any sanctions. However, if there are any subsequent changes in the circumstances of a cartel, the cartel participant does not fulfil their agreed commitments, or if any information the CPC's decision was based on is found to be incorrect or misleading, the CPC may re-open the case and sanction infringing entities.

Corporate defendant and employees

35 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 under the leniency programme – individuals are not eligible to apply for immunity or reduction of fines. Irrespective of whether an undertaking has been granted full or partial leniency, the individuals who assisted its cartel activities remain subject to penalties (ie, fines).

Dealing with the enforcement agency

36 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 on the cartel's participants, and detailed information about the cartel's activity, including:

- affected products or services;
- affected territories;
- the nature of the infringement (eg, price fixing, client and market allocation);
- the duration of the cartel; and
- a description of the way it functions (including telephone calls and emails).

The application should be supplemented with relevant evidence.

Leniency applications can be submitted orally, through a CPC contact.

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, an undertaking applying to the EC for immunity may submit a leniency application to the CPC in short form.

Prior to submitting a leniency application, it is possible for an undertaking to anonymously obtain informal guidance from the CPC regarding an application, the content of the leniency programme and information about its eligibility. This is usually done through the undertaking's lawyers.

The applicant may also use the availability of markers to request an extension (a grace period) to submit evidence relevant for establishing an infringement.

DEFENDING A CASE

Disclosure

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

During the investigation, the Commission for Protection of Competition (CPC) only provides defendants with general information about the legal grounds for the investigation and the investigated undertakings. If an investigation was opened due to the claim by another undertaking, the defendant will only be made aware of the claim, the claimant and identities of other investigated undertakings.

No specific details about the alleged infringement or documents that have been provided are given to the defendant until the CPC serves the statement of objections or issues a decision that there was no competition infringement. In both cases, the defendant is not be provided with access to confidential information, the CPC's internal documents (including correspondence with the EC or with EU national competition authorities (NCAs)). If the CPC considers certain information is not confidential as per its criteria, it issues a ruling stating so and makes the information accessible by parties to the CPC investigation.

Regarding the statement of objections, the defendants are only given access to the CPC's file (except for documents identified as confidential) after the statement has been served. Defendants are not provided with access to confidential documents, even during appeal proceedings before the SAC. In its case law, the SAC views that parties' interests are not affected by limited access to documents collected by the CPC, as the SAC has unlimited access to the entire file.

Representing employees

- 38 | 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 or representation?

The LPC does not regulate this issue. Under the Bulgarian Bar Act, members of the Bar may not represent the interests of two or more parties if their interests conflict. Therefore, counsel may represent both

a corporation and its employee if their interests do not conflict. However, if a conflict of interest arises, counsel should withdraw as counsel for one of the parties.

Multiple corporate defendants

- 39 | 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.

Payment of penalties and legal costs

- 40 | 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.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Pursuant to Bulgarian law, fines are not tax-deductible. According to the non-binding opinions of the Bulgarian tax authorities, private damages awards are deductible from the corporate tax base.

International double jeopardy

- 42 | 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 does not take penalties imposed in other jurisdictions into account.

To date, there is no precedent in Bulgaria for private damages cases resulting from cartels.

Getting the fine down

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

According to the CPC, the existence of a compliance programme is not considered, by itself, a mitigating factor and does not affect the level of an imposed fine.

Under Bulgarian law, the optimal way to get the fine down for cartel activity is by submitting a leniency application and terminating an infringement. In this regard, the timing of cooperation is particularly important, as only the first applicant for leniency may obtain full immunity from administrative sanctions. Also, an immunity recipient enjoys further protection in private damages claims against it (eg, access to the leniency application by third parties is restricted, the scope of liability of an immunity recipient is limited to the damages caused to its own behaviour, and there is no solidarity with the other cartel participants).

Outside of the leniency programme, participants in a cartel may obtain a 10 per cent reduction in a fine from mitigating circumstances. Under the CPC methodology for the calculation of fines, terminating an infringement immediately after the start of an investigation is not considered a mitigating circumstance in cases of cartel activity.

The mitigating circumstances in cartel cases that may affect the level of fine are:

- passive behaviour by the undertaking in the cartel activity;
- a limited role in the infringement or adopting the strategy of 'follow the leader';

- short-term participation in the cartel and terminating participation upon the company's management becoming aware of it (for which compliance programmes may help);
- fully cooperating with a competition authority during an investigation;
- undertaking measures to remedy 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.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In 2020, the focus of the Commission for Protection of Competition (CPC) was not on the traditional sectors prone to cartels where it has detected coordinated behaviour (eg, retail chains, fast-moving consumer goods and its production sector, industry trade associations, etc). The most substantial current cartel investigation concerns the wholesale and retail fuel/petrol sector in Bulgaria. However, as the CPC carried out a sector analysis after a one-year-long review of this sector and the participants in its whole value chain and found no disturbing practices by the market participants, it is unlikely the investigation will discover a cartel. Rather, in the sector analysis, the CPC found various disturbances in the market's structure and in legislation and recommended various legislative amendments. The current cartel investigation seems to have been triggered by pressure from prosecutors and from the public to lower the retail price of fuel.

The period of 2019-2020 also showed an increased number of bid rigging cases. These cases, which only involved a minor part of the CPC's work, are now an urgent matter for the CPC due to an increased number of publicly funded projects. And since, due to covid-19, even more state and EU-financed programmes have become available to local market players, bid rigging cases are likely to remain one of the CPC's top enforcement priorities.

In recent CPC practice, there is a notable change of focus from antitrust abuses to unfair trade practices within various commercial sectors in Bulgaria. Since unfair trade practices, although part of Bulgarian competition law, entail more consumer-related abuses, such as misleading advertising, such proceedings also create more publicity for the CPC, showing it as a corrective in commercial markets.

At this time, the CPC has conducted several dawn raids and fined two companies for non-cooperation in dawn raid inspections. The leniency procedure was used for the first time as a method for collecting evidence and to incentivise the initial whistleblower.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

There are no ongoing reviews or proposed changes to the legal framework applicable to cartel cases.

WOLF THEISS

Anna Rizova

anna.rizova@wolftheiss.com

Hristina Dzhevlekova

hristina.dzhevlekova@wolftheiss.com

Office Park Expo 2000, Phase IV
55 Nikola Vaptsarov Blvd
1407 Sofia
Bulgaria
Tel: +359 2 8613 700
www.wolftheiss.com

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The covid-19 pandemic did not lead to many measures enhancing competitors' conduct and commercial cooperation. As of the reporting date, the only explicit derogation announced by the CPC applied to the milk and dairy, potatoes, and the live trees and other plants sectors, under EU Regulations 2020/593, 2020/599 and 2020/594, which all entered into force on 1 May 2020 and lasted six months. The derogation, which applied to article 101 of the Treaty on the Functioning of the European Union, but not article 15 of the Law on Protection of Competition, explicitly excluded cartel arrangements in the aforementioned sectors. At present, it is not clear if any local companies used the derogation and notified the CPC and the Ministry of Agriculture, Foods and Forests of cooperation measures they had undertaken.

Canada

William Wu, Guy Pinsonnault and Neil Campbell

McMillan LLP

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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) and who reports to the Minister of Innovation, Science and Industry. 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 the 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 is 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 are initially handled by the Bureau but ultimately concluded by the PPSC, with the Bureau's input.

Changes

3 | 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 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 in the discretion of the court.

In December 2009, the Bureau issued guidelines setting out its policy on competitor agreements, including how it will determine whether to pursue enforcement action under the criminal cartel or civil competitor agreement provisions. In July 2020, the Bureau initiated a public consultation process for its proposed updates to the December 2009 guidelines, which reflect the Bureau's enforcement experience since 2009 and several recent related court rulings.

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.

In April 2020, the Bureau issued a statement providing specific guidelines relating to competitor collaboration during the exceptional circumstances created by the covid-19 pandemic.

Substantive law

4 | 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 with '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 the 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, group purchasing, 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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The Bureau has indicated that the criminal provision in section 45 will be reserved for agreements between competitors (or potential competitors) to fix prices, allocate markets or restrict output that constitute 'naked restraints' on competition. Other forms of competitor collaborations, including joint ventures and strategic alliances, may be subject to review by the Bureau as a 'reviewable practice' under section 90.1, which prohibits agreements only if they are found to be likely to lessen or prevent competition substantially in a market. Fines or other monetary penalties are not available under section 90.1. However, these guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The federal Competition Act (the Act) applies to both individuals and organisations. An 'organisation' is defined as:

- a public body, body corporate, society, company, firm, partnership, trade union or municipality; or
- an association of persons that:
 - is created for a common purpose;
 - has an operational structure; and
 - holds itself out to the public as an association of persons.

Charges are often laid against both a corporation and individuals such as its senior managers, officers or directors. Senior Competition Bureau (the Bureau) officials have noted in speeches that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the Public Prosecution Service of Canada (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 stayed against all parties. In the past 10 years, more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision *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. 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.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 of Competition (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.

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 United States 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. 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. While extradition will only be granted for offences punishable by imprisonment for a term of more than one year, the cartel and bidrigging offences discussed above qualify because they provide for jail terms of up to 14 years.

The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. The request documentation would include an arrest warrant. This procedure has been used for offences under the Act at least twice. In *Thomas Liquidation* – a misleading advertising case – 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.

Export cartels

8 | 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Federal Financial Institutions

Federal financial institutions include federally regulated banks and authorised foreign banks, federal trust and loan companies, and federally incorporated and regulated insurance companies.

Section 49 of the Act specifically provides that, with some exceptions, federal financial institutions that make an agreement or arrangement with one another with respect of the following are guilty of an indictable offence:

- the rate of interest on a deposit;
- the rate of interest or the charges on a loan;
- the amount or kind of any charge for a service provided to a customer;
- the amount or kind of a loan to a customer;
- the kind of service to be provided to a customer; or
- the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld.

Section 49 also makes clear that every director, officer or employee of the federal financial institutions who knowingly made such an agreement or arrangement is also guilty of an indictable offence.

The maximum penalties are a fine of C\$10 million per count and five years in prison.

Underwriting

Section 45 does not apply in respect of an agreement or arrangement between persons who ordinarily engage in the business of dealing in securities or between such persons and the issuer of a specific security, in the case of a primary distribution, or the vendor of a specific security, in the case of a secondary distribution, if the agreement or arrangement has a reasonable relationship to the underwriting of a specific security.

Amateur and Professional Sport

The Act as a whole, including section 45, does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

In respect of professional sport, any person who conspires, agrees or arranges with another person to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or to limit unreasonably the opportunity for any other person to negotiate with and, if an agreement is reached, to play for the team or club of his choice in a professional league is guilty of an indictable offence, which carries a fine in the discretion of the court or up to 14 years in prison.

Airlines

The Canada Transportation Act was amended in 2018 to introduce a regime through which the minister of transport may authorise airline joint ventures if the minister is satisfied that they are in the public interest. Under this new regime, an authorisation by the minister of transport has the effect of allowing parties to coordinate their activities and exempt an airline joint venture from the application of sections 45 (criminal conspiracy provision), 47 (criminal bid rigging provision), 90.1 (civil competitor agreement provision) and 92 (mergers provision).

Collective Bargaining

The Act as a whole, including section 45, does not apply in respect of collective bargaining activities of employees or employers.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Historically, there existed a 'regulated conduct' defence, which was developed as a principle of statutory interpretation, whereby Canadian courts read down the conspiracy provisions to avoid criminalising a regulatory body exercising its authority under a validly enacted provincial

legislation or the regulated person proceeding in accordance with such provincial regulation. Canadian courts have occasionally applied the 'regulated conduct' defence in the context of federal legislation. When the conspiracy provisions in section 45 were amended to become a per se offence, the applicability of the 'regulated conduct' defence, as it existed in common law at the time, was retained by express statutory language.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Bureau (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 of Competition (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 federal Competition Act (the Act). In addition, the commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Industry 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.

After evidence is obtained during an inquiry, the commissioner decides whether to discontinue the inquiry or refer the case to the director of public prosecutions (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.

If a matter is referred to the DPP, the DPP 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.

Investigative powers of the authorities

12 | 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. 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 (ie, 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 or her 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 a constitutional challenge by Toshiba in the *Cathode Ray Tubes* (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 the 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

Inter-agency cooperation

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

In international cartel cases, the Competition Bureau (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 United States 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 United States, the European Union, Australia, Brazil and others. In general, such agreements build upon the 1995 OECD Recommendation Concerning Cooperation 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.

Interplay between jurisdictions

- 14 | 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, a company defending a cartel investigation that has multi-jurisdictional implications, 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

Decisions

- 15 | 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.

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 director of public prosecutions (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. Procedure in these prosecutions is governed by the Criminal Code and 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 federal Competition Act (the Act), a corporation has no right to a jury trial, although individuals may elect trial by jury.

Burden of proof

- 16 | 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 admissible in other types of criminal cases.

Circumstantial evidence

- 17 | 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.

Appeal process

18 | 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 appellate court 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 any of the following grounds:

- that it is unreasonable or cannot be supported by the evidence;
- a wrong decision on a question of law; or
- 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

Criminal sanctions

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

Given their status as the most serious indictable offences under the federal Competition Act (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 contexts, that fines must be large enough to deter powerful companies and must not become simply a cost of doing business. To date, C\$10 million is the highest fine 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 being conditional sentences (ie,

to be served in the community). However, legislative amendments to the Criminal Code in 2012 eliminated the availability of conditional sentencing for future section 45 and section 47 convictions.

Civil and administrative sanctions

20 | 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. It is also common for the director of public prosecutions (DPP) to seek a prohibition order to prevent the future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, section 90.1's reviewable practice provisions permit the Competition Bureau (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 the 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.

Guidelines for sanction levels

21 | 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 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 or convert its assets 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 based on 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.

While these criteria and the Bureau recommendations are not binding on the DPP or the court when a defendant presents a guilty plea to the court for acceptance, nor are they binding on the DPP when making submissions on the appropriate sentence after obtaining a conviction at trial, they are given significant consideration in the negotiation of guilty plea arrangements. With the Public Prosecution Service of Canada (PPSC) being a co-author of the 2018 revised immunity and leniency policies, the DPP is generally expected to act in a manner consistent with these policies.

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.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Under the 2018 revised Immunity and Leniency Program, if the Bureau is satisfied that a compliance programme in place at the time the offence occurred was credible and effective, consistent with the approach set out in the Bureau's Bulletin on Corporate Compliance Programs, the Bureau will treat the compliance programme as a mitigating factor when making its recommendation regarding sanctions to the DPP.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals could be prohibited from serving as corporate directors or officers pursuant to a judicial order pursuant to section 34 of the Act. The maximum duration of such orders cannot exceed 10 years.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

A revised 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 convicted of such an offence, 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. A proposed draft of the revised Ineligibility and Suspension Policy was released for public consultation in the fall of 2018. To date, the revised Ineligibility and Suspension Policy has not been finalised.

Many provincial (and also municipal) governments have also established 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 under the Competition Act in the previous five years from entering into contracts with public bodies or municipalities.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 (including section 45 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 enforcement track to pursue is a matter of discretion for the Commissioner and the DPP. 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. However, at the initial stage of an investigation, the Bureau may proceed with both the criminal and civil tracks of the investigation in parallel, until such time that it has adequate information to decide which track is more appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Section 36 of the federal Competition Act (the Act) grants private parties the right to recover in 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.

In a September 2019 decision, the Supreme Court of Canada held that 'umbrella purchaser' claims are permitted under section 36 of the Act, assuming the claimant can establish causation and injury, as the provision offers a cause of action to 'any person who has suffered loss or damage as a result of' cartel conduct. The court rejected the argument that such claims should be barred for subjecting defendants to 'indeterminate liability'.

There is no private right of action in relation to the competitor agreements reviewable practice in section 90.1 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.

Class actions

27 Are class actions possible? If so, 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. Cases may be brought on the basis of classes defined by reference to the province in question, but some provinces also allow nationwide class actions to be brought in their courts. Class actions may also be initiated on a national basis in the Federal Court. These 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.

There is no formal procedure for consolidating or coordinating parallel actions brought in multiple courts. However, in order to facilitate the management of multijurisdictional class actions by making use of existing class action legislations, rules of court and rules of civil procedures, the Canadian Bar Association developed the Canadian Judicial

Protocol for the Management of Multijurisdictional Class Actions in 2011, which was revised in 2018. This protocol has been adopted by courts in a number of 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, 13 defendants have thus far agreed to settlements which collectively exceed C\$110 million. The largest settlement to date involved a long-running class action against Microsoft for C\$517 million. Most recently, in the international auto parts conspiracies, the plaintiffs have so far entered into settlements with 37 defendants, totalling approximately C\$138 million.

COOPERATING PARTIES

Immunity

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

The Competition Bureau (the Bureau) has an immunity programme whereby a company or individual implicated in cartel activity may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the director of public prosecutions (DPP) on the 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 illegal activities and must not have coerced others to participate in 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.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 immunity. The Bureau will recommend to the DPP that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation. A prompt agreement to plead guilty along with valuable cooperation 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 possibility 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'.

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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by an 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 be progressively less able 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 per cent to 10 per cent discount off the corporate fine for the first offence and potentially an additional favourable treatment for individuals.

Approaching the authorities

31 | 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. To increase its likelihood of obtaining immunity or a substantial leniency discount, 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.

Cooperation

32 | 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 that are seeking partial leniency?

A participant in the Bureau's immunity or leniency programmes must provide a:

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.

Confidentiality

33 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. However, as part of an immunity or leniency applicant's ongoing cooperation, absent compelling reasons, the Bureau will expect the applicant to provide its consent in the form of a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. Such waivers are expected to be provided promptly and cover both substantive and procedural information.

With respect to private actions, the Bureau's policy is to provide confidential information from immunity or leniency applicants 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 such information, including by seeking a protective order from the court.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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.

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. Case law strongly favours acceptance of 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.

Corporate defendant and employees

35 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 (eg, 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 approach 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 exist (eg, subsequently working for another party to the cartel). 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 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).

Dealing with the enforcement agency

36 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 programme, 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 (eg, complex ongoing cross-border investigations).

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 the potential evidence that the cooperating party can provide. 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. The Bureau also seeks 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 with 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.

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: the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution, or the commissioner and the DPP have no reason to believe that further assistance from the applicant could be necessary.

DEFENDING A CASE

Disclosure

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

The director of public prosecutions (DPP) is required to produce to an accused 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 for the protection of witnesses or a continuing investigation but will have to disclose this information before the trial. This disclosure obligation begins at the outset of the prosecution at the first appearance and continues until the end of the proceedings. The right to receive disclosure of all relevant information from the DPP is protected by the Canadian constitution and a violation of this right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

Representing employees

38 | 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 or representation?

As individual employees and the company can both be charged with an offence under the federal Competition Act (the Act), there is a potential conflict of interest if counsel acts for both the company and employees that are also targets of an investigation or prosecution. For example, an employee may wish to obtain immunity in exchange for testimony that 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 potential conflicts of interest and confidentiality arrangements as between them. However, the Competition Bureau (the Bureau) investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

Multiple corporate defendants

39 | 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 (which are not affiliates) during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between co-defendants. 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.

Payment of penalties and legal costs

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

A corporation can 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.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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 (eg, 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 v Canada*, "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
- 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'.

International double jeopardy

42 | 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 occasion 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 penalized 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.

Getting the fine down

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

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 significant fine reduction 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 quality of the cooperation, 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 involvement in the instigation of the offence.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The most important judgment of the past year is the Supreme Court of Canada decision in the *Godfrey* litigation (optical disk drives). The court determined that:

- in order to certify a class action, class action plaintiffs do not need a methodology to show harm to all class members or a methodology to assess which class members were harmed – it is sufficient to show harm to the purchaser level (however, at trial, only class members that actually suffered harm can recover damages);
- umbrella purchasers have a cause of action and their claims can be certified;
- the statutory cause of action under section 36 of the federal Competition Act (the Act) is not an exhaustive code and does not preclude parallel common law causes of actions; and
- discoverability principles apply to limitation periods for a cause of action under the Act.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

In July 2020, the Competition Bureau (the Bureau) initiated a public consultation process for its proposed updates to its guidelines setting out its policy on competitor agreements, originally released in December

2009. The proposed revisions reflect the Bureau's enforcement experience since 2009 and several recent related court rulings.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In April 2020, the Bureau issued a statement providing specific guidelines relating to competitor collaboration during the covid-19 pandemic. In its statement, the Bureau acknowledged that the exceptional circumstances created by the covid-19 pandemic 'may call for the rapid establishment of business collaborations of limited duration and scope to ensure the supply of products and services that are critical to Canadians'. With this recognition, the Bureau indicated that it generally will not exercise scrutiny 'in circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the crisis, where those collaborations are undertaken and executed in good faith and do not go further than what is needed'.

In addition, the Bureau announced that it has set up a team tasked with assessing proposed collaborations and providing rapid informal guidance. The Bureau asks that businesses seeking such guidance provide the following information in order to ensure that the scope and duration of a proposed business collaboration are indeed necessary for responding to the crisis:

- the firms involved and the parameters of the collaboration including its proposed scope and duration;
- a detailed description of how the collaboration is intended to achieve a clearly identified objective related to covid-19 that is in the public interest;
- an explanation of why the collaboration is necessary to meet this objective; and
- a description of any guidance sought from relevant authorities on whether the collaboration contemplated will actually further Canada's response to covid-19.

mcmillan

William Wu

william.wu@mcmillan.ca

Guy Pinsonnault

guy.pinsonnault@mcmillan.ca

Neil Campbell

neil.campbell@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

Ding Liang

DeHeng Law Offices

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Anti-Monopoly Law of China (AML) of 2008 is the main legislation in China governing cartels. In addition, the State Administration for Market Regulation (SAMR), the consolidated anti-monopoly enforcement agency, issued the Interim Provisions on the Prohibition of Monopoly Agreements in 2019, which provides more detailed rules to regulate cartel arrangements.

In January 2019, the Anti-monopoly Committee of the State Council (AMC) issued the Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements (the Leniency Guidelines). The Leniency Guidelines was published in June 2020 and provides more detailed provisions to regulate cartels and leniency.

Relevant institutions

2 | 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?

SAMR and the Provincial Market Regulatory Department (PMRD) – the market regulatory departments of the governments of provinces, autonomous regions and municipalities directly under the Central Government – are the competition authorities in China and investigate cartel arrangements.

Many cartel investigations are conducted by either SAMR or PMRD. SAMR may assign certain cartel cases to PMRD if the target companies are located in one province. For these assigned cartel cases, SAMR may accompany PMRD to carry out on-site dawn raids and PMRD will report to SAMR from time to time regarding the development of the investigation. If PMRD finds no cartel behaviour, SAMR may accept this conclusion. However, if SAMR does not agree with the approach of the PMRD, it may rule on the matter as if it has not assigned the case to the PMRD.

According to the AML, the AMC was established to organise, coordinate and supervise anti-monopoly activities. The AMC serves as a policy-making body and is not involved in the specific anti-trust cases.

Cartel agreements are not criminal violations in China. Therefore, except for bid-rigging or obstructing law enforcement by means of violence or threats, the role of the criminal prosecution authorities is very limited in a cartel investigation in China.

Under the AML, SAMR and PMRD conducts anti-trust investigations against cartel arrangements and renders decisions independently, without relying on the People's Court.

Changes

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

Draft AML amendment

SAMR solicited public comments on a Draft of Amendments to the AML (the Draft AML) in January 2020. The Draft AML is still subject to consultation and further review by China's administrative and legislative bodies. While there is no fixed timetable for formal adoption, the Draft AML could be passed by the National People's Congress as early as 2021 if the remaining process runs smoothly.

The Draft AML proposes increasing fines for cartel arrangements and changes to the AML to allow for 'hub and spoke' arrangements to be investigated and dealt with.

Increasing fines against cartel arrangements

The Draft AML proposes the following:

- a new fine applied to undertakings found to be organising or facilitating others to reach cartel agreements of 10 per cent of its revenue for the preceding year;
- the fine for trade associations organising or facilitating others to reach cartel agreements to be increased from 500,000 yuan to 5 million yuan;
- the fine for agreeing to a cartel arrangement that is not yet implemented to be increased from 500,000 yuan to 50 million yuan; and
- a new fine applied to undertakings that agree to a cartel arrangement, but have no revenue for the previous year of 50 million yuan.

In practice, 'preceding year' refers to the fiscal year before an investigation is launched. A fiscal year spans from 1 January to 31 December based on the Gregorian calendar. Where an undertaking adopts a different fiscal year system, adjustments shall be made accordingly.

Hub & spoke collusion

In a hub and spoke collusion, the common supplier is the 'hub', while the distributors are the 'spokes'. The hub facilitates the coordination of competition between the spokes and there is no direct contact between the spokes. In this way, a cartel can be achieved based on indirect communication between the cartel's horizontally aligned members.

The AML in its current form is unable to deal with such an arrangement, as it only applies to competing undertakings and lacks relevant provisions to deal with an undertaking that is not a competitor to a cartel's parties but plays an important role in it. The Draft AML proposes extending the scope of investigations and penalties for monopoly agreements to include undertakings that organise or facilitate other undertakings to reach cartel agreements.

New anti-trust guidelines

In June 2020, a book titled the *Collection of Antitrust Regulations and Guidelines 2019*, authored by the Anti-Monopoly Bureau of SAMR, was published by China Industry and Commerce Press. This book officially made public the following guidelines into anti-trust investigations:

- Antitrust Guidelines for the Automotive Industry (the Auto Guidelines);
- Leniency Guidelines;
- Guidelines on the Undertakings' Commitments in Anti-trust Cases (the Commitments Guidelines); and
- Antitrust Guidelines for Intellectual Property Rights (IP Guidelines).

Each of these guidelines introduced new cartel rules, which are detailed as follows.

Auto Guidelines

The Auto Guidelines is focused on vertical arrangements. They apply on cartel issues when the following exemptions apply.

The Auto Guidelines identified the following five types of horizontal agreements that would generally improve the efficiency and promote competition, and are conducive to increasing the benefits of the consumers. These agreements are likely to be exempted from the application of the cartel rules under the AML:

- research & development agreements;
- agreements on specialisation;
- technology standardisation agreements;
- joint production agreements; and
- joint purchasing agreements.

The Auto Guidelines provide that:

[For] instance, the horizontal agreements during the R&D and production processes of the new energy automobile may enable the undertakings to share the investment risks, improve the efficiency and promote social public interests.

Leniency Guidelines

The key elements of the Leniency Guidelines are:

- a leniency application should be followed with a report and material evidence meeting criteria specified in the Leniency Guidelines;
- a marker system allows a first-in undertaking to hold its place for 30 days (extendable to 60 days in exceptional circumstances) in order to provide supplementary material evidence required by SAMR or PMRD; and
- the following mitigations are applied to the sanctions of successful leniency applicants:
 - the first-in may receive immunity or a reduction in its fine of at least 80 per cent;
 - the second-in may receive a 30 per cent to 50 per cent reduction in its fine;
 - the third-in may receive a 20 per cent to 30 per cent reduction in its fine; and
 - subsequent applicants may receive no more than a 20 per cent reduction in their fines.

Commitments Guidelines

According to the Commitments Guidelines, the following forms of anti-trust agreements cannot be settled by commitments from undertakings: price-fixing, restricting production or sales volume, and market or customer allocation.

In addition, if SAMR or PMRD identifies and verifies the cartel agreement after an investigation, it will no longer accept proposed commitments and it will not settle the investigation.

IP Guidelines

The IP Guidelines provides a safe harbour for the following IP-related horizontal agreements:

- the cartel arrangements other than price-fixing, restricting production or sales volume, market or customer allocation, restricting R&D or new technology/products, and group boycotts; and
- the cartel's combined market share does not exceed 20 per cent, or there are at least four other competing technologies available in the market.

Although the anti-trust guidelines were issued internally by the AMC on 4 January 2019, they were not released to the public nor invoked in an anti-trust investigation. This was the first time important anti-trust guidelines were published in a book publication rather than official websites. The grounds for this unusual approach are not known.

After publishing these substantive guidelines in June, SAMR provided grace periods to allow undertakings to adjust their practices.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The AML and the *Interim Provisions on the Prohibition of Monopoly Agreements* prohibit:

- price-fixing;
- restricting production or sales volume, market or customer allocation, research and development or new technologies, or products; and
- group boycotts.

Price-fixing

Price-fixing is an agreement, either written, verbal or inferred from conduct, among competitors that increases, lowers or stabilises prices or competitive terms.

Price-fixing can be achieved directly by setting the price level, range, or discount. It can also be achieved indirectly by setting the profit, fees and expenses or a standard formula for calculating prices. The nature of the price-fixing is to limit the discretion of the parties on pricing, rather than allowing the price to be determined naturally through free-market forces.

Market or customer allocation

Market or customer allocation is an agreement among competitors to divide sales territories or assign customers. In practice, the market allocation can be further divided as geographic market allocation, product-market allocation and market share allocation.

- geographic market allocation – undertakings assign exclusive territories for each cartel member (online and offline markets could also be so allocated);
- product market allocation – undertakings allocate the exclusive rights on certain categories, volume and timing of sales of products to each cartel member;
- market share allocation – undertakings' similar products compete in the same territory, however, when one cartel member reaches an agreed market share, sales target, sales revenue or sales profit, it restricts its sales activities and ceases to compete; and
- customer allocation – customers are allocated among the undertakings, so an undertaking will not sell their products or services to customers allocated to another cartel member.

Group boycott

Group boycott is an agreement among competing undertakings not to do business with a targeted undertaking. This arrangement could target the customers in the downstream market by jointly refusing to supply or

sell products or target the suppliers in the upstream market by jointly refusing to purchase products. According to the *Interim Provisions on the Prohibition of Monopoly Agreements*, jointly restricting a specific undertaking from trading with undertakings which are in competition with them can also be determined as a group boycott.

Output agreement

An output agreement is an agreement among competing undertakings to prevent, restrict or limit the volume or type of particular products or services available in the market. The goal of such a cartel agreement can be achieved at either the production stage or the distribution stage. At the production stage, the competing undertakings will restrict or fix the production volume of particular products. At the distribution stage, the competing undertakings will restrict or fix the sales volume of specific types or models of products.

Bid rigging

'Bid rigging' is an agreement among competing undertakings as to who will submit the winning bid when an original equipment manufacturer solicits proposals to purchase products or services. Though the AML does not expressly include bid rigging, it may be seen as a type of cartel conduct. The competition authority in China investigates and fines bid rigging-related conduct by applying article 13 AML in several high-profile cases, including the *Auto Parts and Bearings* case (2014) and the *Auto Maritime Transportation* case (2015).

Restricting R&D or new technology or products

This is an agreement among undertakings to restrict innovation or restrict the purchasing or use of new technology and products in order to maintain the ability to restrain competition and stifle new challenges to their hegemony.

Innovation, whether in the form of improved product quality and variety, or of production efficiency that allows lower prices, is a powerful engine to promote competition and enhance consumers' welfare. New technology and products are the result of innovation. This cartel rule under the AML is vitally important to preserve competition in innovation and ensure the best outcome for consumers.

Information exchanges

Information exchange among undertakings is not presumptively illegal in China, unless the cartel agreements, decisions or concerted practices can be found. Although information exchange may facilitate collusion, in most cases, an undertaking can gain insights on how to compete more effectively through information exchange and can introduce more and better products and services based on the information obtained.

Concerted practices

According to the AML, monopoly agreements are agreements, decisions or other concerted practices that eliminate or restrict competition.

Finding concerted practices does not require the existence of any written or oral agreements among the competitors, rather only:

- uniformity of behaviour among competitors;
- opportunity for communication or exchange of information among competitors;
- that the uniformity cannot be reasonably explained other than as the result of improper communication among competitors; and
- the market structure, competition status, market changes and other situations of the relevant markets may facilitate collusion.

Per se illegal v rule of reason

Because cartel arrangements are subject to exemption rules under the AML, in general, cartel arrangements are not per se illegal. However, according to the Supreme Court's Provisions on Several Issues

concerning the Application of Law in the Civil Disputes Arising from Monopoly Conduct of 2012 (the Antitrust Judicial Interpretation), the anti-competitive effects of price-fixing, restricting production or sales volume, market or customer allocation, restricting R&D or new technology or products, and group boycotts are presumed. An undertaking under investigation shall bear the burden of proof to fulfil the exemption requirements.

In addition, according to the Commitments Guidelines, price-fixing, restricting production or sales volume, and market or customer allocation cannot be settled by commitments from an undertaking. Therefore it will be harder for an undertaking under investigation to apply for leniency for cartel arrangements.

What level of knowledge or intention is required for a finding of liability?

In June 2020, the Standing Committee of the National People's Congress released the Draft amendment of the Administrative Penalty Law (the Draft Administrative Penalty Law) for public comments. Article 30 (3), a newly drafted provision, of the Draft Administrative Penalty Law provides that 'If the party has evidence to prove that there is no subjective fault, no administrative penalty shall be imposed.'

The current Administrative Penalty Law is silent on whether the subjective element should be considered in making an administrative penalty decision. In judicial practice, the People's Courts have different opinions on whether the subjective element constitutes one of the elements in the making of an administrative penalty decision.

In the appeal of *Wang Xiaojun v Hejing County Public Security Bureau*, the People's Court only considered conduct. It held that the plaintiff carried a forged driving license in his vehicle and that the Road Traffic Safety Law does not require administrative agencies to identify the subjective knowledge of the perpetrator when making administrative penalties (in this case, whether he knew, should have known but did not, or did not know the driving license was forged).

However, in the appeal of *China Rail Finance Leasing Co, Ltd v Tianjin Branch of the State Administration of Foreign Exchange*, Beijing No. 1 Intermediate People's Court held that the determination of a party's illegal conduct should satisfy both objective and subjective requirements: there should be conduct that violates the administrative law, and there should be subjective fault. That is, if the illegal conduct can be proved, and there is no contrary evidence that can rule out the subjective fault of the party, it should be presumed that the party is at subjective fault.

According to the Draft Administrative Penalty Law, if the existence of an illegal act can be proved, and the party has no contrary evidence to prove that it does not hold subjective fault, the party shall be presumed to have a subjective fault. Since the amendment is subject to public comments, the above provisions could be further amended in the released version.

Joint ventures and strategic alliances

- 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint Ventures

A joint venture can be established by either non-competitors or competitors. A joint venture can also compete with its participating companies or operate in a separate market. If the participating companies and the joint venture are actual or potential competitors, there is a risk of a cartel being formed.

Establishment of a joint venture by competitors

Although the AML looks sceptically upon agreements between competitors, SAMR considers a joint venture as a new undertaking joining the

market and increasing competition, and that, in general, joint ventures are pro-competitive behaviour, so it affords lenient treatment to the establishment of legitimate joint ventures.

Joint ventures can take a number of different forms, such as:

- the fully integrated joint venture – an integrated full line of businesses, including manufacturing, distribution, marketing and sales;
- the purchasing joint venture – enables the participating companies to procure parts, raw materials and services etc from a common source in order at economic scale to increase their purchasing power to balance with market power;
- the research joint venture – enables participating companies to increase innovation, reduce R&D costs, and so possibly create better quality products;
- the production joint venture – intergrates or creates a shared production facility among the participating companies; and
- the distribution joint venture – intergrates or creates a shared distribution channel among the participating companies.

Special attention must be paid to distribution joint ventures if the participating companies maintain their own brands and continue to compete in the market, and the only purpose of the joint venture is to coordinate distribution between the participants. Because of the structure of a distribution joint venture, it is inevitable that competing participating companies will share sensitive information and there is a strong risk that they may fix prices of their goods or divide the distribution market between them.

In general, the other forms of joint ventures established by competing companies are less likely to raise competition concern. For instance, a purchasing joint venture will lower costs and improve the quality of parts, which may lead to the final product having a lower price but a higher quality, which will benefit the consumers, while a production joint venture may achieve economic scale, which lowers the cost of production and improves efficiency, which also good for consumers of the participants' product.

No competition between a joint venture and its participating companies

In order to protect the commercial value and the effective operation of a joint venture after its formation, competing participating companies often stipulate in the transaction agreement that they will not compete with the joint venture for specified products in a geographical area for a certain period of time. Such transaction terms are collectively referred to as a 'non-compete clause'.

A non-compete clause should be restricted within a proper scope to protect the joint venture's commercial value and its effective operation. Possible forms of restriction follow.

Duration

The term of the non-compete clause should not be too long. There are no guidelines for the duration of a non-compete clause, but more than three years could attract attention.

Geographic scope

The geographical scope covered by the non-compete clause should be limited to the joint venture's business scope. In the future, if it becomes necessary to cover further areas than what the venture originally planned to enter, it is necessary to check whether a preliminary investment has been made.

Product scope

The non-compete clause is limited to the products and services that constitute the operating activities of the joint venture but may include products in the advanced development stage or that are fully developed

but not yet marketed. However, non-compete clauses should not be set for products or services that are not operated by the joint venture.

Restricted undertakings

A non-compete clause may restrict the participating companies from competing with the joint venture, however, the parent companies cannot divide the market outside the joint venture's products or services and geographic scope. In addition, the non-compete clause can only restrict a participating company, its subsidiaries and commercial agents, but it cannot directly restrict distributors. The joint venture's participating companies can only achieve this goal through vertical agreements with its distributors.

Competitors participating in a joint venture cannot use it as a platform for collusion

Information sharing between a participant and the joint venture itself is acceptable under the AML, as participants have to evaluate the joint venture's performance and may need to provide support to it.

However, there is a risk that competitors may use a joint venture they are party to as a platform to achieve collusion. The cartel rules under the AML clearly prohibit the fixing of prices or dividing markets between competitors, either directly or indirectly through third parties such as joint ventures.

Joint ventures cannot use participating companies as a platform for collusion

In addition, if a participant has two or more competing joint ventures, a firewall and a clean team should be established to prevent sensitive information flowing between the competing joint ventures and a parent company.

Strategic Alliances

Competing companies may coordinate through a strategic alliance without establishing an entity (ie, forming a joint venture). The reasons for choosing a strategic alliance are that they are commercial contracts, which are easier to unwind if they do not work out, and the relationship between the parties of a strategic alliance is simple and flexible and does not require the level of work regarding tax, accounting, governance and other matters associated with the formation of a joint venture.

However, the anti-trust risk of a strategic alliance agreement should be considered. Anti-competition clauses are usually embedded in these agreements, but cartel issues may resurface when parties to a strategic alliance agreements agree on implementation agreements.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

- 6 | 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.

The NDRC issued the Guide to the Pricing Behaviour of Operators Dealing in Drugs and Active Pharmaceutical Ingredients in Short Supply effective as of 16 November 2017 to regulate the market price behaviours of drugs in short supply and active pharmaceutical ingredients

(API). SAMR is drafting anti-trust guideline for the auto sector and plans to introduce guideline by 2020. These two provisions are industry-specific cartel provisions introduced by authorities.

Application of the law

7 | Does the law apply to individuals, corporations and other entities?

Article 12 of the Anti-Monopoly Law of China (AML) defines an '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.

Extraterritoriality

8 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 within 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.

To establish that conduct outside China has an anti-competitive effect in China the product under investigation must be imported into China, and there is a reasonable causal nexus between the alleged conduct and the anti-competitive effect in China.

Export cartels

9 | 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 has been included to permit export cartels.

Industry-specific provisions

10 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Agriculture

Article 56 of the AML provides that the AML shall not apply to co-operative or collaborative acts between agricultural producers and rural economic organisations in business activities such as the manufacturing, processing, sale, transportation and storage etc of agricultural products. This article is only applicable to agricultural producers and rural economic organisations; industrialised undertakings in the agricultural sector cannot enjoy this exemption. In addition, this article is only applicable to cartel activities, abusive conduct and resale price maintenance (RPM) can still be caught under the AML. For instance, article 56 makes the price-fixing conduct of farmers in several villages agreeing to raise the prices of crops, meat, milk or eggs at the same time exempt from the AML.

'Agricultural producers' refers to undertakings and individuals operating in agricultural crop cultivation, forestry, animal husbandry or fisheries in agricultural land and separate facilities.

A 'rural economic organisation' are special economic organisations that are the main form of rural collective asset management. At

this stage, local government authorities above the county level are responsible for issuing organisation registration certificates to these organisations, which enables them to follow the relevant procedures for opening bank accounts with the relevant government departments in order to carry out business operations and management.

Active pharmaceutical ingredients

The Guide to the *Pricing Behavior of Undertakings Dealing in Drugs in Short Supply and Active Pharmaceutical Ingredients* (the API Pricing Guidelines) issued in November 2017 and the *Antitrust Guideline in the field of Active Pharmaceutical Ingredients (draft for comments)* (the Draft API Guidelines) issued in October 2020 regulate the cartel activities related to active pharmaceutical ingredients (APIs).

According to the API Pricing Guidelines, the AML prohibits any of the following horizontal monopolistic price agreements by competing API undertakings:

- fixing the price level or the range of price;
- fixing the tender price;
- fixing agency fees, distribution fees, market discounts and other expenses influencing the price;
- fixing the benchmark price, profit rate, gross profit rate, etc for transactions with any third party;
- agreeing upon a standard formula to calculate the price of an API;
- fixing the price by limiting the output or sales volume;
- fixing the price by dividing the market;
- fixing the price by restricting the purchasing of new technologies or equipment, or restricting the development of new technologies or products;
- fixing the price by boycotting transactions; and
- fixing the price in any other disguised form.

The Draft API Guidelines cover broader anti-trust issues, such as abusive of dominance, merger control and abuse of administrative power related to the API. According to the Draft API Guidelines, in a cartel investigation, SAMR or PMRD has the discretion to not define the relevant market; however, if an undertaking under cartel investigation wants to apply for an exemption under the AML, a market definition is required in order to prove that the market competition is not seriously restricted.

The Draft API Guidelines also states that the API, in general, constitute an independent market and may be further divided. This means that the API related anti-trust investigations are more likely to involve abusive conduct, as it is very likely that API manufacturers and distributors will be assumed, whether independently or jointly, to dominate the API manufacturing or distribution markets.

The significant cartel rules under the Draft API Guidelines are:

- Competing API manufacturers shall avoid reaching joint production agreements, joint purchase agreements, joint distribution agreements and joint bidding agreements with competitors. This provision is strong signal that SAMR and PMRD take a harsher position on API-related cases, as joint production and joint purchase agreements in the automotive industry are considered exempt under the AML.
- Competing API manufacturers shall avoid sharing sensitive information through third parties (such as API distributors or pharmaceutical manufacturers). This is the first time that a sharing information rule is specifically addressed in anti-trust guidelines.

The Draft API Guidelines is subject to further revision. No matter how this document will be revised, as stated in article 20 of the Draft API Guidelines, SAMR and PMRD will strictly and severely investigate anti-trust acts related to API.

Automobiles

According to article 5(1) of the Anti-trust Guidelines for the Automotive Industry (the Auto Guidelines) issued by the Anti-monopoly Committee of the State Council (AMC) in 2019 (published in June 2020):

[Certain] types of horizontal agreements, for instance, research & development agreements, agreements on specialisation, technology standardisation agreements, joint production agreements and joint purchase agreements, would generally improve the efficiency and promote competition and are conducive to increasing the benefits of the consumers. For instance, the horizontal agreements during the R&D and production processes of a new energy automobile may enable the undertakings to share the investment risks, improve the efficiency and promote social public interests. Hence, undertakings in the automotive industry that reach the aforesaid horizontal agreements that can improve efficiency and promote competition may prove that the provisions of article 13 of the AML do not apply to their agreements pursuant to article 15 of the AML.

The Auto Guidelines reshape the rules on vertical monopoly agreements in China, and its impact extends beyond the automotive industry.

Government-approved conduct

11 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

State actions and government-approved activity are not justifications for the cartel under the AML

According to the AML and the Interim Provisions on Prohibiting Acts of Abuse of Administrative Authority to Eliminate or Restrict Competition (Abuse of Administrative Authority Provision), administrative authorities shall not abuse their administrative authority to compel or compel in a disguised form undertakings to engage in the monopolistic practices in violation of the AML. In addition, the Opinions on Establishing a Fair Competition Review System During the Development of Market-oriented Systems (FCR Opinions) was issued in 2016. The purpose of the Fair Competition Review System (FCRS) is to prevent policy-making bodies from issuing measures that eliminate or restrict competition and to gradually abolish regulations and practices that hinder the creation of a unified market and fair competition. According to the FCR Opinions, the administrative authority cannot force the undertakings to engage in the monopolistic practices in violation of the AML, and cannot set government pricing exceeding the pricing authorities. Therefore, according to the above provisions and opinions, the cartels endorsed under the state actions or approved by the government are not exempted from the AML.

Government-guided prices or government-set prices are permitted in China with narrow application

In general, the administrative authorities shall not misuse their authority by drafting regulations containing provisions that eliminate or restrict competition.

However, government-guided prices and government-set prices are permitted under the Price Law and the Rules for the Pricing Activities of the Government (issued in August 2017). About 3 per cent of the prices in China are government-guided prices or government-set prices. The price related to important public utilities, public welfare services, and goods and services operated under the natural monopoly will be based on the pricing catalogue drafted by the central or a local government. Undertakings follow the government-guided prices or government-set prices are not caught under the AML.

INVESTIGATIONS

Steps in an investigation

12 | 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. The State Administration for Market Regulation (SAMR) or a local Provincial Market Regulatory Department (PMRD) may also initiate an investigation if it has reason to believe there has been a cartel infringement.

Pre-investigation

At this stage, SAMR or PMRD will conduct an external investigation to understand the background and verify the evidence obtained to determine whether to formally initiate an anti-trust investigation. The PMRD may communicate with SAMR before initiating the investigation.

Initiation of an investigation

SAMR or PMRD may initiate an anti-trust investigation at their own discretion if one believes there is a good case to pursue. A PMRD shall, within seven working days after the initiation of an anti-trust investigation, report the case to SAMR for its records. No notice of investigation can be obtained by the entity under investigation.

Leniency applications

An undertaking under investigation may file a leniency application to SAMR or a PMRD. SAMR or the PMRD shall decide whether to give a mitigated penalty or exempt the undertaking from a penalty by considering factors including the time sequence of the voluntary reporting by the undertaking, the degree of importance of the evidence provided, and the relevant information on the conclusion or implementation of the monopoly agreement concerned.

Fact-finding and dawn raids

SAMR and PMRDs have broad investigative powers and, during the fact-finding stage, SAMR or PMRD may carry out a dawn raid on the undertaking under investigation by conducting an on-site inspection to collect and fix evidence, conducting interrogations and request the undertaking to provide documents.

Undertakings which are under investigation and interested parties have the right to voice their views. SAMR or PMRD shall verify the facts, reasons and evidence presented by undertakings under investigation or interested parties.

SAMR or PMRD will ask undertakings under investigation to submit documents or provide explanations for certain conduct. The fact-finding process may last for several months, even years, and the scope of the investigation may be upstream, downstream or involve competitors of the undertaking under investigation.

Decisions on cancellation, suspension, resumption or termination of an investigation

The investigation can be cancelled if no violation can be found. The investigation can be suspended if the undertaking which submits an application agrees to undertake certain specific measures that will lead to the elimination of the effect of suspicious practices within a time limit designated by SAMR. If such measures are properly implemented in the agreed period of time, SAMR may terminate the investigation. The investigation could be resumed if the measures are not implemented as promised.

Expert argumentation meeting

There is an Expert Committee under the Anti-monopoly Commission of the State Council. Seventeen experts in the Expert Committee can be

called on by SAMR to attend an expert argumentation meeting to give an expert opinion on the findings and preliminary decisions of SAMR.

Oral notice for the finding of the case

After the expert argumentation meeting, SAMR will release its findings and its preliminary decision to the undertaking under investigation orally. The oral notice may include the proposed fine base and the proposed rate of fine. The undertaking can provide SAMR with a statement or argument to challenge the facts and the law's application.

Prior notice for administrative penalties

After communication between SAMR and the undertaking under investigation, SAMR will issue the Prior Notice for the Administrative Penalty. This is a notice in written form stating the facts, the violation found, the fine base and the rate of fine. It will state the right for the undertaking to make a statement, an argument or apply for a hearing. The undertaking under investigation may challenge the decision, the fine base and the rate of fine to reduce the penalty.

Final decision on administrative penalties

After the undertaking under investigation provides the statement, argument or attends the hearing, SAMR will issue the final decision on the administrative penalty. The wording of the decision could be negotiated if it contains trade secrets.

Publication

A decision on the administrative penalty or a decision on suspending terminating an investigation will be released to the public through SAMR's website.

Administrative review or administrative lawsuit

If the undertaking does not accept a decision made by SAMR, it may apply for administrative review or file an administrative lawsuit.

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, SAMR's internal priorities, the cooperation of the undertakings under investigation, etc.

Investigative powers of the authorities

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

Article 39 of the Anti-Monopoly Law of China (AML) grants SAMR and PMRDs broad investigative powers, including the ability 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.

SAMR and PMRDs do 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 SAMR or the PMRD for approval.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The State Administration for Market Regulation (SAMR) has pursued bilateral cooperation with their counterparts in other jurisdictions. Since the enactment of the Anti-Monopoly Law of China (AML) in 2008, it has entered into at least 55 cooperation agreements or memoranda of understanding (MoUs) with competition authorities in 28 countries and regions, including the United States, the European Union, Japan, Korea and Australia.

In July 2011, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) signed an anti-trust MoU with the US Federal Trade Commission and Department of Justice to foster cooperation in the enforcement of their competition laws and policies.

In September 2012, the NDRC, the SAIC and the Directorate-General Competition of the EU signed an MoU, which created a dedicated framework to strengthen cooperation and coordination between DG Competition and China authority concerning legislation, enforcement and technical cooperation regarding cartels, other restrictive agreements and abuse of dominant market positions.

In May 2019, SAMR concluded an MoU with the Japan Fair Trade Commission, which provides that the authorities will provide information to each other on individual cases that both investigate or review.

In May 2012, NDRC and the Korea Fair Trade Commission signed an MoU to cooperate in work related to international cartels, abuses of dominance, abuses of intellectual property and cross-border violations of South Korea's Monopoly Regulation and Fair Trade Act.

In November 2015, NDRC and the Australian Competition and Consumer Commission signed an MoU to allow the agencies to take coordinated action in response to anti-competitive conduct, including through the exchange of information and evidence.

In terms of multilateral cooperation, China is not a member of the International Competition Network (ICN) or the OECD. However, consolidation of China's three anti-trust agencies will smooth communication and coordination between SAMR and ICN and the OECD. As a member state of the United Nations, China is involved in some of the work of the competition group of the UN Conference on Trade and Development.

Interplay between jurisdictions

15 | 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 SAMR and anti-trust enforcement agencies in other jurisdictions, 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

Decisions

16 | How is a cartel proceeding adjudicated or determined?

After State Administration for Market Regulation (SAMR) or a Provincial Market Regulatory Department (PMRD) establishes a finding of a monopoly agreement, it will issue a formal penalty decision and a public announcement. Usually, SAMR or PMRD is obliged to issue a 'prior

notice for administrative penalties' to the investigated parties before issuing the formal penalty decision. The investigated undertaking may request 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 for administrative penalties and the formal decision, and SAMR or PMRD has the discretion to set this period.

The hearing and written submission provide 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 SAMR or the PMRD, no penalty will be imposed.

Burden of proof

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

In public enforcement, SAMR or the PMRD bears the burden to prove the existence of a cartel. Once SAMR or PMRD has proved the existence of a cartel, it is hard for the parties to rebut the presumption of anti-competitive effects.

As to cartel-related private actions, the general rule is a litigant must provide evidence to prove the facts on which its claims are based or the facts on which its rebuttal of the counterparty's claims are based, except otherwise stipulated by the law. Prior to the making of a judgment, where a litigant is unable to provide evidence or adequate evidence to prove its assertions, the litigant who has the burden of proof bears the adverse consequences.

In anti-trust litigation, if the alleged monopolistic conduct is an entry into a horizontal agreement of price-fixing, division of the market, a restriction on output, a restriction on research and development or a joint boycott, the defendant has the burden to prove that those agreements do not have the effects of eliminating or restricting the competition. If the alleged monopolistic conduct is entering into a vertical agreement of resale price maintenance, the plaintiff has the burden to prove the resale price maintenance and the effects of eliminating or restricting the competition.

At present, a high degree of probability is the standard of proof that is applicable. Beyond reasonable doubt and a comparatively high degree of probability are supplementary standards of proof.

High degree of probability

Article 108 of the Judicial Interpretation of the Civil Procedural Law provides the foundation of the general standard of proof of 'high degree of probability':

... for evidence provided by a litigant who has the burden of proof, where the People's Court, upon examination and taking into account the relevant facts, confirms that it is highly probable that the facts sought to be proved exist, the People's Court shall deem that the facts exist.

Beyond a reasonable doubt

For evidence provided by litigation to prove the facts of fraud, duress or malicious collusion, or to prove the facts of a verbal will or gift, where the People's Court concludes that the possibility of the existence of the facts sought to be proved is beyond a reasonable doubt, the People's Court will deem that the facts exist. (See article 86 of the Several Provisions of the Supreme People's Court on Evidence for Civil Actions.)

Comparatively high degree of probability

For the facts relating to procedural matters, such as litigation preservation or abstention, where the People's Court takes into account the litigant's statement and the relevant evidence to conclude that the

relevant facts are comparatively highly probable, the People's Court may deem that the facts are existent. (See article 86 of the Several Provisions of the Supreme People's Court on Evidence for Civil Actions.)

Circumstantial evidence

18 | 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 cartel 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.

Appeal process

19 | What is the appeal process?

There are two routes available to an undertaking to challenge an administrative penalty decision of SAMR or a PMRD after the formal penalty decision has been made: an administrative review and administrative litigation.

After a formal penalty decision is made, the undertaking has 15 days to pay any penalties. Applying for an administrative review or filing an administrative suit with a court does not suspend the payment of penalties.

Administrative review

The competent authorities

Administrative review is a procedure that generally applies to penalties imposed by administrative agencies. For the penalty decision made by SAMR, the application for administrative review shall be submitted to SAMR. Decisions made by PMRD can be challenged either at the provincial government level or with SAMR, subject to the applicant's discretion.

Who may file an application for an administrative review

The undertaking under investigation that is subject to a penalty imposed by SAMR or a PMRD (the administrative counterpart), or undertakings which have an interest in a specific administrative decision of SAMR or a PMRD may file an application for administrative review to the competent authority.

Foreign nationals, stateless persons and foreign organisations may also file such an application.

The standard of review

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. After the administrative review, the administrative decisions can be nullified, changed or confirmed to be illegal, if:

- the main facts are unclear and the material evidence is inadequate;
- the application of the law is incorrect;
- the statutory procedures have been violated;
- the power of authority has been exceeded or abused; or
- the administrative decision is obviously inappropriate.

Process and timing

The undertaking must apply for administrative review within 60 days of receipt of the formal decision. The agency has 60 days from accepting an application to make a decision, which can be extended by up to 30 days upon approval.

The applicant may file for administrative litigation if it is unsatisfied with the decision of the administrative review.

Administrative litigation

The administrative lawsuit

An undertaking can challenge a SAMR or PMRD penalty decision via an administrative lawsuit in a court. For the decision issued by a PMRD, the undertaking can bring an administrative lawsuit directly to the Basic or Intermediate People's Courts where the PMRD is located. For decisions issued by SAMR, the undertaking can bring an administrative lawsuit directly to the First Intermediate People's Court of Beijing.

Who has the right to file an administrative lawsuit?

An administrative counterpart or any citizen, legal person or other organisation who or which has interests in a specific administrative decision of SAMR or PMRD has the right to initiate an administrative lawsuit. The 'interests' could be:

- the decision of SAMR or PMRD involves its right to fair competition;
- the revocation or change of the decision of SAMR or PMRD involves its lawful rights and interests; or
- the undertaking has made a complaint to SAMR or PMRD, and it has not handled the case.

The standard of review

In an administrative lawsuit, the People's Court will look at the facts and the application of the law. The People's Court may make a ruling to nullify or partially nullify the administrative decision, or rule that the defendant make a new administrative decision, in the following cases:

- inadequacy of material evidence;
- erroneous application of the law or regulations;
- violation of legal procedure;
- exceeding authority;
- abuse of powers; and
- obvious unfairness.

The process and timing

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 can be extended upon approval.

From 2019, the Intellectual Property Tribunal of the Supreme People's Court can bypass the Higher People's Courts and directly hear appeals against the rulings and judgments of first-instance civil and administrative monopoly cases made by the Intellectual Property Courts and the Intermediate People's Courts. This is called a 'leapfrog' appeal.

SANCTIONS

Criminal sanctions

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

Except for bid rigging or obstructing law enforcement by means of violence or threat, cartel behaviour is generally not a criminal violation in China.

Bid rigging

According to the Criminal Law, bidders who act in collusion with each other in offering bidding prices, jeopardising the interests of bid inviters and other bidders, shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and may also be fined.

A crime of 'bid-rigging' crime is not a concept that originated in the AML. In 1993, the Anti-Unfair Competition Law first touched on this issue, providing that bidders shall not collude in bidding to raise or

lower the bid price. In 1999, the Bidding Law provided that bidders shall not collude with each other in bid quotations, and shall not crowd out other bidders to damage the lawful rights and interests of the tenderer or other bidders. The bid-rigging criminal offence was introduced in the Criminal Law in 1997. All the above legislations are earlier than the AML in 2008, and the Bid rigging crime is not a part of the AML.

According to statistics, about 75 per cent of bid-rigging is found in the construction industry. The longest sentence for bid-rigging is two years and six months where the offender paid a 'reasonable benefit' to other bidders and asked them not to compete genuinely and let the offender win the bid.

Obstructing law enforcement by means of violence or threat

According to the Criminal Law, whoever obstructs a functionary of a state organ from carrying out its functions according to law by means of violence or threat shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or be fined. (Criminal detention shall be not less than one month but not more than six months and is carried out by the public security organ in the vicinity the obstruction occurred in. During the period of detention, the criminal may return for one to two days each month.)

The longest sentence for obstructing law enforcement by means of violence or threat is one year and six months.

Civil and administrative sanctions

21 | What civil or administrative sanctions are there for cartel activity?

SAMR or a PMRD may impose the following penalties against cartel arrangement according to the AML:

- order the illegal act to cease;
- confiscate illegal income; and
- order the undertaking to pay a fine of 1 per cent to 10 per cent of its sales volume for the preceding year.

In practice, 'preceding year' refers to the fiscal year before an investigation is launched. A fiscal year spans from 1 January to 31 December based on the Gregorian calendar. Where an undertaking adopts a different fiscal year system, adjustments shall be made accordingly.

Where a monopoly agreement has been entered into but has not been implemented, a fine of not more than 500,000 yuan may be imposed.

Where an industry association has violated the provisions of the AML in organising the undertakings in the industry to enter into a monopoly agreement, SAMR or a PMRD may impose a fine of not more than 500,000 yuan; where the case is serious, the registration and administrative authorities for social organisations may de-register the industry association pursuant to the law.

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 were made in the 2014 penalty decision against 12 Japanese auto parts and bearing companies. Eight auto parts manufacturers were imposed fines totalling 831.96 million yuan (Hitachi was exempted from this penalty) and four bearing manufacturers were imposed fines totalling 403.44 million yuan (Nachi-Fujikoshi was exempted from this penalty). The combined amount of the fines reaches 1.24 billion yuan, representing 4 per cent to 8 per cent of the penalised companies' annual turnovers.

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 the 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.

Guidelines for sanction levels

22 | 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?

To determine the specific amount of a fine, SAMR shall consider factors such as the nature, extent and duration of the cartel.

Step 1: Determining the base fine

The fine will be imposed on the basis of the preceding year's sales revenue. In practice, 'preceding year' refers to the fiscal year before an investigation is launched. A fiscal year spans from 1 January to 31 December based on the Gregorian calendar. Where an undertaking adopts a different fiscal year system, adjustments shall be made accordingly.

The scope of the fine may be narrowed to the relevant products under the investigation and the geographical area covered by the cartel. If the geographical area concerned is beyond the territory of China, SAMR generally takes the China-wide domestic sales revenue as the basis for calculating fines. However, since it was established, SAMR has used the total sales revenue of the undertaking under investigation as the base to impose a fine, in order to increase deterrence and unify the standard of antitrust enforcement.

The undertaking subject to the fine could be narrowed down to the undertaking which directly implements the cartel. However, SAMR may impose fines on a parent company, provided that the parent company can exercise decisive influence over the undertaking that has engaged in the cartel.

Step 2: To determine the fine rate

In general, the initial fine rate against cartel agreements will be 2 per cent or 3 per cent according to the Draft Guidelines on the Determination of Illegal Gains and Fines in Relation to undertakings' Monopolistic Conduct (the Draft Guidelines on Fines). The Draft Guidelines on Fines has not yet been enacted, but it reflects the practice of the authority and can be used as a helpful reference. For price fixing, limiting the output or sales, or dividing the market, the initial fine rate is 3 per cent, because such a cartel agreement usually aims at eliminating or restricting competition with the most severe harm to competition, and can hardly promote competition, or benefit consumers. For the restriction on R&D, group boycotts and other cartel agreements, the initial fine rate is 2 per cent.

Step 3: Adjust the fine rate according to aggravating or mitigating circumstances

SAMR has full discretion to adjust the initial fine rate by considering the following aggravating and mitigating circumstances:

- +1 per cent for playing a leading role in monopolistic conduct, coercing other undertakings to implement the monopolistic conduct, or preventing other undertakings from discontinuing the monopolistic conduct;
- +1 per cent for committing multiple examples of monopolistic conduct in the same case or having violated the AML in the past;
- a maximum of +10 per cent for monopolistic conduct that continues beyond one year, calculated as follows:

- +0.5 per cent for a period of up to six months, beyond the first year;
- +1 per cent for each full year, or a period of between six to 12 months, beyond the first year;
- +0.5 per cent for continuing monopolistic conduct after being ordered to cease by SAMR or a PMRD; and
- +0.5 per cent for other aggravating circumstances not listed above.

The following mitigating circumstances cause the following adjustments to be applied:

- -1 per cent: being coerced to implement the monopolistic conduct by other undertakings;
- -1 per cent: being forced or coerced to implement the monopolistic conduct by administrative authorities;
- -1 per cent: cooperating with an anti-monopoly enforcement agency and showing meritorious performance;
- -1 per cent: taking the initiative to eliminate the harm and consequences of illegal activities;
- -0.5 per cent: taking the initiative to mitigate the harm and consequences of illegal activities;
- -0.5 per cent: voluntarily providing relevant evidence of other undertakings' violations of the AML; and
- -0.5 per cent: other mitigating circumstances.

Compliance programmes

23 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The AML and the *Antitrust Compliance Guidelines for Undertakings* issued by the Anti-monopoly Commission in September 2020 are silent on whether the existence of a compliance programme affects the level of the fine. Based on the past practice of SAMR and PMRDs, the mere existence of a compliance programme is not recognised as a factor affecting the level of a fine. In the view of SAMR and PMRDs, if the compliance programme is effective, there should be no suspicious cartel activities at all.

Establishing or strengthening anti-trust compliance programme going forward, even after SAMR or PMRD initiate an investigation, is more helpful as this shows that the parties are willing to cooperate and take the authority's concerns seriously.

Director disqualification

24 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There are no relevant laws or regulations prohibiting individuals from serving as director, supervisor or senior officer of a company due to conducting a cartel.

The *Antitrust Compliance Guidelines for Undertakings* encourages undertakings to:

- establish and improve anti-monopoly compliance assessments and reward and punishment mechanisms for employees;
- make anti-monopoly compliance assessments results important bases for employee and department performance assessments; and
- punish violations and improve incentives for employee compliance with relevant provisions of the AML.

However, the *Antitrust Compliance Guidelines for Undertakings* is not a law and is not mandatory.

Debarment

25 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

The AML and its relevant regulations do not provide for debarment as a form of penalty against anti-competitive conduct, including cartel infringements. However, article 53 of the Bidding Law provides for 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.

Parallel proceedings

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

The administrative penalty imposed by SAMR or a PMRD does not preclude private civil litigation against the same conduct. Both 'stand-alone' actions and 'follow-on' actions after the decision of SAMR or PMRD are permitted.

Tian Junwei v Carrefour and Abbott (2016) was a follow-on private litigation of an NDRC penalty decision against baby formula manufacturers for resale price maintenance. The suit was dismissed since court considered that the penalty decision submitted by plaintiff Tian Junwei could not prove that there is a monopoly agreement between Carrefour Shuangjing Store and Abbott. More specifically, the decision of an administrative penalty issued by NDRC only proved that Abbott and its downstream undertakings had a fixed vertical monopoly agreement on the price of milk powder when reselling milk powder to a third party, but it was not clear who was the other party of the vertical monopoly agreement, therefore, it was unreasonable to directly conclude that Carrefour Shuangjing Store and Abbott had a vertical monopoly agreement.

This case demonstrates the possibility of parallel proceedings and a *de novo* review by the court.

PRIVATE RIGHTS OF ACTION

Private damage claims

27 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private damage claims are available for indirect purchasers

Neither the Anti-Monopoly Law of China (AML) nor the Anti-Monopoly Judicial Interpretation distinguishes between direct purchasers and indirect purchasers. Indirect purchasers are allowed to file antitrust civil actions with courts as no laws or precedents have prohibited this.

Pursuant to the Civil Procedure Law, the plaintiff should have a direct interest in the case to have standing to file a lawsuit. An indirect purchaser who suffers losses from cartel arrangement may file a lawsuit under the AML.

In *Tian Junwei v Carrefour and Abbott* (2016), Tian Junwei, a consumer or indirect purchaser, who purchased a tin of Abbott's infant formula at a Carrefour supermarket in Shuangjing Beijing filed a lawsuit against Carrefour Shuangjing Store and Abbott Shanghai for the resale price maintenance imposed by Abbott upon Carrefour Shuangjing Store (the direct purchaser). The plaintiff was challenged that he did not have the standing to file the lawsuit. The court held that Junwei Tian, as an

indirect purchaser, had the right to bring anti-trust litigation in court. In the appeal, the Beijing Higher People's Court rejected the jurisdictional challenge filed by Abbott and Carrefour.

According to the general rules relating to the burden of proof, if the plaintiff is an indirect purchaser challenging price-fixing, it has the burden to prove that a horizontal agreement has been reached by the defendant and its competitors and that the direct purchaser has passed on the damages caused by higher pricing to the indirect purchaser. The defendant (direct purchaser) then has the burden to prove that the passing on has not occurred, and it bears the cost.

If the plaintiff is a direct purchaser challenging price-fixing, it has the burden to prove a horizontal price-fixing agreement. The defendant (supplier) then has the burden to prove that passing on has occurred, and the direct purchaser does not suffer any losses.

In practice, it is unlikely undertakings that purchased an affected product from non-cartel members would bring claims against cartel members based on alleged parallel increases in the prices they paid, as it would be much easier to purchase a product from cartel members to have the standing to sue.

In theory, umbrella purchaser claims are possible in an oligopolistic market, if the plaintiff can prove:

- the existence of a cartel;
- the product purchased from non-cartel members is a competing product (in order to do so the market definition is inevitable); and
- the product purchased from non-cartel members is affected by the cartel arrangement, such as being subject to a price increase at the same level as cartel members.

In a competitive market, such an umbrella purchaser claim has almost no chance to win.

Double or treble damages, or other kinds of punitive damages, are not available under the AML. According to the Anti-Monopoly Judicial Interpretation, upon a 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.

Class actions

28 | Are class actions possible? If so, 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?

China does not have class actions but it does have representative claims. Pursuant to the Civil Procedure Law, a joint lawsuit (in which there are numerous plaintiffs) may be brought by representatives selected by and from the group of plaintiffs.

In the case of a joint action where there more than 10 persons comprising one party to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative will be binding upon the litigants that he or she represents. For changes of representative, waivers of the claims of the action or confirmation of the claims of the counterparty litigants or settlement, consent by the litigants he or she represents is required.

If multiple litigants cannot be confirmed at the time of the filing of the lawsuit, the relevant People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period.

COOPERATING PARTIES

Immunity

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

An immunity programme that provides full leniency or amnesty is available under the Anti-Monopoly Law of China (AML). State Administration for Market Regulation (SAMR) and Provincial Market Regulatory Departments (PMRDs) have the discretion to grant immunity or mitigate the penalty for undertakings participating in a cartel if undertaking voluntarily reports the relevant facts and provides material evidence.

According to the *Leniency Guidelines* published in June 2020, the immunity and mitigated rate shall be determined according to the following rules:

- for the first applicant, SAMR or PMRD may grant immunity to such undertaking or mitigate the fine amount by not less than 80 per cent;
- for the second applicant, the fine amount may be mitigated by 30 per cent to 50 per cent;
- for the third applicant, the fine amount may be mitigated by 20 per cent to 30 per cent; and
- for subsequent applicants, the fine amount can be mitigated by not more than 20 per cent.

When determining the confiscation of illegal earnings, SAMR or PMRD may apply the same immunity and mitigated rate to deal with the illegal earnings.

To obtain immunity or a mitigated sanction, the undertaking must cease the suspected cartel arrangements immediately after making the application for leniency; unless SAMR or a PMRD requires it to continue carrying out the cartel acts in order to ensure the smooth progression of the investigation. If the undertaking has applied for leniency from an overseas law enforcement agency which requires it to continue to perform the cartel acts, it shall report this to SAMR or a PMRD.

The undertaking must also cooperate promptly, continuously, comprehensively and sincerely with the investigation, properly preserving and providing evidence and information, and must not conceal, destroy or transfer evidence or provide false materials or information or engage in any other conduct that may affect the anti-trust investigation.

The application for leniency must not be disclosed without the consent of SAMR or the PMRD.

Basic elements of the immunity programme

According to the *Leniency Guidelines* published in June 2020, the leniency application shall be accompanied by a report and material evidence.

The report must include:

- basic information of the participants of the cartel agreement (including but not limited to name, address, contact information and participating representatives, etc);
- the background of the cartel agreement (including but not limited to the time, place, content, and specific participants of the agreement);
- the main content of the cartel agreement (including but not limited to the products or services involved, price, quantity, etc);
- the undertakings' conclusion and implementation of the cartel agreement;
- the geographic area and market scale affected by the cartel agreement;
- the duration of the implementation of the cartel agreement;
- explanation of the material evidence;

- whether the undertaking has applied for leniency from other overseas law enforcement agencies; and
- other relevant documents and materials.

'Material evidence' refers to evidence which plays a critical role in the launch of an antitrust investigation or the determination of a monopoly agreement by SAMR or PMRD, including:

- for the first-in:
 - providing sufficient evidence for an anti-trust investigation to be launched, if SAMR or the PMRD had no clues or evidence;
 - providing evidence the SAMR or PMRD can use to determine a monopoly agreement exists under the AML.
- for the second and following applicants, providing:
 - evidence that has greater proving power or supplementary proving value in terms of the conclusion and implementation of the cartel agreement;
 - evidence that has supplementary proving value to prove:
 - the content of the cartel agreement;
 - the time of the conclusion and implementation of the cartel agreement;
 - the scope of the products or services involved; and
 - the participating members; and
 - other evidence that can prove the cartel agreement, or fix the probative power of the evidence that proves the cartel agreement.

A leniency application can be made orally. In practice, SAMR or PMRD permits an undertaking to orally submit the leniency application if there are disclosure risks in the context of civil litigation. The oral submission will be conducted at the office of SAMR or a PMRD. SAMR or PMRD officials will make written records of the oral submission, which shall be verified and signed by the representatives of the undertaking.

Subsequent cooperating parties

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

An undertaking applying for leniency by submitting the report on the cartel agreement and material evidence after the first-in may apply to SAMR or PMRD for mitigation. SAMR or PMRD issues a written receipt to the undertaking specifying the list of materials and the time it was received.

Going in second

31 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The mitigated rates for fines for the second and following applicants are:

- 30 per cent to 50 per cent for the second applicant;
- 20 per cent to 30 per cent for the third applicant; and
- no more than 20 per cent for each subsequent applicant.

There is no 'immunity plus' or 'amnesty plus' treatment under the AML. If an undertaking in one anti-trust investigation reports information about another anti-trust violation occurring in a separate industry, it may not get additional benefits from SAMR or the PMRD because the authority may not have enough enforcement resources to investigate the reported conduct in the other industry and cannot prove the truthfulness of such reports. However, if another anti-trust investigation

is initiated based on such a report, the reporter will benefit from the leniency application in the separate anti-trust investigation and may be eligible for benefits in the current anti-trust investigation.

Approaching the authorities

32 | 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 deadlines for initiating or completing an application for immunity (ie, full leniency or amnesty) or partial leniency is the issuance of the prior notification of the administrative penalty.

Undertakings participating in a cartel agreement can apply for leniency before SAMR or PMRD initiates an anti-trust investigation. They can also apply for leniency after the initiation of an anti-trust investigation but before the prior notification of the administrative penalty.

The marker system for the first-in

The marker system is detailed in the Leniency Guidelines. For the first applicant that applies for leniency by submitting the report on the cartel agreement and material evidence, SAMR or the PMRD shall issue a written receipt to the applicant specifying the time of receipt and a list of materials. This written receipt is an official document to prove the chronological order of the leniency application. The written receipt will not be issued to the first applicant if the report submitted does not meet the requirements of the Leniency Guidelines.

If the first applicant submits a report that meets the requirements of the Leniency Guidelines, but temporarily cannot provide complete material evidence when it applies for leniency, SAMR or the PMRD may register the date of the report and will issue a written receipt if the undertaking submits all necessary supplemental materials within the period specified by the authority. This registration is the marker and the written receipt issued by SAMR or PMRD will show the date on which it received the report.

If the undertaking fails to supplement the material evidence within the specified period (generally no longer than 30 days, and this can be extended to 60 days under special circumstances), SAMR or PMRD will cancel its registration qualifications, and the first-in will have lost its marker.

After the first-in is disqualified from registration, it can still supplement the material evidence and apply for immunity if there are no follow-up leniency applicants. If other undertakings have already applied for leniency, the first-in whose registration qualification has been disqualified may apply for mitigation.

Normally, the marker is made in written. In certain cases, the leniency application can be made orally through a dictation in SAMR to reduce the risk of disclosure.

Cooperation

33 | 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 that are seeking partial leniency?

To obtain full immunity, the undertaking as a party to a cartel agreement shall be first-in and voluntarily report the circumstances of its cartel activities and provide 'material evidence' that can help SAMR or PMRD to start the investigation or to make the final decision.

In addition, pursuant to the Leniency Guidelines, the applicants should also fulfil the following obligations:

- the suspected cartel arrangements must be stopped immediately after the application for leniency;

- the undertaking must cooperate promptly, continuously, comprehensively and sincerely with the investigation of SAMR or PMRD;
- the undertaking must properly preserve and provide evidence and information, and must not conceal, destroy or transfer evidence or provide false materials and information;
- the application for leniency from SAMR or PMRD must not be disclosed without the consent of SAMR or PMRD; and
- not engage in any other conduct that may affect the antitrust investigation.

The subsequent applicants are expected to do the same to obtain partial leniency.

Confidentiality

34 | 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 Leniency Guidelines, the report, documents and other materials submitted by the undertaking in applying for leniency shall not be disclosed to the public without the consent of the undertaking, and no entity or individual has the right to access such information.

In practice, in order to attract more leniency applications, SAMR and PMRDs will not disclose the documents or materials provided by the leniency applicants to any third party. No other agencies, organisations or individuals can obtain access to such information.

The level of confidentiality protection applicable to subsequent cooperating parties is the same as to the first-in.

In practice, SAMR or PMRDs keep the identity of the leniency applicants confidential during investigations. However, the applicants' identities will be revealed in SAMR or the PMRD's final decision. Usually, SAMR or the PMRD 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.

Settlements

35 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 *Guidelines on the Undertakings' Commitments in Antitrust Cases* (the Commitments Guidelines) was issued by the Anti-monopoly Commission in 2019 and published in June 2020. According to the Commitments Guidelines, SAMR or PMRD may accept commitments from undertakings in which the undertakings undertake or commit to eliminating anti-competitive effects of the infringing conduct within a period approved by the authority.

The commitment is, in general, a unilateral conduct made by the undertaking under investigation. However, since the content of the commitments should be evaluated and discussed with SAMR or the PMRD before the decision of the suspension of the investigation, a settlement negotiation could be conducted. The process of settlement negotiation is:

- timely filing of the application to suspend the investigation, together with the initial commitments to establish the foundation of the settlement negotiation between the undertaking and SAMR or the PMRD;

- the undertaking may negotiate with SAMR or PMRD regarding the content of the commitments and address all concerns of the authority; and
- if SAMR or PMRD, after considering the subjective attitude of the undertaking towards the cartel, the nature of the cartel, its duration, its consequences, its social impact, the measures committed by the undertaking and their expected effects, holds that the facts are clear, and the committed measures are sufficient to eliminate the effects caused by the cartel arrangements, SAMR or the PMRD may decide to suspend the investigation based on the commitments.

Price-fixing, restricting production or sales volume, and dividing the market cannot be settled by commitments.

In addition, if SAMR or PMRD has identified and verified the cartel agreement after the investigation, it will no longer accept applications for the suspension of the investigation proposed by the undertaking.

If the cartel arrangements have affected the legitimate rights and interests of another unspecified majority of undertakings, consumers, or the public interest, SAMR or PMRD may solicit public opinions on the commitment measures proposed by the undertaking under investigation. The time for soliciting opinions is generally no less than 30 days.

The investigation can be terminated if the undertaking performs its commitments within a time limit designated by SAMR or the PMRD. However, it can be resumed, if:

- the undertaking fails to perform its commitments;
- a major change has occurred which is relevant to the grounds for the settlement; or
- the settlement was based on incomplete or inaccurate information provided by the undertaking.

Corporate defendant and employees

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

There are no administrative or criminal penalties imposed on employees under the AML, unless they obstruct the investigation. Since the current and former employees have no liability under the AML, there is no immunity or partial leniency program for them.

Dealing with the enforcement agency

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

Before applying for leniency, the undertaking may communicate with SAMR or a PMRD anonymously or using its real name, either orally or in writing.

During the whole process of the antitrust investigation, an immunity applicant or subsequent cooperating party must cooperate with the investigation promptly, continuously, comprehensively and sincerely.

DEFENDING A CASE

Disclosure

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

Usually, the undertaking under investigation has very limited access to the case information during the investigation. State Administration for Market Regulation (SAMR) or the Provincial Market Regulatory Department (PMRD) may disclose information or evidence to the undertaking under investigation at its discretion. In addition, SAMR and

PMRDs are required to issue a prior notice for administrative penalties to the undertaking under investigation before formally making a decision. The prior notice for administrative penalties includes the basic facts found by SAMR or the PMRD.

In *Calcium Gluconate API* (2020), Shandong Kanghui Medicine (Kanghui), Weifang Puyunhui Pharmaceutical (Puyunhui) and Weifang Taiyangshen Pharmaceutical (Taiyangshen) were pharmaceutical distributors in China. They purchased and distributed calcium gluconate API (active pharmaceutical ingredient) for injection from August 2015 to December 2017. SAMR found that they held a dominant position in China's sales market for calcium gluconate API for injection and had abused their dominance by selling products at unfairly high prices and imposing unreasonable trading conditions on clients. SAMR issued a penalty decision against them in April 2020. The total fines plus the confiscation of illegal earnings amounted to RMB 325.5 million yuan – the largest penalty imposed on API producers and the overall pharmaceutical industry in China to date.

Before issuing the penalty decision, SAMR sent a prior notice to the companies outlining the details of its planned decision as well as their legitimate rights to make statements, arguments or to apply for hearings. Kanghui applied for a hearing, which was conducted on 8 January 2020. During the hearing, not all of the evidence collected from the manufacturers or from dozens of calcium gluconate injection manufacturers was provided to the companies for cross-examination by SAMR due to reasons of confidentiality.

This case indicates that when challenging SAMR or PMRD's penalty decision in administrative litigation, administrative review or hearing before the decision, the undertaking under investigation may not gain access to SAMR's or PMRD's complete case files.

Representing employees

39 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 or representation?

There are no administrative or criminal penalties imposed on employees under the Anti-Monopoly Law of China (AML), unless they obstruct an investigation. But the law does not prohibit counsel from representing employees as well as their corporation, provided there is no conflict of interest.

Multiple corporate defendants

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

Affiliated companies normally do not require separate representation. For instance, in a cartel investigation, both the parent company and its subsidiaries are involved. The counsel can represent them all to defend the case.

For multiple corporate defendants which are not affiliates, there could be a conflict of interest for counsel to represent all of them in a cartel investigation. For instance, when all the parties want to apply immunity, there is no way to compromise. Therefore, it is not advisable for a counsel to represent multiple corporate defendants in a cartel investigation.

Payment of penalties and legal costs

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

There are no administrative or criminal penalties imposed on employees under the AML, unless they obstruct the investigation. If it is the latter,

the company could pay the legal costs or financial penalties imposed on that employee, whether former or current, as no rules or regulations prevent the company from doing so.

In practice, the company will not pay the fines to the authority directly on behalf of its employees. The employees will pay the fines from his or her personal account and the company will indemnify such losses by paying the employees for the same amount.

Taxes

42 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

According to the Corporate Income Tax Law (2018), penalties, fines and losses on the confiscated property may not be deducted when computing the taxable amount of income.

According to the same law costs, expenses, taxes, losses and other reasonable expenditure (the necessary and normal expenditure which complies with the norms of production and business activities and which should be included in the profit and loss in the current period or in the relevant asset costs) incurred in direct relation to income received by an enterprise may be deducted when computing the taxable amount of income. Private damages payments are not necessary and normal expenditure which complies with the norms of production and business activities, therefore cannot be deducted when computing the taxable amount of income.

International double jeopardy

43 | 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?

SAMR and PMRDs do not recognise a principle of international double jeopardy. Another jurisdiction may penalise the undertaking under investigation by imposing fines. However, this will not prevent SAMR or PMRD from investigating the cartel activities and imposing fines in China.

The purpose of the damages in private anti-trust litigation is to compensate for the losses caused by the monopolistic conduct. If the plaintiff already received damages or amounts paid in settlements from the defendant in civil cases in other jurisdictions, such amount should be deducted from the damages in the civil case in China to avoid double recovery by the plaintiff. In short, in private damage claims, the overlapping liability for damages in other jurisdictions may be taken into account.

Getting the fine down

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

Under article 15 of the AML, the cartel prohibition rules under the AML are not applicable if undertakings can prove the following.

- 1 At least one of the following public interests or efficiencies can be realised through the cartel arrangement:
 - advancing technology or researching and developing new products;
 - improving product quality, lowering cost, increasing efficiency, unifying specifications and standards, or implementing a division of labour based on specialisation;
 - improving the operation efficiency and competitiveness of small- and medium-sized undertakings;
 - realising public interests such as energy conservation, environmental protection, and rescue and relief efforts;
 - alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;

- protecting legitimate interests during foreign trade or foreign economic cooperation; or
 - other circumstances specified by laws or the State Council.
- 2 The specific form and effect of the cartel arrangement realises the public interests or efficiencies; and
 - the causation between the cartel arrangement and the public interests or efficiencies can be shown; and
 - the cartel arrangement is necessary in order to realise the public interests or efficiencies.
 - 3 The cartel arrangements do not seriously restrict competition in the relevant market.
 - 4 The cartel arrangements enable consumers to share the benefits therefrom, such as lowering prices, improving quality or introducing new types of products into the market.

In addition to the leniency program and commitment negotiation, another effective way to reduce the fine is for the undertaking to negotiate with the relevant authority and prove that:

- it was coerced by other undertakings to implement the cartel;
- it was forced or coerced by administrative authorities to implement the cartel;
- it cooperated with SAMR or a PMRD and made a meritorious performance;
- it took the initiative to eliminate or mitigate the harm and consequences of the cartel;
- it voluntarily provided relevant evidence of other undertakings' violation of the AML;
- it neither played a leading role in cartel nor coerced other undertakings to implement the cartel;
- it neither committed multiple examples of monopolistic conduct nor violated the AML in the past;
- the duration of the cartel's existence was very short; and
- it has stopped taking part in cartel activities.

UPDATE AND TRENDS

Recent cases

45 | What were the key cases, judgments and other developments of the past year?

The glacial acetic acid API cartel investigation

Glacial acetic acid is used in the production of hemodialysis concentrate for the treatment of advanced kidney failure and uremia. Chengdu Huayi, Sichuan Jinshan and Taishan Xinning are three undertakings that supply glacial acetic acid active pharmaceutical ingredients (API) in China. The three undertakings agreed to raise the price for glacial acetic acid API, which resulted in a hike in the price from 9.3 yuan per kilo to 28 yuan per kilo or 33 yuan per kilo. In December 2018, the SAMR fined the three undertakings 4 per cent of their turnover for the preceding year (the year before the investigation is launched), and confiscated the illegal earnings.

The Tianjin port yard cartel and leniency application

Twenty-seven undertakings operating container yard services at Tianjin port discussed increasing and adjusting the comprehensive surcharge and unloading fees from 2010. Ten of these undertakings no longer exist or are in operation. Sixteen of them were fined by the Tianjin Municipal Development and Reform Commission (the Tianjin DRC) at 2 per cent to 5 per cent of their turnovers in the preceding year because of the cartel arrangements.

Tianjin Penvavico Logistics was exempted from the fines because it was the first to file a leniency application, actively cooperated with Tianjin DRC and took the initiative in stopping the illegal activities.

Tianjin Keyun International Logistics was the second to file a leniency application, and as a result its fine was halved from 5 per cent to 2.5 per cent of its turnover in the preceding year.

Regime reviews and modifications

46 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

SAMR solicited public comments on a Draft of Amendments to the Anti-Monopoly Law of China (the Draft AML) in January 2020. The Draft AML is still subject to consultation and further review by China's administrative and legislative bodies. While there is no fixed timetable for formal adoption, the Draft AML could be passed by the National People's Congress as early as 2021 if the remaining process runs smoothly.

The proposals contained in the Draft AML include increasing fines against cartel arrangements and changes to the AML to deal with 'hub and spoke' arrangements.

The Draft AML proposes increasing fines for cartel arrangements and changes to the AML to allow for 'hub and spoke' arrangements to be investigated and dealt with.

Increasing fines against cartel arrangements

The Draft AMP proposes the following:

- a new fine applied to undertakings found to be organising or facilitating others to reach cartel agreements of 10 per cent of its revenue for the previous year;
- the fine for trade associations organising or facilitating others to reach cartel agreements to be increased from 500,000 yuan to 5 million yuan;
- the fine for agreeing to a cartel arrangement that is not yet implemented to be increased from 500,000 yuan to 50 million yuan; and
- a new fine applied to undertakings that agree to a cartel arrangement, but have no revenue for the previous year of 50 million yuan.

Hub & spoke collusion

In a hub and spoke collusion, the common supplier is the 'hub', while the distributors are the 'spokes'. The hub facilitates the coordination of competition between the spokes and there is no direct contact between the spokes. In this way, a cartel can be achieved based on indirect communication between the cartel's horizontally aligned members.

The AML in its current form is unable to deal with such an arrangement, as it only applies to competing undertakings and lacks relevant provisions to deal with an undertaking that is not a competitor to a cartel's parties but plays an important role in it. The Draft AML proposes extending the scope of investigations and penalties for monopoly agreements to include undertakings that organise or facilitate other undertakings to reach cartel agreements.

Coronavirus

47 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

On 5 April 2020, SAMR issued the *Announcement on Anti-monopoly Enforcement to Support Combating Pandemic and Restarting Economy* (the Announcement), which is aimed at facilitating efforts to combat the covid-19 pandemic and restart China's economy by exempting the following agreements among competitors from liability under the AML:

- improving technologies, efficiency, public interest and consumer protection (eg, joint R&D agreements in the fields of medicines,



德恒律师事务所
DeHeng Law Offices

Ding Liang

dingliang@dehenglaw.com

12/F, Tower B, Focus Place
19 Finance Street
Xicheng District
Beijing 100033
China
Tel: +86 10 5268 2800
www.dehenglaw.com

vaccines, testing technology, medical equipment and protective equipment).

- unifying specifications and standards, or implementing a division of labour based on specialisations to improve product quality, reduce costs and increase efficiency;
- realising public interest through assisting rescue and relief efforts; and
- improving the operation efficiency and competitiveness of small- and medium-sized undertakings.

In addition, to create a fair competitive market environment to help combat the pandemic, restart the economy, and effectively protect consumer interests, SAMR tightened its antitrust enforcement of undertakings that manufacture and distribute masks, medicines and medical equipment public utilities (eg, water, electricity and gas suppliers) and businesses closely related to people's livelihoods.

Denmark

Frederik André Bork, Olaf Koktvedgaard and Søren Zinck

Bruun & Hjejle

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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, the relevant executive orders issued under the Act and guidelines on the application of the rules, dawn raids, leniency and compliance are accessible on the website of the Danish Competition and Consumer Authority (DCCA). The Competition Damages Act lays out the regulation on damages claims related to infringements of competition law.

Danish competition law is, to a large extent, similar to EU competition law. Section 6 of the Act contains a general prohibition against anticompetitive agreements similar to article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). Correspondingly, section 8 of the Act contains an efficiency defence for agreements, decisions or concerted practices that are caught by section 6 similar to article 101 (3) of the TFEU. Moreover, the Danish rules are interpreted in accordance with case law from the European Commission as well as the European Court of Justice.

Relevant institutions

2 | 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 constitutes, together with the Danish Competition Council (the Council), an independent competition authority. The DCCA is the authority responsible for enforcing the Act. Thus, the DCCA investigates cartels and other competition law infringements and ensures compliance with the competition rules in general.

Cartel cases are generally initiated, investigated and prepared by the DCCA. On the basis of the DCCA's recommendation, the cases are 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. Appeals proceedings before the Danish courts are civil.

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 criminal 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.

Changes

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

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.

The recent EU directive (Directive 2019/1 of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning on the internal market) has not yet been implemented in Denmark. The directive obliges member states to assign national competition authorities the power to impose fines or to request for a court to impose fines in cases regarding infringements of articles 101 and 102 TFEU without involving the State Prosecutor. The deadline for implementing the directive is 21 February 2021.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

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 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.

The four conditions set out above are cumulative.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are subject to cartel laws. Section 6(2) of the Act explicitly lists coordination through the creation of a joint venture as an example of an anticompetitive agreement which is covered by the prohibition in section 6(1).

Coordination through a full-function joint venture is assessed by the DCCA as part of the merger control process if the thresholds for notification are met. The creation of a non-full-function joint venture is not notifiable (in line with EU competition law, cf. C-248/16 *Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*) and should therefore undergo a self-assessment by the undertakings concerned to ensure that the joint venture does not lead to anticompetitive coordination.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The substantive provisions of the Danish Competition Act (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. However, the Act does not apply to agreements, decisions or concerted practices within the same undertaking or group of undertakings.

The Act 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.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 (the effects doctrine). Consequently, a cartel between two undertakings situated outside Denmark may infringe the Danish competition rules and be subject to scrutiny by the Danish competition authorities.

Export cartels

8 | 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).

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Act contains no provisions on industry-specific infringements or industry-specific defences or exemptions. However, the Act does not apply to pay and working conditions or to agreements, decisions or concerted practices within the same undertaking or group of undertakings (sections 3 and 5(1) of the Act).

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

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 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*).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Cartel investigations are primarily carried out by the Danish Competition and Consumer Authority (DCCA) but may also be carried out by the State Prosecutor for Serious Economic and International Crime (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 an investigation, the DCCA will usually carry out a dawn raid on the premises of the relevant undertaking to secure evidence. The DCCA must obtain a court order stating the subject matter and purpose of the inspection ahead of a dawn raid.

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 work days after the dawn raid has been carried out. The review of the electronic material must be concluded with a report listing the documents that the DCCA has tagged as potentially relevant for the investigation. Afterwards, the undertaking subject to the dawn raid will have 10 work days (according to the DCCA's guidelines on dawn raids) to go through the tagged material. The 10 work days constitute a stand-still period for the DCCA, because the DCCA does not work with the case during this period. During the stand-still period, the undertaking can make protests to material included by the DCCA which the undertaking does not find relevant for the investigation or which is covered by the principle of legal professional privilege.

When an agreement is reached as to what documents can be included in the investigation, the DCCA will commence the analysis phase which typically lasts two to three months. The investigation may result in a decision by the DCCA to:

- close the case;
- 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
- continue the investigation and present the case to the Danish Competition Council (the Council) in order for the Council to render a decision (whereafter the DCCA may refer the case to the State Prosecutor).

Investigative powers of the authorities

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

Under section 17 of the Danish Competition Act (the Act), the DCCA may demand all information deemed necessary to carry out its tasks under the Act or to decide whether the provisions of the Act apply to a certain situation. Pursuant to section 18 of the Act, the DCCA is entitled to carry out dawn raids on the premises of an undertaking. If the DCCA cannot gain access to information directly from the undertaking, the DCCA is entitled to be given access to data processors that stores or processes data on behalf of the undertaking.

During a dawn raid, the DCCA can make copies of the undertaking's IT system and electronic media (section 18 of the Act). The DCCA can request oral statements (concerning factual circumstances) from employees and can 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 the 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 professional privilege. However, the question of whether the State Prosecutor will have access to such correspondence has not yet been tried before the courts.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such 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 European Union's other member states.

The Danish Competition and Consumer Authority (DCCA) also participates in the informal cooperation of the European competition authorities. Further, the DCCA may conduct dawn raids to grant assistance to the European Commission and other competition authorities of the European Union or the European Economic Area (EEA) area in connection with these authorities' application of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or articles 53 or 54 of the EEA agreement, in accordance with section 18(9) of the Act.

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. Also, the DCCA may conduct dawn raids to grant assistance to the competition authorities in Sweden, Norway, Iceland, Finland, Greenland and the Faroe Islands, in respect of the application of national competition rules by these authorities in accordance with section 18(10) of the Act. 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 the World Trade Organization.

Interplay between jurisdictions

14 | 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. 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

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Decisions on cartel infringements can be made by the Danish Competition Council (the Council), based on investigations by the Danish Competition and Consumer Authority (DCCA) or directly by the courts in a criminal proceeding.

If a case is referred to the State Prosecutor for Serious Economic and International Crime (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.

As a general rule, sanctions can only be imposed by the State Prosecutor or the courts, while the Danish competition authorities do not have the power to impose administrative fines or criminal sanctions on undertakings or individuals. Typically, the State Prosecutor will offer the undertaking a fine in lieu of prosecution by issuing a fixed penalty notice. Where case law exists on an identical violation of competition rules, the DCCA may, subject to approval by the State Prosecutor, also propose a fixed penalty notice.

If the undertaking accepts the fine, there will be no further proceedings and the case may therefore be closed relatively quickly. If the undertaking does not accept the fine proposed by the State Prosecutor or the DCCA, the case will be tried by the courts.

It should be noted, that the recent EU directive (Directive 2019/1 of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning on the internal market) has not yet been implemented in Denmark. The directive obliges member states to assign national competition authorities the power to impose fines or to request for a court to impose fines in cases regarding infringements of articles 101 and 102 TFEU without involving the State Prosecutor. The deadline for implementing the directive is 21 February 2021.

Burden of proof

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

The Danish Competition Act (the Act) does not contain any provisions on the burden of proof or on the level of proof required. Consequently, the general rules of Danish law apply as regards the burden of proof.

As a general rule, the burden of proof lies on the competition authorities to prove their case, including the existence of an anticompetitive agreement under section 6 of the Act. However, if the authorities prove an anticompetitive agreement, the burden of proof shifts so that the undertaking has 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 free to assess the evidence. No hierarchy of different forms of evidence is 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.

Circumstantial evidence

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

The Act does not contain any 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. Consequently, it follows from section 6(1) of the Act that a restriction of competition can be demonstrated without proof of a specific agreement.

The DCCA must prove its case, but it and the courts are free to assess all the evidence.

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*).

Appeal process

18 | 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 submitted to 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.

The infringing parties or any other party having a sufficient interest in the subject matter of a case can appeal or bring decisions made by the Appeal Tribunal before the courts within eight weeks after the parties have been notified of the decision. If the parties fail to bring the case before the courts within this deadline, the decision of the Appeal Tribunal becomes final.

The DCCA cannot challenge a decision by the Appeal Tribunal before the courts. However, the DCCA may appeal a decision by a lower court to a higher court.

SANCTIONS

Criminal sanctions

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

Criminal sanctions may be imposed on both individuals and undertakings where an intentional or grossly negligent infringement of competition law is established.

As of 1 March 2013, imprisonment may be imposed on individuals in cartel cases if their participation in the 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. The courts have yet to impose the first prison sentence for cartel participation, but prison sentences are, when relevant, expected to be imposed on members of the board or the management.

When meting out the level of a fine, the gravity of the infringement and its duration must be taken into account (see section 23(5) of the Act). Further, the level of the fine depends on the undertaking's worldwide group turnover. It is stated in the preparatory works of the Act that fines should not exceed 10 per cent of the undertaking's worldwide group turnover.

The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative levels of the fines for each category of gravity (before and after the increase in the level of fines of 1 March 2013) are:

- for less grave offences (eg, exclusive purchase obligations lasting more than five years) it was up to 400,000 Danish kroner, and now is up to 4 million kroner (or, for individuals, a minimum 50,000 kroner);
- for grave offences (eg, resale price maintenance, certain types of exchanges of information and joint bids) it was 400,000 to 15 million kroner, and now is 4 million to 20 million kroner (or, for individuals, a minimum of 100,000 kroner); and
- for very grave offences (eg, coordination of prices, production, customers or bids, and certain types of abuse of dominance) it was a minimum of 15 million kroner, and now is a minimum of 20 million kroner (or, for individuals, a minimum of 200,000 kroner).

As it appears, the indicative level of fines for cartel behaviour exceeds 20 million Danish kroner for legal persons and 200,000 kroner for individuals. However, it should be noted that the courts are assigned considerable discretion when imposing fines.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

There are no civil or administrative sanctions under Danish law.

However, under the Act, the Minister for Industry, Business and Financial Affairs or the director-general of the DCCA may impose daily or weekly penalty payments in accordance with section 22 of the Act, if a party fails to submit the information requested by the DCCA.

The Danish competition authorities may offer undertakings and individuals a fine in lieu of prosecution, subject to acceptance by the State Prosecutor.

Guidelines for sanction levels

21 | 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?

Criminal sanctions may be imposed on both individuals and undertakings where an intentional or grossly negligent infringement of competition law is established.

As of 1 March 2013, imprisonment may be imposed on individuals in cartel cases if their participation in the 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. The courts have yet to impose the first prison sentence for cartel participation, but prison sentences are, when relevant, expected to be imposed on members of the board or the management.

When meting out the level of a fine, the gravity of the infringement and its duration must be taken into account (see section 23(5) of the Act). Further, the level of the fine depends on the undertaking's worldwide group turnover. It is stated in the preparatory works of the Act that fines should not exceed 10 per cent of the undertaking's worldwide group turnover.

The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative levels of the fines for each category of gravity (before and after the increase in the level of fines of 1 March 2013) are:

- for less grave offences (eg, exclusive purchase obligations lasting more than five years) it was up to 400,000 Danish kroner, and now is up to 4 million kroner (or, for individuals, a minimum 50,000 kroner);
- for grave offences (eg, resale price maintenance, certain types of exchanges of information and joint bids) it was 400,000 to 15 million kroner, and now is 4 million to 20 million kroner (or, for individuals, a minimum of 100,000 kroner); and
- for very grave offences (eg, coordination of prices, production, customers or bids, and certain types of abuse of dominance) it was a minimum of 15 million kroner, and now is a minimum of 20 million kroner (or, for individuals, a minimum of 200,000 kroner).

As it appears, the indicative level of fines for cartel behaviour exceeds 20 million Danish kroner for legal persons and 200,000 kroner for individuals. However, it should be noted that the courts are assigned considerable discretion when imposing fines.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

According to the preparatory works of the Act and case law, a compliance programme may lead to a reduction of a fine. When assessing the level of a fine, it can be taken into consideration as a mitigating circumstance if an undertaking or a person has actively tried to ensure all relevant employees' compliance with the Act through compliance programs or similar measures. The compliance program must have been in place at the time of the offence and the undertaking or person must in fact have made efforts to ensure compliance with the competition rules.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Act does not warrant disqualification of individuals involved in cartel activity.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Under section 137(1)(4) of the Danish Act on Public Procurement (based on Directive No. 24 of 26 February 2014 of the European Parliament and of the Council on Public Procurement), it is possible for a contracting authority to exclude a company from participation in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the company 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.

Section 137(1)(4) does not only cover agreements with the purpose of distorting competition specifically related to the procurement procedure in question. In principle, an infringement of section 6(1) of the Act may lead to exclusion from participation in any procurement procedure.

The contracting authority has decision-making powers. The decision is usually a discretionary sanction but under certain circumstances debarment is mandatory. The usual duration of debarment is two years from the date when the relevant anticompetitive behaviour ended. The company 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 company cannot be excluded from the procurement procedure.

Any questions in this regard can be brought before the Danish Complaints Board for Public Procurement.

Parallel proceedings

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

Civil and administrative fines 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. There can be no parallel proceedings on cartel activity for the same conduct by both the competition authorities and 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 may be reported directly to the State Prosecutor.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The rules on private damage claims are outlined in the Competition Damages Act, supplemented by the general principles and practice concerning liability in tort. The Competition Damages Act ensures a right to full compensation for competition law infringements. The Competition Damages Act applies to infringements initiated after 27 December 2016.

Under Danish law, a claimant may be granted damages if the competition law infringement was committed with negligence or intent, if there is a causal and foreseeable loss and if there was absence of fault by the claimant.

Indirect purchaser claims are permitted, and thus, indirect purchasers may make a damage claim for a competition law infringement. Also, purchasers that acquired the affected product from non-cartel members may bring claims against the cartel members if the before-mentioned requirements for bringing a damage claim are met.

The passing-on defence may be used in damages cases arising from a competition law infringement in accordance with the Competition Damages Act. Thus, a tortfeasor may argue that the claimant did not suffer any loss as any overcharge attributed to anticompetitive behaviour has been passed on to a subsequent purchaser. The burden of proof lies with the tortfeasor. However, the burden of proof may shift during the case if, for example, an indirect purchaser brings a damage claim. If a claimant has passed on its loss, the claimant cannot be granted damages for the loss that has been passed on.

As regards the level of damages, it is a fundamental principle that the claimant'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 claimant. Furthermore, the claimant is under a duty to mitigate his or her loss.

Only a limited number of cases on private damages claims has been brought before the Danish courts. All of these cases have concerned infringements that have taken place before the implementation of the Damages Act on 27 December 2016, and consequently, recent case law gives no guidance on the new damages claim regime. However, in general, the Danish courts have a conservative approach to damage claims. In the *Electricity Cartel* case from 2006, where the municipality of Copenhagen claimed to have suffered a loss of 320,000 Danish kroner, the District Court found that the counterfactual situation without the cartel would only have resulted in a price three per cent lower and fixed the damages at 50,000 kroner. In the *Skandinavisk Motor Company* case from 2008, the District Court dismissed the case on the basis of an absence of actual data or calculations of the plaintiff's loss. In the *Cheminova A/S* case from 2015, where Cheminova had claimed damages in the amount of 47.2 million kroner, the Maritime and Commercial High Court awarded damages of 10.71 million kroner without specifying the details of the calculation.

Class actions

27 | Are class actions possible? If so, 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 possible under Danish law. Class actions are regulated in Chapter 23a 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 Competition Damages Act states that where several persons have raised claims for damages due to infringements of the Act or articles 101 or 102 of the Treaty on the Functioning of the European Union (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. 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 currently pending before the High Court of Eastern Denmark.

COOPERATING PARTIES

Immunity

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

The Danish Competition Act (the Act) provides for a leniency programme, which is comparable to the leniency programme set out under EU law.

Thus, according to section 23a(1) of the Act, anyone who acts in breach of section 6 of the Act or article 101 of the Treaty on the Functioning of the European Union (TFEU) by entering into a cartel agreement can apply for leniency and can under certain conditions be granted immunity from a fine or from imprisonment for participating in a cartel. Withdrawal will only be granted if the applicant is the first to have approached the authorities, and if the applicant has submitted information which the authorities were not in possession of at the time of the application.

It is further a condition according to section 23a(1) that either, before the authorities have conducted any inspection or a search regarding the matter in question, the submitted information must be the information to give the authorities specific grounds to initiate an inspection, to conduct a search or to inform the police of the matter in question, or, after an inspection or search regarding the matter in question, the

submitted information must be the information that enables the authorities to establish an infringement in the form of a cartel.

Section 23a(2) lays out further conditions, and 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.

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 (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.

Subsequent cooperating parties

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

According to section 23a(3) of the Act, a leniency application will be treated as an application for a reduction of the penalty if the leniency applicant is not the first one to apply for immunity (and therefore does not meet the requirements set out in section 23a(1) to obtain immunity). 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Under section 23a(5) of the Act, the applicant that goes in second (and is therefore unable to obtain full leniency) 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.

Approaching the authorities

31 | 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 at a time 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.

A marker system was recently introduced making it possible for a cartel participant to reserve its place in the queue while putting together a final leniency application (see section 23a (6) of the Act). The applicant must hand in a preliminary application for leniency and must subsequently deliver further documentation to the Danish Competition and Consumer Authority (DCCA) within a fixed time frame.

There are no formal requirements as to the form of application to be submitted to the DCCA for leniency but using the application form provided on the DCCA's website is recommended.

Cooperation

32 | 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 that are seeking partial leniency?

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 expect full cooperation throughout the process, both by the first leniency applicant and by any subsequent cooperating parties. The applicant must provide all information and evidence on the cartel and, at any time, be available to provide a quick response to questions from the authorities (according to the guidelines on leniency).

Confidentiality

33 | 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 case from 2018. 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 is required to publish judgments and penalty decisions, or a summary thereof, involving a fine or prison. If a case is referred to the State Prosecutor for Serious Economic and International Crime (the State Prosecutor), the question of confidentiality will be considered by the State Prosecutor. Furthermore, the DCCA notifies the European Commission and national competition authorities in other EU member states when receiving applications for leniency.

Settlements

- 34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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.

Undertakings and individuals may accept a fine in lieu of prosecution from the State Prosecutor (or from the DCCA, upon approval from the State Prosecutor), and in this way avoid criminal trial in open court.

An undertaking that contacts the DCCA in order to settle a case will normally be granted a reduction in the fine.

Corporate defendant and employees

- 35 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 that each person satisfies the requirements set out in section 23a(2).

A leniency application from an undertaking or an association must be filed by a person who can sign for the undertaking or association (eg, a director). The authorised person must expressly state that it is the company applying for leniency and if an application is to cover companies in a group, it must also be expressly stated in the application.

Dealing with the enforcement agency

- 36 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.

DEFENDING A CASE

Disclosure

- 37 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 Danish Competition and Consumer Authority (DCCA) at the beginning of the case. The NOC will contain the DCCA's immediate opinion with regard to the claimed breach of the Danish Competition Act (the Act). The opinion is non-binding for the DCCA.

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 regarding the defendant, excluding internal working papers and confidential material, eg competitively 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 for Serious Economic and International Crime (the State Prosecutor) who will initiate criminal proceedings. This information is not necessarily disclosed to the defendant. However, according to the general procedural rules in criminal cases, if the State Prosecutor initiates criminal charges, the defendant has the right to be informed.

Representing employees

- 38 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 or representation?

As a general rule, a counsel may represent both the undertaking under investigation and the employee 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.

Multiple corporate defendants

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

A counsel may represent multiple corporate defendants unless the representation implies a conflict of interest or an immediate risk of a conflict of interest.

Payment of penalties and legal costs

- 40 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. Such payments will be taxed as income for the relevant employees.

Taxes

- 41 Are fines or other penalties tax-deductible? Are private damages payments 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. As fines and other penalties are generally not considered a natural operating expense, fines or other penalties are thus not tax-deductible.

With regard to damages incurred as a consequence of a criminal offence, the question of whether such an expense is considered a natural operating expense, and consequently, whether it is tax-deductible, depends on a specific assessment. The courts will generally be reluctant to accept any tax-deduction if the undertaking concerned has acted with intent or gross negligence.

International double jeopardy

- 42 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 claimant's financial position must be restored to as it was before the damage occurred. Consequently, any compensation received by the claimant in another jurisdiction will be taken into account in a subsequent Danish case.

Getting the fine down

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

The optimal way in which to get the fine down is to apply for leniency, assuming the conditions for leniency are fulfilled.

Other means to seek a reduction in the fine includes contacting the DCCA to settle the case or to have a compliance programme in place. Undertakings that contact the DCCA in order to settle a case by paying a fine in lieu of prosecution will generally be granted a reduction of the fine. Undertakings which had a compliance programme in place at the time of the offence, which continues to follow such a programme and which does in fact seek to ensure compliance with the competition rules may obtain a reduction of the fine.

Section 82 of the Danish Criminal Code provides for a number of mitigating circumstances that can be taken into consideration when meting out a sanction, the most relevant of which provides the basis for the leniency programme.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In December 2018, the Danish Competition Council (the Council) found that two competitors on the market for the sale of advertising space in outdoor media in Denmark had infringed section 6 of the Danish Competition Act (the Act) and article 101 of the Treaty on the Functioning of the European Union (TFEU). The two undertakings, Clear Channel Danmark A/S and AFA JCDecaux A/S, had coordinated rebates concerning media commissions, security compensation, information compensation and cash discounts. The Council found that the objects of the agreements and concerted practices had been to restrict competition, and in November 2019, the Danish Competition Appeal Tribunal (the Appeal Tribunal) upheld the Council's decision. The case is now pending before the Maritime and Commercial High Court.

In June 2019, the Danish Maritime and Commercial High Court upheld a decision from the Appeal Tribunal in a case regarding coordination of prices on gas furnace maintenance subscriptions. HMN Naturgas offered its end customers gas furnace maintenance subscriptions through independent plumbers, who also offered gas furnace maintenance subscriptions to end-users. The court found that the parties were competitors on the market for maintenance subscriptions and that the parties had agreed on a raise in HMN's end prices with the objective of making it possible for the independent plumbers to raise their prices as well. The case is noteworthy, as the agreement in fact caused a reduction of the total price for HMN's customers. The case is pending before the Eastern High Court.

In November 2019, a case regarding road marking was decided in the third instance by the Supreme Court. In June 2015, the Council had found that the two companies, LKF Vejmarkering (LKF) and Eurostar Danmark (Eurostar), had entered into an anticompetitive agreement in submitting a joint bid through a consortium in a public procurement for road marking. The public procurement consisted of three contracts on three different parts of Denmark with the option of submitting a bid for just one of the contracts. The consortium of LKF and Eurostar, who was at the time the two largest contractors on the market for road marking, bid

on all three contracts and won the tender. In 2016, the Appeal Tribunal upheld the Council's decision by finding that regardless of whether LKF and Eurostar individually had the capacity and possibility to submit a bid for all three districts, they could have submitted individual bids for the individual districts, and consequently, they were actual or potential competitors. In August 2018, the Danish Maritime and Commercial High Court, however, overturned the Council's and Tribunal's decisions and found that LKF and Eurostar had not violated competition rules. The Court considered that the fact that LKF and Eurostar had the capacity to submit individual bids for the individual districts did not preclude them from entering into a consortium and submit a joint bid for all three districts. Thus, the assessment of whether the joint bid had violated the prohibition on anticompetitive agreements was based on whether LKF and Eurostar could have submitted individual bids for all three districts (and not just one or two districts). In November 2019, the Supreme Court ruled in favour of the Appeal Tribunal. The Supreme Court agreed with the Tribunal's assessment that LKF and Eurostar were actual or potential competitors and that they had violated competition rules. From now on, participants in a consortium in a public procurement must carefully assess whether they have the capacity to individually bid on the contract.

In two cases on information exchange of June 2020, the Council has decided to refer the cases to the State Prosecutor for criminal proceedings. The Council found that Hugo Boss, a producer, supplier and retailer of articles of clothing in retail, had exchanged information on prices from January 2014 to November 2017 with Kaufmann and from December 2014 to April 2018 with Ginsborg. Both Kaufmann and Ginsborg were retailers of articles of clothing from, among other brands, Hugo Boss. The Council found that the exchange of information on prices, rebates etc constituted horizontal concerted practices subject to the prohibition in section 6(1) of the Act, and article 101(1) TFEU that could not benefit from either block exemptions or the exemptions in section 8(1) of the Act or article 101(3) TFEU. Criminal prosecution from the State Prosecutor awaits appeals by the parties to the Appeal Tribunal's ruling.

In August 2020, the competition authorities made investigations into the use of minimum resale prices on Happy Helper and Hilfr, two digital platforms enabling contact between providers and buyers of private cleaning services. The cases are notable as they are the first to deal with the question of whether self-employed individuals that sell services on digital platforms are subject to the Act. The Council found that the providers of cleaning services on the digital platforms most likely are to be considered self-employed individuals that are competitors on the platform. For this reason, Happy Helper and Hilfr made commitments to the Council to cease the use of fixed hourly prices for the cleaning services offered on the platforms, as they restricted the self-employed individuals' possibility to set their own prices. Furthermore, the cases are notable as they demonstrate, in practice, the increased focus of the Danish Competition and Consumer Authority (DCCA) on cases involving digital platforms.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 1 May 2019, the DCCA established a Centre for Digital Platforms as a response to the government's decision to strengthen the enforcement of the competition rules in relation to digital platforms. Thus, an increase in cases involving digital platforms can be expected due to the enhanced focus.

In 2020, the DCCA's guidelines on consortia under competition law is expected to be revised in correspondence with the Supreme Court's judgment in the case on road marking.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In March 2020, the Council issued a short notice addressing the competition law issues that may arise in relation to covid-19. The notice emphasised that the competition rules apply in times of crises.

Specifically, regarding cartels, the notice recognised that it may be necessary to collaborate with competitors in order to produce enough safety equipment, to ensure the supply of goods to all consumers or to prevent the virus from spreading. It follows from the notice that the DCCA will take the purpose of such agreements into careful consideration and usually deem these unproblematic under competition law.

However, the notice (which is available online, in Danish) also states that the DCCA will keep a close eye on undertakings that seem to exploit this critical situation to co-ordinate prices, limit output, share markets, share information or the like. The notice underlines that the damage brought by a cartel may be even greater than usual in times of crisis, as undertakings and consumers may be more vulnerable.

BRUUN & HJEJLE**Frederik André Bork**

fab@bruunhjejle.dk

Olaf Koktvedgaard

oko@bruunhjejle.dk

Søren Zinck

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

Mélanie Thill-Tayara and Marion Provost

Dechert LLP

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartels that have an effect on trade between member states of the European Union are prohibited under article 101 of the Treaty on the Functioning of the European Union (TFEU), which applies to all agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market. The European Commission (EC), which is primarily in charge of enforcing article 101 TFEU at the European level, issued specific guidelines in 2011 to help undertakings self-assess their horizontal cooperation agreements under EU competition law (Guidelines on the applicability of article 101 TFEU to horizontal cooperation agreements, 2011/C 11/01). Although these guidelines are not intended to provide guidance as to what does or does not constitute a cartel, it nonetheless contains several references to cartels as well as a specific chapter on the competitive assessment of information exchange that, depending on the circumstances and type of information exchanged, may be fined as cartels.

Relevant institutions

2 | 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?

Pursuant to Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003), the EC has exclusive jurisdiction to both investigate – through its Directorate-General for Competition (DG Competition) – and sanction cartels at the European level. Its decisions can then be appealed to the General Court of the European Union (GCEU) and, ultimately, the European Court of Justice (ECJ).

Changes

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

Except for the temporary framework communication adopted by the EC on 8 April 2020 to address the challenges resulting from the coronavirus outbreak, there have been no recent changes to the EU cartel regime.

However, it is worth recalling that two sets of rules of interest in cartel matters were adopted in 2018 and 2019, regarding the development of private enforcement actions and the powers of national competition authorities (NCAs) to better implement the provisions of Regulation No. 1/2003.

On 9 August 2019, following the transposition by all member states of Directive No. 2014/104 of 26 November 2014 on certain rules

governing actions for damages under national law for infringements of the competition law provisions of member states and of the European Union (the Damages Directive), which establishes a framework to facilitate damages actions by victims of competition law infringements, the EC released guidelines for national courts on how to estimate the passing-on of cartel overcharges to indirect purchasers.

On 11 December 2018, the European Parliament and the Council adopted Directive No. 1/2019 to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive). Member states have until 4 February 2021 to transpose it. The ECN+ Directive seeks to harmonise the enforcement of competition law by NCAs by providing resources, fining tools and guarantees of independence. The ultimate aim of the ECN+ Directive is to ensure that competition law is applied effectively and consistently throughout the European Union, and that the application of national competition laws by NCAs does not lead to a different outcome than the one that would have been reached under EU law.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU prohibits:

[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.

A non-exhaustive list of prohibited practices is set out in this provision and includes agreements, decisions and concerted practices which, directly or indirectly, aim to:

- fix prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply; and
- apply dissimilar conditions to equivalent transactions or making the conclusion of contracts subject to acceptance of supplementary obligations.

Depending on the conduct, it may be considered as having either an anticompetitive object or, in the alternative, an anticompetitive effect. Object restrictions are those which, by their very nature, entail a sufficient degree of harm to competition so that there is no need to examine their effects (see ECJ, 2 April 2020, *Gazdasági Versenyhivatal c/ Budapest Bank Nyrt. e.a.* C-228/18). In order to determine whether an agreement or concerted practice has an anticompetitive object, regard must be had to the content of the agreement, its objectives, and the economic and legal context of which it forms part. In practice, certain

collusive behaviours, including information exchanges, are deemed by object restrictions, such as price-fixing or market sharing.

Under article 101(2) TFEU, agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the EC that they breach article 101(1) TFEU.

However, article 101(3) TFEU provides that agreements whose efficiencies outweigh the anticompetitive effects can be exempted, provided they meet certain criteria, and notably that they contribute to economic progress to the benefit of the end-consumer, without foreclosing competition. It is nonetheless extremely rare that cartels qualify for such exemption.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

If a joint venture is not deemed a 'concentration' within the meaning of the EU merger control regulation, it will be considered as a cooperation agreement, which must therefore be examined under article 101 TFEU. In practice, this will be the case of all non-full function joint ventures, (ie, those where the joint venture does not have sufficient resources to operate autonomously from its parent companies), which are therefore deemed parties to a cooperation agreement.

While joint ventures may have pro-competitive effects, those which directly or indirectly organise or facilitate price-fixing, market sharing or limitation of output may be assessed under cartel laws.

While they can bring benefits to final consumers and are generally exempt under article 101(3) TFEU, strategic alliances – such as the ones in the air transport or food retail sectors – can also give rise to competition concerns and be sanctioned under article 101(1) TFEU. The EC has, for example, recently opened an investigation targeting two French supermarkets chains for possible collusion on sales activities as part of a buying alliance they set up in 2014 (case AT.40466).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Article 101 of the Treaty on the Functioning of the European Union (TFEU) only applies to undertakings. The notion of 'undertaking' has been defined broadly in European Union case law, as any entity engaged in an economic activity (ie, the sale of goods or provision of services), regardless of its legal status and the way in which it is financed (European Court of Justice (ECJ), 1991, *Höfner and Elser*, C-41/90). Accordingly, in addition to individual companies operating in a market, the following entities have been considered as undertakings within the meaning of competition law:

- professional orders;
- trade unions and professional associations;
- public agencies that do not exercise the prerogatives of a public authority;
- sports federations and associations; and
- entities working in the social sector.

In practice, this means that individuals can only be subject to competition law provisions if they themselves are an undertaking, ie if they sell goods or services on their own behalf. However, article 101 TFEU does not apply to individuals acting as employees of an undertaking. Please note that the national legislation of some member states provides for criminal sanctions or administrative fines for employees that participate in an infringement of competition law.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes. Article 101 TFEU has an extra-territorial reach insofar as any conduct which has effects in the EU territory, irrespective of the nationality of the infringer and the country in which sales are booked, falls within the jurisdiction of the European Commission (the EC).

In this respect, according to the Guidelines on the method of setting fines imposed pursuant to article 23(2)a of Regulation No. 1/2003 (the Guidelines on the method of setting fines), the EC usually calculates the fine imposed on an undertaking on the basis of 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area' within the European Economic Area (EEA) (paragraph 13). By way of exception, however, the EC may 'assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA)' (paragraph 18) to reflect both the aggregate size of the sales concerned in the EEA and the relative weight of each undertaking in the infringement. Thus, on several occasions, the EC took into account sales made by participants in the cartel outside the EEA in order to reflect their participation when they had little or no sales within the EEA. This was notably the case in the *Power Cables* decision (EC, 2 April 2014, *Power Cables*, case AT.39610), where the EC's approach to take into account the sales made by the Japanese companies participating in the cartel was recently validated by EU courts (General Court of the European Union (GCEU), 2018, *Viscas*, T-422/14; ECJ, 2019, *Viscas*, C-582/18 P).

Export cartels

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

There is no such exemption or defence under EU law.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements. However, specific regulations or guidelines exist in some sectors that the EC wishes to encourage. This is the case for instance in the maritime transport sector, where Regulations No. 246/2009 of 26 February 2009 and No. 906/2009 of 28 September 2009 exempt joint-service agreements between liner shipping companies aimed at rationalising their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as 'consortia'). Exemptions also apply in the agriculture sector, where Regulation No. 2017/2393 provides for a derogation for some activities of producer organisations, such as joint sales.

Specific regulations used to apply in other sectors, such as insurance or air transport, but they expired or were repealed.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is not, as such, a defence or exemption for a cartel that has been approved or encouraged by a state. For instance, in a 2008 preliminary ruling about a scheme under which some beef processors undertook to leave the processing industry the ECJ considered that even if the scheme resulted from a study carried out at the request of the Irish government, it amounted to a restriction of competition by object (ECJ, 20 November 2008, *Beef Industry Development Society*, C-209/07).

However, the Guidelines on the method of setting fines provide that the basic amount of the fine imposed on undertakings that infringed article 101 TFEU may be reduced to take into account mitigating circumstances, such as where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation.

In 2017, following the GCEU annulling its first decision on procedural grounds, the EC readopted a cartel decision against 11 air cargo carriers that were found to have infringed article 101 TFEU by operating a price-fixing cartel. They were all granted a 15 per cent reduction in fines on the ground that they had been encouraged to concert on prices with their competitors by the applicable regulatory regime (see EC, 9 November 2010 and 17 March 2017, *Airfreight*, AT.39258).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Initiation of the proceedings

The European Commission (the EC) may take up a matter on its own initiative or be contacted by any natural or legal person with a legitimate interest (eg, competitor, victim, or even co-perpetrator within the context of leniency). The EC may also launch a sector inquiry, which can subsequently give rise to individual investigations (eg, the case of the pay-for-delay investigations launched against Lundbeck and Servier, that followed the EC's sector inquiry in the pharmaceutical sector). Please note that the EC enjoys full discretionary prosecution powers, and can choose not to investigate a complaint, for instance, if it lacks interest from a European perspective or if it is already examined by a national competition authority (NCA).

Investigation

The proceedings are carried out by the investigation services of the EC. They can request oral or written information from the undertakings concerned, carry out on-site inspections at their premises, as well as seal premises or business records. The companies investigated are under a duty of cooperation, meaning that they are required to respond to the investigation services' questions, and to abide by the decisions authorising dawn raids, at the risk of sanctions. The EC can also hear other persons than the companies being investigated. Such interviews are not mandatory; however, after the subject has agreed to testify, he or she must cooperate and provide the EC with accurate information.

Adversarial phase of the procedure

The undertakings concerned receive a statement of objections in which the EC presents the objections raised against them, as well as the factual evidence and legal arguments behind its analysis. The undertakings are then able to examine all elements contained in the EC's investigation file, to file observations in response to the statement of objections and to request an oral hearing to present their comments on the case. Please note that, where applicable, discussions regarding a potential settlement procedure will be initiated by the EC before the undertaking receives the statement of objections. If the undertaking accepts to settle, it will have to send a settlement proposal to the EC, to which the latter will respond by sending a statement of objections setting out the content of the proposal.

Decision

If it concludes to the existence of an infringement of article 101 of the Treaty on the Functioning of the European Union (TFEU), the EC will adopt a grounded decision prohibiting the conduct and imposing a fine and/or specific remedies. While in certain antitrust cases the EC may deem appropriate to close its investigation with a commitment decision,

in which case there is no finding of infringement, commitment decisions are not appropriate for cartel cases.

There is no legal deadline for the EC to complete cartel inquiries. Though it is difficult to make general assumptions about the timing of cartel cases, such proceedings usually last for several years.

Investigative powers of the authorities

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

Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003) sets out the main investigative powers of the EC. In particular, it has the power to

- issue requests for information (under article 18);
- take voluntary statements from natural or legal persons (under article 19);
- carry out on-site inspections at the premises of the undertakings concerned (under article 20); and
- where the circumstances require it, inspect the employees' homes and cars (under article 21).

The EC may collect any information it deems necessary for the proper conduct of its investigation. In addition, the EC may itself conduct the inspection on the territory of a member state, or request an NCA to carry out the inspection on its behalf.

Request for information

Requests for information are the most common means used to carry out an investigation and can be issued by the EC at any stage of the procedure. The EC may require the information either by simple request or by decision.

Simple requests must be imperatively motivated and state the legal basis and the purpose of the request, the information requested, which must be necessary to establish a violation of article 101 TFEU, the time limit to provide the information (generally two to three weeks), and the sanctions in case false or misleading information is provided (which can reach up to 1 per cent of the total turnover of the undertakings concerned).

Decisions forcing the provision of information may be adopted only when, following a simple request, no information or incomplete information was supplied within the time limit fixed by the EC. It shall contain the same information, and remind the addressee of its privilege against self-incrimination. If the undertaking fails to provide the requested information, the EC may impose periodic penalty payments not exceeding 5 per cent of the undertaking's average daily turnover in the preceding business year per day.

Power to receive statements

The EC can interview representatives of the undertakings concerned, as well as third parties. Interviews with third parties are conducted on a voluntary basis.

The EC has a wide discretion in the conduct of interviews. It shall only, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview. In practice, the interview is always recorded. The presence of a lawyer is permitted. The officials of the relevant NCA can assist the EC.

Undertakings which are subject to an investigation do not normally have a right to question witnesses testifying against it. In this respect, the European Court of Justice (ECJ) ruled that:

[As] the procedure before the Commission is purely an administrative procedure, the Commission is not required to afford

the undertaking concerned the opportunity to cross-examine a particular witness and to analyse his statements at the investigation stage.

ECJ, 7 January 2004, *Aalborg*, joined cases C-204/00, C-205/00, C-211/00, C-217/00 and C-219/00)

On-site inspections

On-site inspections may be conducted on two grounds: pursuant to a written authorisation or pursuant to a formal EC decision (a dawn raid). The undertaking concerned is only obliged to accept the investigation when it is carried out pursuant to a formal decision. However, in practice, should the undertaking refuse an inspection, the EC will then generally order a dawn raid pursuant to a formal decision and may request the support of officials of the member state within which the inspection is to be conducted.

Whether on the basis of a written authorisation or of a decision, the EC must specify the subject matter and purpose of the inspection, as well as the relevant penalties provided for in Regulation No 1/2003. In case of a formal decision, the EC must also specify the date on which it is to begin as well state the right of the undertaking to have the decision reviewed by the ECJ.

When carrying out an inspection, either on the basis of a written authorisation or a decision, the EC may:

- enter any premises, land and means of transport of undertakings and associations of undertakings;
- examine the books and other records related to the business, irrespective of the medium on which they are stored and not limited to documents already identified by the EC;
- take or obtain in any form copies of or extracts from such books or records;
- seal any business premises and books or records for the period and to the extent necessary for the inspection; and
- 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.

Companies facing an inspection are under a duty to cooperate and may be sanctioned if they fail to do so. In practice, the company is under the obligation to give access to all professional documents requested by the investigators stored in any medium or device (eg, PCs, laptops, smartphones, USB drives), including electronic messages (eg, WhatsApp). EC officials can take copies of the documents, including by transferring data on their computers. Usually, the EC selects the documents that are relevant to the subject matter of its investigation directly on the company's premises. However, when the circumstances do not allow the EC to complete its inspection on-site, it may make copies of documents in order to examine them later in Brussels (ECJ, 16 July 2020, *Nexans*, C-606/18).

The officials also have the power to ask oral questions and to request 'explanations on facts or documents relating to the subject matter and purpose of the inspection', as well as to record the answers.

The rights of defence of the undertakings concerned are limited during dawn raids, and mostly include:

- the right not to be subject to an unauthorised inspection, or to refuse inspections conducted pursuant to simple authorisations;
- the right to be assisted by a lawyer, although the inspection can start before a lawyer arrives;
- the right not to be required to produce legally privileged documents (limited to correspondence with external lawyers admitted by the bar of a member state of the European Union); and
- the right not to be required to incriminate themselves.

Finally, breaching a seal is considered a violation of the undertakings' duty to cooperate and can result in a significant fine. In 2012, the ECJ upheld the €38 million fine imposed by the EC on a German company for a broken seal (see ECJ, 22 November 2012, *E.ON Energie AG*, C-89/11).

Please note that although the EU courts confirmed that the EC has extensive powers of investigation, these powers are not unlimited and due account must be given to the fundamental rights of the undertakings being investigated. In 2015, the ECJ clarified the scope of the EC's ability to use the information it found during a dawn raid. In particular, it cannot go on 'fishing expeditions', which means that the information obtained during the investigation must not be used for purposes other than those indicated in the inspection warrant or decision (see ECJ, 18 June 2005, *Deutsche Bahn*, C-583/13 P). More recently, the General Court of the European Union (GCEU) recalled that the EC needs sufficiently strong evidence to reasonably suspect an infringement of competition law to justify a dawn raid. In exercising its powers, the EC must therefore give due account to the rights of the undertakings being raided and cannot, without sufficient evidence, order an inspection that is, by its very nature, extremely intrusive (see GCEU, 5 October 2020, *ITM*, T-254/17 and *Casino*, T-249/17).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Cooperation between the European Commission (EC) and other competition authorities takes place at two levels: bilateral and multilateral.

At the bilateral level, the European Union has signed cooperation covenants with a number of countries, based on dedicated competition agreements, be they simple memoranda of understanding whereby the authorities can discuss legislation, share non-confidential information and request assistance from one another (eg, with Brazil, China, India or Russia), or wider agreements for the enforcement of competition law including cooperation provisions, notification obligations with respect to enforcement activities that may affect each other's interests and exchanges of confidential information (eg, with Canada, Japan, Mexico, Switzerland, South Korea or the US); and general trade agreements including competition provisions, (eg, with the UK in the context of Brexit, Chile, Colombia, Egypt, Israel, Jordan, Morocco and Ukraine).

At the multilateral level, the EC participates in the work of international organisations where competition issues are discussed, such as the International Competition Network, which aims at providing anti-trust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. The EC also contributes to the work of the European Economic Area (EEA), the OECD and the World Trade Organization.

The EC also cooperates extensively with national competition authorities (NCAs) within the European Competition Network (ECN), which aims at creating an effective mechanism to counter companies which engage in cross-border practices restricting competition. In accordance with Regulation No. 1/2003, it 'transmit[s] to the competition authorities of the member states copies of the most important documents it has collected' (article 11) and at the request of an NCA, it 'shall provide it with a copy of other existing documents necessary for the assessment of the case'. Conversely, governments and competition authorities 'shall provide the Commission with all necessary information to carry out the duties assigned to it by [Regulation No. 1/2003]' (article 18).

Furthermore, according to the 2004 EC Notice on Cooperation within the Network of Competition Authorities, ECN members in charge of a case may refer a case to another NCA best placed to handle it.

Although in most instances the authority that receives a complaint or starts an ex officio procedure will remain in charge of the case, reallocation can indeed be envisaged at the outset of a procedure. Reallocation to the EC itself will also usually occur for cases involving more than three member states.

Interplay between jurisdictions

14 | 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 most significant interactions of the EC in cross-border cases are with NCAs of member states. Cooperation between the EC and NCAs, with regard to the distribution of powers regarding investigations, prosecutions and fining, is specifically provided for in Regulation No 1/2003 (article 11) and relationships are organised by the 2004 EC Notice on Cooperation within the Network of Competition Authorities. It was used for instance in the *Prestressing Steel* case, where the EC cooperated with the German competition authority, which provided it with documents, including statements and audited reports that helped it prove the involvement of one specific undertaking in the cartel (EC, 30 June 2010, *Prestressing Steel*, COMP/38.344).

There is also significant interplay between the NCAs themselves, within the framework of the ECN network. For instance, the French competition authority (FCA) recently issued a decision sanctioning a cartel in the fruit-compotes sector, after dawn raids conducted in France and in the Netherlands in coordination with the Dutch competition authority, under article 22 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, which led to the finding of additional evidence to that already provided by the leniency applicant (FCA, 17 December 2019, *Fruit-compotes*, 19-D-24).

The EC also often cooperates with the US Federal Trade Commission and Department of Justice, through two agreements signed in 1991 and 1998, which provide that both competition agencies notify each other when proceedings initiated by one competition authority are likely to affect the other's important interests. These agreements also provide for exchanges of information, and mutual assistance when they have an interest in doing so and whenever their laws and resources enable them to do so.

Above all, the 1998 agreement introduces the principle of 'positive comity', under which one party may request the other party to remedy anticompetitive behaviour which originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. Please note that positive comity provisions are rarely used in practice, as complainants usually prefer to directly address the competition authority they consider to be best suited to deal with the alleged infringement.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The European Commission (the EC) both investigates and adjudicates on cartel matters. The final decision is taken by the EC's College of Commissioners.

Burden of proof

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

Pursuant to article 2 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, the burden of proof rests on the EC, which must establish the existence and duration of the alleged infringement to competition law with sufficient evidence. The principle of legal certainty requires that, absent evidence directly establishing the duration of the infringement, the EC must rely on evidence relating to facts sufficiently close in time so that it can reasonably be assumed that the infringement was continuous and uninterrupted between two specific dates.

It is then up to the undertaking being investigated to demonstrate that its conduct does not violate article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It may also decide to invoke a possible exemption which requires it to prove that it meets the conditions of article 101(3) TFEU.

There is no specification as to the level of proof required. In practice, while the EC is not bound by an obligation to adduce proof of an infringement beyond reasonable doubt (General Court of the European Union (GCEU), 8 July 2008, *BPB*, T-53/03), the GCEU indicated that:

[Any] doubt in the mind of the Courts of the European Union [. . .] must operate to the advantage of the undertaking to which the decision finding the infringement was addressed.
GCEU, 24 March 2011, *Viega*, T-375/06

Circumstantial evidence

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

It is well-established in case law that direct evidence is rather scarce in cartel cases. The EC can therefore rely on a 'body of evidence', (ie, a set of concurring elements to support its thesis). If, for example, a document refers only to certain facts mentioned in other elements of evidence, it is not sufficient to compel the EC to set it aside. The GCEU held that:

[In] most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.
GCEU, 12 July 2018, *ABB*, T-445/14

Appeal process

18 | What is the appeal process?

The decisions of the EC may be appealed to the GCEU, which has the power to annul the decision, dismiss the appeal, or adjust the fines. The decisions of the GCEU are themselves subject to appeal before the ECJ, which rules on points of law only.

Undertakings that have lodged an appeal against the decision must either pay the fine provisionally or provide a bank guarantee equivalent to the amount of the fine plus interest, enforceable upon first call. The former vice-president of the EC, Joaquín Almunia, recalled in a 2010 information note that, though the management of fines guarantees and their safekeeping imposes an administrative burden on the EC that does not exist in the case of provisional payments, article 85a of the implementing rules for the Financial Regulation grants the undertakings the right to choose between these two options.

The duration of proceedings before the GCEU depends on the complexity of the case. They generally last between 32 and 36 months,

with an additional 12 to 18 months in the case of an appeal to the ECJ. Please note that the EC may incur a financial liability in cases excessively lengthy proceedings, where such a length was unjustified and caused damage to the undertakings concerned. In the *Gascogne* case, for instance, the applicants, which were convicted for their participation in a cartel in the industrial bags sector, brought an action for damages before the GCEU against the EU for the excessive duration of the proceedings, which lasted almost six years. The judges ruled in favour of the applicants at the lower court (see GCEU, 10 January 2017, *Gascogne Sack Deutschland*, T-577/14), but the decision was overturned by the ECJ, which found that there was no sufficiently direct causal link between the violation of the reasonable time limit for judgment and the loss allegedly suffered by the companies as a result of the payment of bank guarantee fees, during the period by which that time was exceeded (ECJ, 13 December 2018, *Gascogne Sack Deutschland*, C-138/17 and C-146/17).

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activity at the EU level. However, criminal sanctions might be imposed at the national level.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The EC derives its power to impose fines from article 23(2) of Regulation No. 1/2003, which grants it a wide latitude in setting the amount of the fine, the only limit being that it shall not exceed 10 per cent of the undertaking's total turnover in the preceding business year. In this respect, it should be noted that this maximum limit applies to the undertaking's group turnover and not only to the entity that participated in the infringement.

Please note that there has been a clear increase in the amount of fines in the recent years. The record-breaking total fine imposed in a single case is €3,807 billion in the *Trucks* decision (2016/2017), where Daimler also received the highest individual fine ever of €1 billion for a cartel infringement.

Guidelines for sanction levels

21 | 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 EC first adopted its Guidelines on the method of setting fines in 1998 and then updated them in 2006. They are self-binding on the EC, which must therefore follow them, but do not bind EU or national courts nor national competition authorities (NCAs).

In practice, in setting the amount of a fine the EC first determines the basic amount of the fine, taking into account the value of the undertaking's sales to which the infringement directly or indirectly relates in the relevant geographic area, to which it applies a percentage usually ranging from 0 per cent to 30 per cent depending on the egregiousness of the infringement (in practice, this percentage has varied between 15 per cent and 18 per cent for cartels in the last five years), and a multiplying factor reflecting its duration. In cartel cases, the EC also applies an additional percentage ranging from 15 per cent to 25 per cent to this basic amount, to ensure the deterrent effect of the fine.

The EC then adjusts this basic amount downwards or upwards, to take into account aggravating and mitigating circumstances for

each undertaking. Aggravating circumstances include the undertaking instigating or leading the cartel, or it being previously sanctioned for infringements of competition law. On the other hand, mitigating circumstances include the undertaking's cooperation with the investigation or the fact that the infringement was encouraged or authorised by public authorities or legislation.

Once adjusted, the EC verifies that the amount of the fine does not exceed the legal maximum, (ie, 10 per cent of the undertaking's worldwide turnover in the preceding business year).

Finally, where applicable, the amount of the fine is further decreased to take into account leniency proceedings (full immunity for the first undertaking that came forward to the EC, and reductions of up to 50 per cent for the subsequent ones) or settlement proceedings (a fine reduction of 10 per cent).

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The EC does not have to take into account compliance programmes put in place by an undertaking concerned when it sets the fine. In 2014, the GCEU clearly excluded that a compliance programme be regarded as a mitigating circumstance. Indeed:

[The] mere adoption by an undertaking of a programme of compliance with the competition rules cannot constitute a valid and definite guarantee of future and continuing compliance by that undertaking with those rules, and consequently the mere existence of such a programme cannot compel the Commission to reduce the fine on the ground that the objective of prevention pursued by the fine has already been at least partly achieved.
GCEU, 14 May 2014, *Donau Chemie*, T-406/09

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is currently no EU legislation prohibiting individuals involved in cartel activity from serving as corporate directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

While Regulation No. 1/2003 does not list debarment from government procurement procedures as a possible sanction, Directive No. 2014/24 on EU Public Procurement provides for a combination of mandatory and facultative debarment when public authorities have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition, which can be qualified as '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. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability. The debarment rule is seldom enforced throughout the EU.

Parallel proceedings

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

Cartels are subject to both administrative penalties, which can exclusively be imposed by the EC, as well as potential civil damages, which can be decided by any national court. In this respect, public enforcement and private enforcement are considered as being complementary one to another, and together act as a deterrent tool to cartel infringements.

PRIVATE RIGHTS OF ACTION

Private damage claims

- 26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any third party – being a direct purchaser or indirect purchaser – who has suffered loss as a result of a cartel can sue one or several of its participants for damages before the national courts of member states.

This right is enshrined in EU case law, which has long recognised that, where there is a causal link between the infringement of competition law and the harm suffered, the victim may seek compensation for that harm (ECJ, 20 September 2001, *Courage and Crehan*, C-453/99). The ECJ clarified that in the absence of EU rules governing the matter, it was for the domestic legal systems of each member state to prescribe the detailed rules governing the exercise of that right, provided that the principles of equivalence and effectiveness are observed (ECJ, 13 July 2006, *Manfredi*, joined cases C-295/04 to C-298/04).

Victims are entitled to full compensation of their damage, which includes actual loss as well as loss of profits, plus the payment of interest. However, there is no such thing as punitive or multiple damages under EU law.

To ensure an effective system of private enforcement throughout the European Union, the European Parliament and the Council adopted Directive No. 2014/104 of 26 November 2014 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 (the Damages Directive), which aims at facilitating private enforcement actions by victims of competition law infringements.

In particular, the Damages Directive sets forth several presumptions to facilitate the compensation of victims of cartel infringements, such as a presumption that prohibition decisions constitute irrevocable evidence of a wrongdoing or that cartels cause harm. In addition, while recognising the passing-on defence, the Damages Directive reverses the burden of proof that now lies on the infringer: with respect to direct purchasers, the Damages Directive establishes a presumption that cartel overcharges have not been passed on to the indirect purchasers; conversely, with respect to indirect purchasers, it establishes a presumption that overcharges have been passed on to them.

Although the Damages Directive may have seemed to take particular account of 'follow-on' actions, its provisions are also applicable to 'standalone' actions, brought in the absence of any prior decision by the EC or an NCA.

Class actions

- 27 | Are class actions possible? If so, 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 Damages Directive does not provide for class actions. However, the EC issued a recommendation in 2013 inviting member states to adopt measures at the national level by 26 July 2015 favouring recourse to class action mechanisms. As class actions are still not available everywhere throughout the European Union, the EC issued a draft directive on 11 April 2018 as part of its 'New Deal for Consumers' initiative, which, if adopted, will introduce a European class action mechanism for damages claims related to anticompetitive behaviours. The European Parliament and the Council reached a provisional political agreement regarding the proposal on 22 June 2020.

According to the planned mechanism, only qualified entities designated in advance by member states or created on an ad hoc basis for a specific action will be entitled to bring damages claims class actions, provided that they comply with strict obligations regarding the source of their funding. The draft directive provides that member states should be able to choose between opt-in and opt-out mechanisms to best respond to their legal tradition.

COOPERATING PARTIES

Immunity

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

The EC 2006 Notice on Immunity from fines and reduction of fines in cartel cases (the Leniency Notice) provides for a leniency mechanism under EU law.

To benefit from full immunity from fines (and softening of liability in damages claims), an undertaking must be the first to denounce the cartel and must provide evidence allowing the EC to 'carry out a targeted inspection in connection with the alleged cartel; or find an infringement of article 81 EC [now 101 TFEU] in connection with the alleged cartel' (paragraph 8). The undertaking must also cooperate with the EC throughout the procedure, and in particular should supply it with accurate information. In addition, the company must terminate its participation in the alleged cartel without delay. It must not have destroyed, falsified or concealed evidence of the cartel, nor have disclosed its intention to apply for leniency or the contents of its application (except to an NCA). Finally, a company may be deprived of immunity if it has forced one or more others to join or remain in the cartel.

In addition, the EC has introduced whistleblowing mechanisms. In 2017, it put in place an online anonymous whistleblowing form allowing any individual to sound the alert about the existence of a cartel. Furthermore, Directive No. 2019/1937 on the protection of whistleblowers, adopted in 2019, provides for the creation of reporting channels within companies and administrations, a hierarchy of internal and external communication channels, the protection of a large number of profiles (eg, employees, including civil servants, shareholders, volunteers, trainees, etc) and measures to protect whistleblowers from reprisals. Please note that member states have until 17 December 2021 to transpose this Directive.

Subsequent cooperating parties

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

Undertakings that do not qualify for full immunity may still be granted a reduction to their fine. They must provide evidence that has an 'added value with respect to the evidence already in the Commission's possession', (ie, that strengthens by its nature and/or degree of precision the EC's ability to establish the existence of the alleged cartel). In terms of cooperation, subsequent applicants must satisfy the same level of cooperation as the first-in. The reduction ranges from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others. There is currently no 'immunity plus' or 'amnesty plus' option.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Second cooperating parties must satisfy the same level of cooperation as the first-in. They may benefit from reductions in the fine ranging from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others, provided that they bring additional compelling evidence with significant added value. There are no 'immunity plus' or 'amnesty plus' treatments available under EU law.

Approaching the authorities

- 31 | 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 applicant should contact the Directorate-General of Competition (DG Competition) before the statement of objections has been issued. However, in practice, most leniency applications seeking an immunity from a fine (which is only available to the first leniency applicant) are made either before the EC starts an investigation (in which case they form the basis for initiating an investigation) or upon the initiation of an investigation.

The undertaking must submit a formal application for immunity including relevant statements and evidence. According to the Leniency Notice, it can also present this information in hypothetical form, 'in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date' (paragraph 16).

Please note that the EC has set up a marker system 'protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence' (paragraph 15). The marker system is typically used during dawn raids or at the very beginning of an investigation, insofar as it allows the undertaking to file for leniency without having to immediately provide supporting evidence. If the undertaking provides all the documents within the deadline set by the EC, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

Cooperation

- 32 | 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 that are seeking partial leniency?

All immunity applicants, regardless of their rank, must provide compelling evidence to the EC and fully cooperate with the EC's investigators throughout the procedure. The EC will grant immunity from fines to the first leniency applicant, provided that it submits evidence and information which, in the EC's view, will enable it to carry out a targeted inspection in connection with the alleged cartel or to find an infringement of article 101 TFEU. Any subsequent applicant must bring additional evidence with significant added value.

Applicants must also terminate their participation in the alleged cartel without delay, and refrain from disclosing their intention to apply for leniency or their application to anyone, except to an NCA.

Applicants that have destroyed, falsified or concealed evidence of the cartel, or forced one or more others to join or remain in the cartel, will not be eligible for leniency.

Confidentiality

- 33 | 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 EC under the Leniency Notice are confidential. In practice, the following will be deemed confidential:

- documents containing business secrets;
- documents that would significantly harm a person or an undertaking if they were to be disclosed; and
- internal documents of the EC or of NCAs, such as minutes of meetings with leniency applicants.

Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to files (ie, after deletion or replacement of business secrets and other confidential information, as provided for by the Notice on the rules for access to the Commission file of 22 December 2005).

The Leniency Notice further provides that any written statement made to the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used by the EC for any other purpose than the enforcement of article 101 TFEU. Therefore, they may not serve as evidence in matters of private enforcement.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Following an extensive public consultation, in 2008 the EC adopted Regulation No. 622/2008 in order to set up a European settlement procedure, as well as a Communication to clarify its application. Under the settlement procedure, parties which admit having participated in a cartel infringement can obtain a 10 per cent reduction in the fine. The settlement procedure can be combined with a leniency application.

In practice, while undertakings may express their interest for a settlement, the initiative rests with the EC, which has a discretionary power to decide whether a case is suitable or not for settlement. When it considers having recourse to the settlement procedure, the EC sends a letter to all parties informing them of its decision to consider a potential settlement and requesting them to express their interest in such a procedure.

Each party has a period of at least two weeks to decide whether or not to enter into the settlement procedure, without this implying any admission of having participated in an infringement or of being liable for it at this stage. If the party decides to enter into the settlement procedure, bilateral discussions open with the EC. Please note that a party that wishes to enter into such procedure and at the same time to apply for leniency must do both within the same deadline.

If the discussions are fruitful, the party will be granted at least 15 working days to submit a conditional settlement proposal to the EC, in which it acknowledges and explains in detail its responsibility in the implementation of the infringement. Upon the party's request, the EC may allow those settlement submissions to be provided orally. In such cases, settlement submissions will be recorded and transcribed at the EC's premises. In response, the EC sends a streamlined statement of objections endorsing the party's proposal, to which the latter will have at least two weeks to reply, confirming that it reflects its submission.

Finally, the College of Commissioners of the EC adopts the settlement decision, which is generally a lighter version of a decision adopted pursuant to the normal procedure, in that it contains far fewer elements than a full probe decision. The EC can terminate the settlement procedure at any time and retains the right to change its position until the final decision is made.

Although the settlement procedure was initially scarcely used, there have now been 34 cartel settlements. By way of example, the last five decisions of the EC imposing sanctions relating to article 101 TFEU infringements involved settlement proceedings.

Lastly, if the settlement procedure is not subject to the agreement of all of the undertakings involved, the EC is faced with a hybrid procedure, whereby certain undertakings settle while others decide to defend themselves. This was notably the case in the *Trucks* cartel case, where one participant to the cartel was prosecuted under the standard procedure (EC, 27 September 2017, *Trucks*, AT.39824), while the others settled with the EC (EC, 19 July 2016, *Trucks*, AT.39824). In 2017, the GCEU held that in such cases the EC must take all necessary measures to guarantee the presumption of innocence of the undertaking which has decided not to enter into a settlement. To do so, it must take the necessary measures when:

[It] is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement [including] possible adoption on the same date of several decisions relating to all the undertakings concerned by the cartel.

GCEU, 10 November 2017, *Icap*, T-180/15

Corporate defendant and employees

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

The EC does not impose penalties on individuals, there is thus no such immunity.

Dealing with the enforcement agency

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

The immunity applicant and subsequent leniency applicants must contact the DG Competition before the statement of objections has been issued, and submit a formal application including relevant statements and evidence. They can also present this information in hypothetical form, 'in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date' (paragraph 16 of the Leniency Notice).

The undertaking must, without delay, terminate their participation in the alleged cartel and cooperate fully with the EC's investigation team and supply it with relevant information.

DEFENDING A CASE

Disclosure

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

The information disclosed to the defendant depends upon the type of procedure: standard or settlement procedure.

Under the normal procedure, the statement of objections must be issued in writing and contain all the factual and legal elements that the EC intends to use in its decision. Thus, the nature, geographical area, gravity and duration of the infringements identified by the investigators, as well as the liability of each company, must be specified. However, the EC does not have to mention the range of potential fines. Each undertaking concerned must be able to understand clearly the infringement with which it is charged and may have access to the case team's file, but not to internal documents and documents containing confidential information or relating to business secrets.

Conversely, under the settlement procedure the parties are informed in advance of the objections that the EC intends to raise against them, as well as of the maximum amount of the potential fine that may be imposed on them. They have access to all the elements on which the EC intends to rely during the procedure. The parties may be granted access to the file if the statement of objections does not correspond to the content of their submissions.

Representing employees

38 | 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 or representation?

The EC does not impose fines on individuals.

Multiple corporate defendants

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

Conflicts of interests are dealt with at the national level, in accordance with each country's laws.

This principle was recalled by the ECJ in 2018, in a case where the GCEU allegedly erred in law by dismissing a breach of a 'principle of prohibition of double representation'. According to the applicant, the GCEU should have declared the evidence submitted by one party inadmissible, since its lawyers had a conflict of interest in respect of one of their other clients in the same case. The ECJ ruled that:

[The] question whether a lawyer has complied with his obligations under national law and rules governing conduct in agreeing to represent a client in a case liable to give rise to a conflict of interest in respect of another client does not fall within the scope of the competence conferred on the Commission for the purposes of applying articles 101 and 102 TFEU.

ECJ, 1 February 2018, *Schenker*, C-263/16

A counsel may therefore represent multiple corporate defendants if their interests are aligned and if there is no risk of conflict in the future. However, in practice, unless they form part of the same group, each investigated company is usually represented by its own counsel.

Payment of penalties and legal costs

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

The EC does not impose fines on individuals.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Tax consequences of fines and other penalties are dealt with at the national level, as are private damages payments. Please note however that the EC published amicus curiae observations in 2012, stating that allowing these fines to be tax-deductible would deprive them of their deterrent effect (EC, 8 March 2012, written observations in Case No. 5285, *Tessenderlo Chemie*).

International double jeopardy

42 | 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, the EC does not take into account penalties imposed in non-member states' jurisdictions when determining sanctions for a cartel. The ECJ recalled in 2015 that neither the principle non bis in idem nor any other principle of law obliges the EC to take account of proceedings and penalties to which an undertaking has been subject in non-member states (see ECJ, 9 July 2015, *InnoLux*, C-231/14).

Getting the fine down

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

The leniency procedure is the best option available to the parties to obtain a reduction in the fine, which can go up to full immunity for the first applicant. The settlement procedure is the other option available to the parties, allowing them to benefit from a 10 per cent reduction of their fine in exchange for their cooperation and recognition of liability, which allows the EC to achieve procedural gains.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 17 October 2019, the European Court of Justice (ECJ) upheld a decision of the General Court of the European Union (GCEU) dismissing a request for the suspension of a European Commission

(EC) investigation and the annulment of an on-site inspection, on the ground that the inspectors examined documents marked as legally privileged (ECJ, 17 October 2019, *Alcodis/Alcogroup*, C-403/18).

On 7 November 2019, the GCEU found that the EC had wrongfully sanctioned Campine for a single and continuous infringement that lasted three years, while it had not established its participation in the cartel for two 11-months periods (GCEU, 7 November 2019, *Campine*, T-240/17).

On 12 December 2019, the ECJ ruled that any legal person, including a local authority (in this case, an Austrian Land) is able to validly claim compensation, provided it establishes it has suffered damage resulting from a cartel (ECJ, 12 December 2019, *Otis GmbH*, C-435/18).

On 2 April 2020 a preliminary ruling of the ECJ (as well as the 5 September 2019 opinion of Advocate General Bobek), recalled and clarified the criteria applicable for determining whether an agreement can be considered a restriction of competition by object (ECJ, 2 April 2020, *Gazdasági Versenyhivatal c/ Budapest Bank Nyrt. e.a.*, C-228/18).

On 14 May 2020, the ECJ partly annulled the GCEU's judgment dismissing NKT Verwaltung's appeal against the €3.8 million fine imposed on it by the EC for its participation in the 'cable' cartel. The ECJ found that NKT's rights of defence had been breached, insofar as the EC indicated in the statement of objections that it would exclude from the scope of the infringement activities relating to certain sales in non-EU or non-EEA countries, but nonetheless took account of them for the calculation of the fine (ECJ, 14 May 2020, *NKT Verwaltung*, C-607/18).

On 16 July 2020, the ECJ ruled that the EC may make copies of documents during a dawn raid in order to examine them later in Brussels (ECJ, 16 July 2020, *Nexans*, C-606/18).

On 5 October 2020, the GCEU partially annulled decisions adopted by the EC to authorise dawn raids at the premises of two French supermarkets chains, on the grounds that it lacked sufficiently strong evidence to reasonably suspect an infringement to competition law and justify on-site inspections (GCEU, 5 October 2020, *ITM*, T-254/17 and *Casino*, T-249/17).

On 28 October 2020, the ECJ dismissed an applicant's challenge to a GCEU decision that upheld the EC's Power Cables cartel decision of 2014, ruling that the undertaking failed to rebut the presumption that it exercised decisive influence over its subsidiary. The GCEU recalled that the EC can presume 'decisive influence' and thus liability, where a parent company holds all or almost all of the shares in its subsidiary (ECJ, 28 October 2020, *Pirelli*, C-611/18).

Moreover, the most recent cartel decisions issued by the EC include decisions in the sectors of closure systems (EC, 29 September 2020, AT.40299), ethylene (EC, 14 July 2020, AT.40410) and canned vegetables (EC, 27 September 2019, AT.40127), where it imposed fines totalling €18 million, €260 million and €31.6 million respectively. These decisions have not yet been made public.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

On 8 April 2020, the EC published a Notice on a Temporary Framework (the Temporary Framework Notice) to provide guidance on anticompetitive practices for companies cooperating to respond to emergency situations related to the current coronavirus pandemic. This Temporary Framework Notice allows competing undertakings to coordinate their actions in order to address shortages of essential products, whether or not they are used directly in the treatment of coronavirus patients, provided they do not go beyond what is strictly necessary to address the difficulties raised by the current health situation.

The EC thus stated that it would deem admissible, provided that they are accompanied by sufficient guarantees to prevent exchanges of commercially sensitive information, direct or indirect cooperation aimed at:

- coordinating the transport of input materials;
- contributing to the identification of essential medicines for which there is a risk of shortage;
- aggregating information on production capacities; or
- forecasting demand at the level of a member state.

However, such exchanges must be accompanied by sufficient safeguards to prevent, for example, companies sharing commercially confidential information.

In addition, the EC temporarily reinstated the mechanism of comfort letters, which were issued before 2003 but had since been abandoned in favour of a self-examination by companies of the compatibility of their behaviour with competition law. A first comfort letter was issued on 8 April 2020, concerning a cooperation project between pharmaceutical companies to increase and optimise the production of several specialities necessary for the treatment of coronavirus patients.

The EC made clear that there would be no relaxation of competition law enforcement during the pandemic, and that it would not tolerate any behaviour taking advantage of the crisis or using it as a cover to set up anticompetitive collusion, in particular by setting prices above market level or limiting production. Finally, the EC indicated that such relief would not protect undertakings against private litigation, whereby a claimant would seek to recover losses suffered as a result of competition law violations.

Dechert
LLP

Mélanie Thill-Tayara

melanie.thill-tayara@dechert.com

Marion Provost

marion.provost@dechert.com

32 rue de Monceau

Paris, 75008

France

Tel: +33 1 57 57 80 80

www.dechert.com

Finland

Mikael Wahlbeck, Antti Järvinen and Niko Hukkinen

Frontia Attorneys Ltd

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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 five 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.

Changes

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

The Finnish competition law was more comprehensively reformed through the introduction of the new Competition Act that entered 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.

The Finnish Act on Antitrust Damages Actions came into effect on 26 December 2016 after a legislative process following the entry into force of the EU Directive on Antitrust Damages Actions on 26 December 2014.

The most recent amendments to the Competition Act entered into force in 2019, including changes to the investigative powers of the FCCA. For example, the FCCA now has the right to continue dawn raid inspections of electronic information at the FCCA's premises.

The Ministry of Employment and the Economy set up a working group on 14 June 2019 to prepare amendments to the Competition Act necessitated by the Directive (EU) 2019 /1 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive). The working group rendered its report in the form of a draft government bill in May 2020. Proposed amendments relate to, among other things, structural remedies for violations of articles 101 and 102 of the TFEU and the equivalent provision of the Competition Act, fines for infringement of procedural rules and sanctions that can be imposed on trade associations and their members. In addition, the working group proposes guidelines on the calculation of fines that would be binding for the FCCA. The deadline for national implementation is 4 February 2021.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The prohibition against anti-competitive 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 that 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. If a restriction is considered to be 'by object', it is not necessary to show any anti-competitive effects. There are no specific provisions on the level of knowledge or intent for a finding of liability.

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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

As in EU competition law, the creation of a full-function joint venture falls under the merger control rules provided that the turnover thresholds are fulfilled.

Non-full-function joint ventures and strategic alliances are assessed under the rules applicable to cartels, in particular sections 5 and 6 of the Competition Act as well as article 101 TFEU if the competition restriction affects trade between Member States.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

6 | 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.

Application of the law

7 | Does the law apply to individuals, corporations and other entities?

The Finnish Competition Act (948/2011) (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.

Extraterritoriality

8 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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.

Export cartels

9 | 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. The Competition Act is generally not applicable to anti-competitive behaviour outside Finland, unless the restrictions are directed against Finnish customers. However, the Finnish government may prescribe by decree that the Act extends 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.

Industry-specific provisions

10 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Competition Act does not contain any industry-specific infringements. However, according to section 4a, an undertaking with a market share of at least 30 per cent in the Finnish daily consumer goods retail trade shall be deemed to occupy a dominant position. Thus, agreements entered into by such undertakings are in addition to the prohibition against anti-competitive agreements also assessed under the prohibition against abuse of dominance.

The Competition Act is not applied to agreements or arrangements which concern the labour market. Furthermore, section 5 of the Act shall not be applied to arrangements by agricultural producers, associations of agricultural producers, sector-specific associations, and any associations formed by these sector-specific associations concerning the production or sales of agricultural products or the use of common storage, processing or refining facilities if the arrangement fulfils the substantive requirements established in accordance with article 42 the Treaty on the Functioning of the European Union (TFEU).

Government-approved conduct

11 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The Competition Act contains no specific defence or exemption for state actions, government-approved activity or regulated conduct.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

If the Finnish Competition and Consumer Authority (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.

Investigative powers of the authorities

13 | 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 European 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. As of June 2019 the FCCA has also the right of a continued investigation, i.e. take copies of material collected during a dawn raid

to its own premises and continue the inspection there. The inspection rights of the FCCA concern all mediums of storage, including tablets, mobile phones and other mobile devices of company's personnel.

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 (i.e. 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

Inter-agency cooperation

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

The Finnish Competition and Consumer Authority (FCCA) is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of European Union's 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.

Interplay between jurisdictions

15 | 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

Decisions

16 | 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 Supreme Administrative Court (SAC).

Burden of proof

17 | 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.

Circumstantial evidence

18 | 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.

Appeal process

19 | 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

Criminal sanctions

20 | 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.

Civil and administrative sanctions

21 | 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 (the 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 of the Treaty on the Functioning of the European Union (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. After ordering interim measures the FCCA must take a decision on the substance of the matter within 90 days.

Guidelines for sanction levels

22 | 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.

Compliance programmes

- 23 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There are no provisions to this effect in the Competition Act. Compliance programmes can as such be taken into account as part of the overall assessment, however there exist no references to this in the case law.

Director disqualification

- 24 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Competition Act does not include such provisions.

Debarment

- 25 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 debarment time period.

Parallel proceedings

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

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

Private damage claims

- 27 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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). Therefore, there are no legal obstacles to bring, for example,

umbrella purchaser claims. 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.

Class actions

- 28 | Are class actions possible? If so, 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

Immunity

- 29 | Is there an immunity programme? If so, 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 Finnish Competition Act (948/2011) (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 Finnish Competition and Consumer Authority (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 the Treaty on the Functioning of the European Union (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 the 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.

Under the Finnish Act on Antitrust Damages Actions, an undertaking that has obtained immunity from fines is as a main rule responsible only for damage caused to its own direct or indirect customers or suppliers.

Subsequent cooperating parties

- 30 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 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.

Going in second

- 31 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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. 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 is second, and by 20 per cent at most for other applicants fulfilling the criteria.

Approaching the authorities

- 32 | 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.

Cooperation

- 33 | 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 that are seeking partial leniency?

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.

Confidentiality

- 34 | 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 Supreme Administrative Court (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, as a starting point, be used in handling a 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 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. These rules largely follow the EU Directive on Antitrust Damages Actions.

Settlements

35 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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.

Corporate defendant and employees

36 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.

Dealing with the enforcement agency

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

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 the 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.

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.

DEFENDING A CASE

Disclosure

38 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 Finnish Competition and Consumer Authority (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 Treaty on the Functioning of the European Union (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.

Representing employees

- 39 | 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 or representation?

The FCCA's investigations of the suspected cartel infringements and the following Market Court and Supreme Administrative Court (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.

Multiple corporate defendants

- 40 | 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.

Payment of penalties and legal costs

- 41 | 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.

Taxes

- 42 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

- 43 | 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.

Getting the fine down

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

An undertaking can take advantage of the immunity and leniency procedure as described in more detail in questions 28 to 32. 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.



Mikael Wahlbeck

mikael.wahlbeck@frontia.fi

Antti Järvinen

antti.jarvinen@frontia.fi

Niko Hukkinen

niko.hukkinen@frontia.fi

Unioninkatu 30
00100 Helsinki
Finland
Tel: +358 50 362 1951
www.frontia.fi

UPDATE AND TRENDS

Recent cases

- 45 | What were the key cases, judgments and other developments of the past year?

The most significant competition case pending before the Supreme Administrative Court (SAC) concerns the power line design and construction sector. In 2014, the Finnish Competition and Consumer Authority (FCCA) granted full leniency to Empower, and at the same time proposed that a cartel fine amounting to €35 million be imposed on Eltel. The Market Court rejected the proposal as time-barred in March 2016. In June 2019, the SAC made a request for a preliminary ruling to the European Court of Justice (Case C-450/19). The request refers to the question of how long a competition restriction continues in a situation in which a cartel participant has entered into a construction contract, as agreed in the cartel, with a player outside the cartel.

In the biggest cartel case currently pending before the Finnish Market Court, the FCCA has made a fine proposal amounting to about €4 million. The FCCA alleges that three EPS insulation manufacturers have participated in prohibited cooperation between 2012 and 2014.

On the private enforcement side, on 14 March 2019, the European Court of Justice issued its preliminary ruling (C-724/17) related to the Finnish *Asphalt Cartel Damage* case. The Finnish Supreme Court had made a request for a preliminary ruling concerning whether economic succession is applicable in competition law damage cases, and if so, in which circumstances. The European Court of Justice and later the Finnish Supreme Court confirmed that if a company participating in a competition law infringement is dissolved, damages can also be claimed from a company that continues the economic activity of the dissolved company. On 18 June 2019 and 22 October 2019, the Supreme Court ruled on defendant YIT's appeals in three cases and partially accepted them. There is still one case pending before the Supreme Court.

Regime reviews and modifications

- 46 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Ministry of Employment and the Economy set up a working group on 14 June 2019 to prepare amendments to the Competition Act necessitated by the Directive (EU) 2019 /1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive). The working group rendered its report in the form of a draft government bill in May 2020. Proposed amendments relate to inter alia structural remedies for violations of articles 101 and 102 of the Treaty on the Functioning of the European Union and the equivalent provision of the Competition Act, fines for infringement of procedural rules and sanctions that can be imposed on trade associations and their members. In addition, the working group proposes guidelines on the calculation of fines that would be binding for the FCCA. The deadline of the national implementation is 4 February 2021.

Coronavirus

- 47 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In a statement published on 9 April 2020, the FCCA noted that it applies the Competition Act in accordance with the policies given in the Commission's Framework Communication of 8 April 2020. Under the conditions stated therein, companies are, among other things, permitted to make co-operative arrangements for the purpose of, for example, safeguarding the supply of personal protective equipment and medicines.

France

Lionel Lesur and Anna Sacco

Franklin

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

In France, cartels are prohibited by article L 420-1 of the French Commercial Code (FCC).

If a prohibited practice is capable of affecting trade between EU member states, both article 101 Treaty on the Functioning of the European Union (TFEU) and article L 420-1 of the FCC may apply cumulatively.

Procedural rules are provided for in articles L 450-1 to L 450-8 of the FCC, and the principles relating to their implementation are described in articles R 450-1 to R 450-8 of the FCC.

Relevant institutions

2 | 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 French Competition Authority (FCA), an independent administrative authority created in 2008 to replace the former Competition Council, investigates cartel matters.

Within the FCA, a functional separation between its investigating and decision-making services has been established.

The investigating services of the FCA carries out the entire investigation phase. This service is composed of case handlers allocated among different services under the direction of a general case handler.

The FCA's decision-making body, the board, comprises of 17 members who do not participate in the investigations. The president of the FCA is member of the board. Isabelle de Silva was appointed in 2016. The board meets in plenary sessions, divisions or as a standing committee.

The FCA may initiate a cartel investigation ex officio, following a leniency application, a prior investigation led by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control, or a third-party complaint.

Changes

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

On procedural aspects, France is transposing the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive) which will bring minor changes to French competition law and will confer new powers on the FCA. It will introduce a principle of discretionary prosecution and the FCA will have the power to choose the cases to be addressed in priority and to act on its own initiative to impose interim measures. Finally, the maximum fine will be raised and the €3 million maximum fine currently applicable to associations will be removed.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article L 420-1 of the FCC prohibits concerted actions, agreements or alliances, whether express or tacit implemented by undertakings or associations of undertakings, that have, or may have, as their objective the effect of preventing, restricting or distorting the free play of competition in a market.

Article L 420-1 of the FCC does not provide for an exhaustive list of prohibited practices. There are no specific provisions dealing with group boycotts or bid rigging but they fall under the scope of this article.

Cartels are 'by object' restrictions which are per se illegal and their anticompetitive effect does not need to be proven.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are subject to cartel regulation.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The law applies both to corporations and individuals, as long as they are engaged in a production, distribution or service activity.

Individuals may also subject to criminal responsibility if they are involved in anticompetitive behaviours, such as cartels.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

French competition law applies to concerted actions, agreements, or alliances that have the objective of affecting the French market or have an effect on the French market regardless of the place where the companies involved have their headquarters and the conduct took place.

Export cartels

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

French law does not provide for any exemption or defence for conduct that only affects customers or other parties outside the jurisdiction.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Article L 420-4 of the French Commercial Code (FCC) sets a specific provision which applies to the agricultural sector.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Two exemptions are set out by the French Commercial Code (FCC) at article L 420-4.

The first exemption covers practices which result from the application of law or subsequent regulations.

For instance, in 2010, the French Court of Cassation 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 L 420-1 of the FCC. The second exemption concerns practices, the actors of which can justify they ensure economic progress, including by creating or maintaining jobs, and that they reserve a fair share in the resulting profit for users, without giving the undertakings involved the opportunity to eliminate a substantial part of the competition for the products in question. Practices consisting of organising agricultural products or products of agricultural origin under the same brand or trade name, production volumes and quality or the commercial policy (including agreeing a common transfer price), may only impose restrictions on competition that are essential to achieve the aim of economic progress.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The French Competition Authority (FCA) can start an investigation at its own initiative, following a leniency application, a third-party complaint, or a prior investigation led by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control.

Once a case has come to the FCA's attention, the FCA will try to collect further information to determine whether there are relevant and reasonable evidence to establish an infringement to competition law.

For that purpose, the general case handler usually appoints one or more agents of the investigating services as case handlers to examine each case.

The FCA may organise unannounced inspections, send requests for information, and set up interviews with any relevant director or employee.

The investigation phase is not subject to any specific timeframe.

Investigative powers of the authorities

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

Under French law, agents of the FCA may conduct two types of investigations.

Ordinary investigations (article L 450-3 of the FCC)

Under article L 450-3 of the FCC, agents have the power to:

- access all business premises, land or means of transport for professional use;
- request copies of books, invoices and all other professional documents, and obtain or take copies of these by any means and on any medium;

- have access to software and data stored, and to the unencrypted reproduction of information;
- access to the data stored and processed by telecommunications operators, under the conditions and within the limits provided for in article L 34-1 of the French Post and Electronic Communications Code.

FCA officials inform an investigated undertaking prior to a visit. The officials schedule a meeting with the investigated undertaking and will, generally, request for a list of documents to be prepared and provided for the scheduled visit.

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct an investigation, in particular by supplying incomplete or inaccurate information, or by submitting incomplete or misleading information or documents (article L 464-2-V of the FCC).

Investigations under judicial control (article L 450-4 of the FCC)

Under this article, investigations are subject to a judicial order from the liberty and custody judge, upon the request of the French Minister of the Economy, the general case handler or the European Commission.

If the authorisation is granted, investigations will be carried out under the supervision of the judge and in the presence of the company's representative (or two independent witnesses) and two police officers.

Officials may:

- conduct unannounced visits to any place;
- seize documents and any information medium;
- affix seals to all business premises, documents and electronic storage media within the limit of the duration of the visit to these premises;
- access the data stored and processed by telecommunications operators; and
- ask any representative for explanations of facts or documents relating to the subject matter of the investigation.

The order issued by the judge of freedoms and detention must be notified verbally.

The company under investigation has the right to be assisted by external legal counsel, but the inspectors do not have to wait for the arrival of the external legal counsel to start an investigation.

The judicial order authorising the dawn raid and the conduct of the dawn raid may each be appealed before the first president of the Court of Appeal, within 10 calendar days following the notification of the judicial order or the receipt of the minutes of the investigation established by the FCA's inspectors.

Any obstruction of an investigation can be punished by a fine of up to €300,000 and a two-year prison sentence (article L 450-8 of the FCC).

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct investigations, in particular by supplying or submitting incomplete, inaccurate or misleading information or documents (article L 464-2-V of the FCC).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The French Competition Authority (FCA) cooperates with competition authorities of other jurisdictions, in particular the European Commission. It may share among the authorities information and documents it already has in its possession.

Cooperation between European national competent authorities (NCAs) is increasing. For instance, in 2019, the FCA and Germany's Federal Cartel Office launched a joined project on algorithms and their implications on competition. The final report was presented in November 2019.

The FCA is also a member of the OECD Competition Committee, the United Nations' Intergovernmental Group of Experts, and the International Competition Network (ICN).

As an example, through the ICN's Cartel Working Group, the FCA participated in the study of the implications of Big Data and algorithms in the fight against cartels. The scoping paper was issued in June 2020 and presented two perspectives: Big Data and algorithms as a new 'threat' and as a new 'tool' for cartel enforcement.

Interplay between jurisdictions

14 | 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?

Regulation 1/2003 organises the cooperation between the European NCAs.

According to article 22(1) of the Regulation 1/2003, the FCA may, in its own territory, carry out inspections or other fact-finding measures under its national law on behalf of the NCA of another EU member state in order to establish whether there has been an infringement of article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

The FCA may also request the communication of information or documents.

Since NCAs may also apply European competition law, the FCA shall inform the European Commission when it applies article 101 TFEU, before starting investigation measures, and will stop its investigation if the Commission initiates its own proceedings.

The FCA actively cooperates with the European Commission by performing investigations and supplying any relevant information or documents.

A recent example of cooperation is the *Booking* case. The FCA, in collaboration with nine NCAs and the Commission, launched a survey among hoteliers to assess remedies implemented in the hotel booking sector.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Adjudication powers lie with the French Competition Authority (FCA) and national courts.

During the investigation and the prosecution phase, the FCA's agents gather all the relevant information to determine the existence of anticompetitive practices.

At the end of the investigation, the FCA dismisses the case or provides the concerned parties with a statement of objections and the parties can answer within two months. The investigation services will then issue a report detailing the objections upheld by the rapporteur at the end of the investigation, the seriousness of the anticompetitive behaviour and the damage it caused to the economy. The parties can answer within two months.

The case is then discussed before the FCA's board. The board hears the investigation services, the parties and a representative of the government.

After a hearing with the parties, the board will issue a decision and may impose sanctions or dismiss the case.

Burden of proof

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

The burden of proof rests on the party alleging a fact. It can fall on the FCA if its stance is that the anticompetitive behaviour is a cartel or on the party alleging a breach of competition rules.

For commercial matters, in France, evidence is freely submitted by the parties (ie, evidence may be provided by any means (eg, documents or witness testimony)).

Circumstantial evidence

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

The FCA can prove an infringement via circumstantial evidence – precise, serious and consistent indicia that are circumstantial and do not have a direct link to the actual infringement can constitute sufficient proof of the infringement when taken together.

Appeal process

18 | What is the appeal process?

The FCA's decisions can be appealed by the parties or the French Minister of the Economy before the Paris Court of Appeal within a month of the decision being issued (article L 464–8 of the French Commercial Code (FCC)). Appeals before the Paris Court of Appeal are full appeals and may challenge facts and points of law. Thus, the court can annul FCA decisions either partially or totally.

Appeals are not suspensive. However, the First President of the Paris Court of Appeal may order the execution of the decision to be suspended if it may lead to manifestly excessive consequences or if new facts of exceptional gravity have come to light since notification of the decision was issued.

Appeals can be further referred to France's highest civil court, the Court of Cassation, within two months of the Paris Court of Appeal issuing its appellant ruling. This further appeal is limited to points of law and does not have a suspensive effect.

An appeal against an FCA interim measure may be lodged before the Paris Court of Appeal within 10 days after receiving notification of the FCA's decision. The FCA shall render its decision within one month.

SANCTIONS

Criminal sanctions

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

Article L 420–6 of the French Commercial Code (FCC) provides that taking a personal and decisive part in the conception, organisation or implementation of an anticompetitive practice is a criminal offence, and individuals can be punished by a prison sentence of four years and a fine up to €75,000.

Criminal sanctions cannot be imposed by the French Competition Authority (FCA), which has to refer the criminal part of the case to the public prosecutor.

In practice, criminal sanctions are very rare and cases are limited to bid rigging in which the French state was the victim. So far, no prison sentences have been issued.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The FCA has the power to impose injunctions, publicise its findings, and issue fines.

Injunctions and interim measures

The FCA may issue injunctions requesting the termination of the anti-competitive practice within a determined period. If this order is not followed, a financial penalty may be imposed.

The FCA may also grant interim measures (L 464-1 of the FCC) if there is a strong presumption that the alleged practice will seriously and immediately affect the general economy, the economy of the concerned sector, or the interests of consumers or the plaintiff.

If the FCA is not already involved, the French Minister of the Economy may also impose orders obliging parties to terminate anticompetitive practices (article L 464-9 of the FCC) if the affected market is local, the practice does not fall within articles 101 or 102 of the Treaty on the Functioning of the European Union, the national turnover of either company does not exceed €59 million, and its aggregated turnover does not exceed €200 million.

Publication

The FCA has the power to order the publication in the press of a summary of its decision. The purpose of this is to alert companies in the sector and the public of the harmful nature of the unlawful behaviour (article L 464-2 of the FCC).

Fines and sanctions

The FCA may impose fines of up to 10 per cent of an undertaking's total annual worldwide turnover. Fines imposed on individuals are limited to €3 million.

Periodic penalty payments of up to 5 per cent of the average daily turnover of a company can also be ordered by the FCA to force a company to comply with its decision or a binding commitment undertaken by the company.

The FCA is bound by its 2011 fining guidelines for the setting of sanctions.

The FCA may also impose fines of up to 1 per cent of an undertaking's total annual worldwide turnover to undertakings that obstruct an investigation, in particular by supplying incomplete or inaccurate information, or by submitting incomplete or misleading information or documents.

Civil sanctions

French law does not provide for any specific civil sanctions. Civil actions before national courts are opened to companies or individuals that have suffered damages from anticompetitive practices.

Guidelines for sanction levels

21 | 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 issued a procedural notice on the method for setting antitrust fines.

First, the FCA sets a 'basic amount' for each company on the basis of the proportion of the value of the sales or products or services to which the infringement relates.

Second, the FCA adjusts the basic amount on the basis of the company's individual situation. It may take into account aggravating

circumstances (eg, a leadership role) or mitigating circumstances (eg, the company was compelled to participate in the cartel).

Then it compares the adjusted base amount with the legal maximum and then adjusts it to take into account leniency proceedings or settlements.

Finally, the FCA may adjust the amount if the company is currently facing financial difficulties.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Since October 2017, the existence of a competition law compliance programme does not affect the fine the FCA may impose. Therefore, no mitigating factor can be expected from a compliance programme. Similarly, the FCA will not treat the existence of a compliance programme as an aggravating factor.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Disqualification is not a sanction under French competition law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Under article L 2141-9 of the French Public Procurement Code, a public purchaser may exclude individuals and companies from public procurement procedures if the purchaser has sufficient evidence that an individual has implemented coordination practices with a view to distorting competition.

Parallel proceedings

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

The same conduct can lead to criminal and administrative sanctions, but they cannot be imposed by the same court. Criminal penalties can only be imposed by the national criminal courts, while administrative sanctions are imposed by the FCA.

Individuals or companies that suffer a loss from an anticompetitive practice can bring a private damage claim in front of the civil courts.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any individual or company that suffers a personal harm from an anticompetitive practice can bring a private claim before national courts.

Pursuant to article L 481-3 of the FCC, the harm suffered may include loss, lost profit, loss of opportunity or non-material damage.

In accordance to the French rules of civil liability, the plaintiff has to prove:

- an infringement of competition rules;
- the damage suffered; and
- a causal link between the infringement and the damage.

There are no specific rules governing the level of damage. French law guarantees the principle of full reparation of the damage but prohibits punitive damages.

Plaintiffs may face numerous difficulties in proving the fault, the damage and the causal link between them.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the EU member states and of the European Union was transposed into French law by Order No. 2017-303 and Decree No. 2017-305 of 9 March 2017.

The new provisions introduce an irrebuttable presumption of fault when the existence and imputation of the anticompetitive practice have been established by an FCA decision which cannot be the subject of an appeal before the Paris Court Appeal (article L 481-2 of the FCC).

Thus, the victim does not have to prove an infringement if the private action is brought after the FCA's decision. Victims of competition law infringements may also bring stand-alone actions (ie, actions that are not based on a previous finding of infringement by a competition authority). In these cases, the victim must prove the alleged infringement of competition law, the harm suffered and the causal link between the two.

The Directive 2015/104/EU created a rebuttable presumption of a damage to the victim of a cartel.

If the claimant faces difficulties quantifying the harm, national courts can be empowered to make an estimation.

Following the directive and the ordinance, additional guidance was provided by the Commission at the European level, which issued a guide in 2019 on the assessment of the passing on of overcharges, as well as by the French Ministry of Justice, which adopted a soft law instrument to assist victims and the courts in interpreting the provisions of the Ordinance (the Circular of 23 March 2017). The Paris Court of Appeal also issued a set of guidelines focusing on the assessment of economic damages (*Fiches méthodologiques*, 19 October 2017).

Class actions

27 Are class actions possible? If so, 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 may bring class actions before competent civil courts.

The class must be represented by an authorised consumer association and members of the class must be selected through an opt-in system (article L 623-1 (2) of the FCC). Neither consumers acting alone nor professionals (ie, workers who are required to be a member of regulatory bodies) may engage in a class action.

Class actions may only be brought within five years from the date of the decision establishing an infringement of competition rules was made.

The procedure is conducted in two phases.

In the first phase, a judge rules on the principle of the defendant's and defines the categories of victims. The judge also determines what damage could be repaired, as well as the period of time during which consumers may join the group.

During the second phase, once a declaratory ruling on liability has been issued, any consumer in an identical or similar situation may join the group to obtain compensation, on an opt-in basis, within a two- to six-month period. This time period, which is fixed by the judge, can be no

less than two months and no more than six months after the completion of the publicity measures ordered by the judge (article L 423-5 of the Consumer Code).

The class members will be compensated under the terms of the judge's ruling made during the first stage of the process.

A simplified procedure has also been established when the identity and the number of consumers are accurately known, and when victims have each suffered equivalent damages.

Class actions remain limited in number, which recently led to the issuance of a report addressing the difficulties encountered in executing them and making certain recommendations to encourage the development of collective redress (French National Assembly, information report of 11 June 2020).

COOPERATING PARTIES

Immunity

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

Article L 464-2 of the French Commercial Code (FCC) provides for the possibility of leniency for companies that have contributed proving the existence of a prohibited practice and whom its authors were providing evidence which the FCC or any public official were previously unaware of.

The regime of leniency programme has been detailed in *Procedural Notice on French Leniency Proceedings*, which was first published in 2004.

Cases in which a leniency applicant can benefit from full immunity are known as 'Type 1 cases'. The Notice provides for two types of Type 1 case: Type 1A and Type 1B cases.

Type 1A cases are those where the French Competition Authority (FCA) has no information or evidence that is sufficient for investigative measures to be initiated and a leniency application enables the FCA to carry out a targeted on-site inspection.

Type 1B cases are those where the FCA is already aware of the cartel but may not have enough evidence to substantiate an objection. The undertaking which receives Type 1B leniency is the first to submit information that allows the FCA to demonstrate the existence of the cartel.

Any leniency applicant has to meet the following obligations: it must immediately end its involvement in the cartel (however, the FCA can authorise the undertaking to continue its participation in the cartel in order to preserve the confidentiality of the leniency application and the efficiency of the investigation), and it must cooperate effectively, fully, totally, on a continuous basis and swiftly with the FCA, which implies:

- providing all information and evidence;
- refraining from destroying, falsifying or dissimulating information or pieces of evidence; and
- maintaining strict confidentiality over its leniency application.

Subsequent cooperating parties

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

Undertakings which do not meet the conditions for a total immunity may benefit from a partial reduction of fine. In any case, they must provide the FCA with evidence of the alleged cartel's existence that has 'significant added value' over the evidence already in the FCA's possession.

To determine the level of the reduction, the FCA will take into consideration the timing of the application and the 'added value' of the information that is provided.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The FCA will take into account the timing of the application and the degree to which the information provided by the applicant is of 'significant added value'.

In principle, the fine for the first undertaking that provides information of 'significant added value' may be reduced by 25 to 50 per cent; the fine for the second undertaking that submits such information may be reduced by 15 to 40 per cent; and the fine for any other undertaking providing such information may be reduced by no more than 25 per cent.

Under French law, there is no 'immunity plus' or 'amnesty plus'.

Approaching the authorities

31 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 is no deadline for initiating or completing an immunity application. However, the FCA takes each applicants' place in the leniency queue into account when granting markers.

In order to obtain a marker, the applicant need only provide limited information. They then receive a deadline – generally one month – to finalise its application and to provide supporting evidence.

Cooperation

32 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 that are seeking partial leniency?

A leniency applicant must cooperate with the FCA in a true, complete, swift and lasting manner from the application date until the end of the investigation. It must submit all relevant information that comes into its possession during the investigation and remain available to answer any questions the FCA may have.

To apply for leniency, the undertaking only needs to provide the following basic information:

- its name and address;
- information on the circumstances which led to its leniency application;
- the names and addresses of the other cartel participants;
- a detailed description of the alleged cartel (eg, information on the products and territories on which the alleged cartel is likely to have an impact, the nature and estimated duration of the alleged cartel); and
- information on any leniency application relating to the alleged cartel.

The applicant will then be granted a certain period of time to provide all the supporting documentation that it may have and a corporate statement describing the alleged infringement in detail.

Confidentiality

33 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 existence of a leniency application and the identity of the applicant are kept confidential from the other parties, until the statement of objections is issued.

Information provided by the leniency applicant is disclosed to the parties involved when the statement of objections is issued. The parties to the procedure have access to the electronic recordings of the oral statements. Other documentary evidence provided by the leniency applicant is made accessible, subject to confidentiality rules.

The FCA may accept the redaction of confidential information that constitutes business secrets, provided this information is not essential for the exercising the rights of defence by the other parties or the establishment of the infringement.

In court proceedings, under article L 483-5 of the FCC, the judge cannot order the FCA to disclose corporate statements made in support of a leniency application.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Undertakings may benefit from fine reductions if they do not challenge the existence of the alleged practices (article L 464-2 of the FCC).

The general case handler submits a proposed settlement 'setting out the minimum and maximum amount of penalty' to the company. If the proposal is accepted, the case handler refers it to the FCA's board which will impose a fine within the range stated in the settlement.

Any company can request a settlement before or following the issuance of a statement of objections. In order to apply, the undertaking must agree to waive its right to challenge the existence of the practices (ie, their materiality, duration, scope and the undertaking's participation in the practices). Once the statement of objections is sent, the undertaking must contact the case handler without delay as a settlement report must be finalised and signed within two months of the statement of objections being issued.

The settlement procedure may be implemented in conjunction with the leniency procedure.

There is another alternative dispute resolution process: the commitment procedure. However, this procedure is mainly used in abuse of dominance cases or vertical practices and is not really appropriate for cartels.

Corporate defendant and employees

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

French competition law does not provide for immunity or leniency from criminal prosecution. The FCA does not have the jurisdiction to prosecute individuals, as this falls within the scope of criminal law and under the scope of the public prosecutor.

However, the FCA's Procedural Notice of 3 April 2015 on leniency programmes indicates that leniency constitutes a legitimate reason for not referring a case to the public prosecutor. Thus employees are protected from criminal sanctions.

If an individual refuses to cooperate with a leniency application's requirements, the undertaking may take disciplinary action in accordance with applicable employment law and contractual rules. In principle, employees are contractually obliged to cooperate to the extent that the requested cooperation does not result in a breach of their fundamental rights.

Dealing with the enforcement agency

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

An application for leniency must be addressed to the FCA's general case handler or leniency officer. They will fix a deadline by which the applicant must provide all the elements of evidence in its possession and on the basis of which, the case handler will prepare a report.

The applicant must file its application with the general case handler in writing or orally.

Receipt of the application by the general case handler allows the applicant to apply for a marker. Markers protect the applicant's place in the leniency queue for a period of time specified by the general case handler.

Finally, the case is examined by the board of the FCA, which formally grants leniency if it considers that the conditions have been fulfilled.

Potential applicants can freely and anonymously contact the FCA's Leniency Officer to obtain information about the leniency programme before formally applying for leniency.

DEFENDING A CASE

Disclosure

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

The procedure before the French Competition Authority (FCA) and national courts is contradictory. Thus, in order to have their rights of defence guaranteed, defendants should have access to the documents on which the FCA or the courts intend to base their claim of a cartel's existence.

Article L 463-4 of the FCC provides that the French Commercial Code (FCC) may refuse to grant 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.

Representing employees

38 | 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 or representation?

Counsel may represent employees under investigation in addition to the corporation that employs them, except in situations where this would lead to a conflict of interest.

A present or past employee should obtain independent legal advice or representation when he or she becomes the individual object of a criminal prosecution or, more generally, when his or her interests differ from that of the corporation employing them.

Multiple corporate defendants

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

Counsel may represent multiple corporate defendants in the same proceedings, unless this would raise to a conflict of interest.

Payment of penalties and legal costs

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

Article L 470-1(2) of the FCC provides that a court may sentence the corporation to pay the fines ordered against one of its employee, the amount of which may not exceed €3,000 for a natural person and €15,000 for a legal person.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Article 39, section 2 of the French General Tax Code provides that financial sanctions are not tax-deductible. This also applies to fines for breaches of competition rules.

Private damages imposed by national courts are tax-deductible.

International double jeopardy

42 | 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 accordance with the principle of double jeopardy, the FCA may not bring proceedings against or impose a fine on corporations or individuals that have already been prosecuted or fined if the facts, the party concerned and the legal interest protected at stake are the same.

This principle also applies to overlapping damage claims.

Getting the fine down

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

The most efficient way to reduce a fine is to apply for leniency or to cooperate with the FCA in the context of settlement procedures.

The existence of a pre-existing compliance programme or compliance initiatives undertaken after the investigation has commenced do not affect the level of the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 9 January 2020, the French Competition Authority (FCA) announced its main priorities for 2020. It stressed that the digital and retail sectors would remain at the top of its agenda, given the recent developments in these fields and the challenging competition issues they raise.

The FCA recalled that trade unions and associations have been sanctioned several times in recent years for infringements of competition law. The FCA sanctioned a wide variety of professional bodies such as notaries, architects, and courier services for cartel practices. The FCA warned that heftier fines were to be expected since the implementation of the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive), which allows for the imposition of fines of up to 10 per cent of the global turnover of each company that belongs to the union or association.

On the legislative front, the FCA will follow the implementation of the ECN+ Directive in France.

On 19 February 2020, the FCA expressed its views on the possible lines of approach to enhance antitrust enforcement in the digital sector, both at the EU and national levels. This publication covers questions

relating to anticompetitive practices and shows the FCA's willingness to be part of the process launched by the European Commission and many competition authorities and regulators in order to deal with questions raised by the growth of digital platforms.

Key cases

On 29 January 2020, the Court of Cassation annulled the judgment of the Paris Court of Appeal in the interbank fees case (Cass. com., 29 January 2020, No. 18-10.967) for interpreting the concept of 'restriction by object' too broadly. The Court of Cassation noted that only coordination practices that harm competition to a sufficient degree may be qualified as restrictions by object. Absent a clearly established anticompetitive object, likely anticompetitive effects must be proven to establish an infringement of articles 101(1) TFEU and L 420-1 of the French Commercial Code (FCC).

On 20 February 2020, the Paris Commercial Court dismissed the damages claim brought by various entities of Belgian retail group Louis Delhaize following the FCA's 2015 sanction decision in the *Dairy Products* case. The Court considered that the claimants' economic assessment of their harm was insufficiently substantiated, whereas the defendants were able to successfully raise the passing-on defence.

On 16 March 2020, the FCA imposed a €1.1 billion fine on Apple for entering in anticompetitive agreements with its distributors and abusing the situation of economic dependency of its network of Apple Premium Resellers. The decision follows an investigation initiated in 2012, when eBizcuss, which was at the time the largest French Apple Premium Reseller, accused Apple of abusing its dominant position. In its decision, the FCA found that Apple had engaged in two vertical infringements, one with its wholesalers and the other with its network of Apple Premium Resellers, and in an abuse of economic dependence under L 420-2 of the FCC.

On 18 May 2020, the Court of Cassation upheld the Paris Court of Appeals' judgment which had confirmed the FCA's fining decision against Groupement des Installateurs Français (Groupe GIF). The Court of Cassation held that the FCA's board could re-open the investigation to allow the FCA's investigation services to add evidence which they relied upon for establishing the statement of objections but that they 'inadvertently omitted' to include in the case file. The defendant's response to the statement of objections can remain in the case file, despite the fact that the defendant did not have access to that evidence when preparing its response, as long as the defendant is given the chance to reply to a supplementary statement of objections after the investigation is re-opened.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

There are no ongoing or anticipated reviews of or proposed changes to the current legal framework.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The FCA's premises closed on 17 March 2020 due to the containment order from the French government, but its services, especially its investigation services, continued to work remotely.

The FCA did suspend 'the two-month period available to companies to submit, in applying article L 463-2 of the FCC, their comments



Lionel Lesur

llesur@franklin-paris.com

Anna Sacco

asacco@franklin-paris.com

26, avenue Kléber
75116 Paris
France
Tel : +33 1 45 02 79 00
www.franklin-paris.com

in response to a statement of objections or a report'. The suspension has now been lifted. As a result, the legal and regulatory time limits which were suspended on 12 March 2020, started to run again as of 24 June 2020.

Germany

Markus M Wirtz and Silke Möller*

Glade Michel Wirtz

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The German Act Against Restraints of Competition (GWB) provides a regulatory framework to prevent the restraint of competition in Germany, irrespective of whether this was caused within or outside the German territory. Section 1 GWB, which has been largely aligned with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings and decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Section 2 GWB is modelled on article 101(3) TFEU and stipulates conditions under which anti-competitive agreements may be exempted from the ban on cartels.

In cases where cooperation between undertakings may affect trade between the member states, the national and EU competition rules are applied in parallel. However, as a result of the harmonisation of section 1 GWB with article 101 TFEU materially the same standards apply.

Relevant institutions

2 | 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?

Cartels that have a domestic effect within the territory of Germany are mainly investigated, prosecuted and enforced by the Federal Cartel Office (FCO), an independent federal authority based in Bonn. The decisions of the FCO are handed down by 12 decision divisions which are primarily organised according to economic sectors. Each division takes decisions independently through a collegiate body consisting of a chairman and two associate members. Although the FCO is under the responsibility of the Ministry of Economics and Energy, it does not receive political orders and is independent in its decision-making. If a cartel only affects a specific federal state or smaller regions, which is rarely the case, the competition authority of the respective federal state is competent. Companies and individuals concerned can appeal against final decisions imposing fines rendered by the competition authority. The competent appeal court is the Higher Regional Court in the district the competition authority has its seat. For decisions of the FCO this is the Higher Regional Court in Düsseldorf.

If a cartel infringement constitutes a criminal offence (eg, bid rigging, pursuant to section 298 of the German Criminal Code), the public prosecutors have the power to investigate and initiate criminal proceedings against individuals, while the competition authorities remain in charge of the investigation of the company.

Changes

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

The most recent amendment of the GWB (the 10th amendment) contains especially the following changes in respect of the cartel regime:

- provisions on the mutual assistance between competition authorities of EU member states in implementing the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+);
- regulations regarding the extension of the investigative tools and of the application of the competition authority's interim measures;
- right of companies to ask the FCO for its legal assessment of the legality of cooperation under the GWB, in cases of a significant legal and economic interest;
- liability of associations of undertakings for administrative fines based on the aggregated turnover of their members operating on the market affected by the cartel infringement;
- codification of more detailed criteria for calculating administrative fines for cartel infringements; and
- statutory provisions on leniency programmes which were until now governed by the FCO's Notice No. 9/2006.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Section 1 GWB prohibits horizontal and vertical agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. The undertaking and individuals concerned will be held liable for any intentional or negligent infringement of section 1 GWB.

'Agreement' within the meaning of section 1 GWB has a wide meaning and covers agreements in any form, whether legally enforceable or not. The concept of 'concerted practices' refers to collusive behaviour knowingly entered into by undertakings in order to prevent or restrain competition. The key difference between an agreement and a concerted practice is that a concerted practice may exist where there is only practical cooperation between undertakings without any formal decision.

'Horizontal agreements' generally refer to agreements entered into between undertakings operating on the same level of a production or distribution chain (ie, actual or potential competitors). Particularly serious types of horizontal agreements concern price fixing, market sharing, production or sales quotas, allocation of customers, the exchange of competitively sensitive information relating to prices or quantities and bid rigging (hard-core cartel).

'Vertical agreements' can be defined as agreements entered into between undertakings operating at different levels of a production or distribution chain and that concern conditions under which the parties may purchase, sell or resell certain goods or services. Vertical price

fixing is a hard-core restriction, while exclusive supply or distribution agreements, selective distribution systems etc are subject to individual assessment.

A cartel infringement must have an appreciable effect on competition. In this regard, the FCO's De Minimis Notice of 13 March 2007 must be taken into account.

Section 2(1) GWB contains an exemption from the prohibition on restrictive practices if the conduct in question:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- allows consumers a fair share of the resulting benefit;
- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Pursuant to section 2(2) GWB, provisions of the EU block exemption regulations are applicable irrespective of whether or not these agreements may affect trade between the member states (ie, also in purely national cases).

In addition, section 3 GWB stipulates a special exemption for certain types of horizontal agreements between small and medium-sized undertakings. As this exemption is, however, more lenient than the one laid down in article 101(3) TFEU and the corresponding section 2(2) GWB it is not applicable to any constellations which affect the trade between member states.

Joint ventures and strategic alliances

- 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures can potentially fall foul of the cartel prohibition if they lead to coordination of the competitive behaviour between the independent shareholders of the joint venture or between a non-controlling shareholder and the joint venture. The risk of coordination rises if two parent companies are engaged in business activities on the same, upstream, downstream or neighbouring markets as the joint venture. But also, in cases where the joint venture is non-full-function and only takes over specific functions within the parent companies' business activities, this may lead to coordinative effects on the level of the parent companies. Notably, even if the formation of such a joint venture, be it full-function or non-full-function, can be subject to merger control, German law applies the cartel prohibition in parallel when assessing the possible effects of cooperation. This assessment does not automatically form part of a merger control assessment or a potential merger control clearance (unlike article 2(4) of the EU Merger Regulation) and is not bound to any statutory merger control deadlines. Such cartel prohibition proceedings may also be initiated at any time following the merger control clearance.

Strategic alliances include various forms of cooperation between undertakings, for example, research & development projects, optimisation of distribution channels, or joint purchasing. Generally, such strategic alliances are subject to the usual framework as set out in the GWB.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

The cartel prohibition (section 1 of the German Act Against Restraints of Competition (GWB)) applies to private undertakings as well as undertakings that are entirely or partly in public ownership or managed or

operated by public authorities, except for the German Central Bank and the Reconstruction Loan Corporation, section 185(1) GWB. The term 'undertaking' is to be understood in a broad sense and includes any entity engaged in an economic activity, regardless of its legal status, the way in which it is financed and whether it has the intention to earn profits. However, section 1 GWB only applies to agreements or concerted practices entered into between at least two independent undertakings. Therefore, if a company exercises (directly or indirectly) decisive influence over another company, it shall be considered as a single undertaking within the meaning of the GWB. The same applies to companies over which decisive influence is exercised by one and the same parent company. Individuals acting on behalf of the undertaking can also be fined.

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

According to section 185(2) GWB, the GWB shall apply to all restraints of competition having an effect within the scope of the GWB's application (ie, Germany), also when caused outside the German territory. Therefore, it is no precondition for the imposition of sanctions or remedies that the company in question has its seat, a branch or an office in Germany. It is not entirely clear if actual effects are required or whether the likelihood of such effects occurring suffices.

Export cartels

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

Usually, pure export cartels do not have an effect within the territory of Germany and therefore do not fall within the scope of the GWB's application (section 185(2) GWB). However, export cartels may indirectly affect competition in the domestic market. For example, a cartel may strengthen the economic power of a participating company that has its seat in Germany in a way that creates a barrier for potential competitors entering the German market, in which case the GWB will apply.

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Sections 28 to 31b GWB contain industry-specific provisions regarding the agricultural, energy, press, and public water supply sectors. For example, pursuant to section 30(1) GWB, vertical resale price maintenance agreements by which an undertaking producing newspapers or magazines; products which reproduce or substitute newspapers or magazines and fulfil the characteristics of a publishing product; or combined products the main feature of which is a newspaper or magazine, requires purchasers to demand certain resale prices are exempt from the prohibition of cartels. Additionally, the price-fixing of books is mandatory in Germany, according to the Law on the Fixing of Book Prices.

Also, there are EU block exemption regulations concerning specific sectors, such as the sale and repair of motor vehicles and the distribution of spare parts for motor vehicles, which also apply to purely national cases (section 2(2) GWB).

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no explicit exemptions from applying the cartel prohibition on undertakings or behaviour that are approved by the government (eg, national laws or administrative decisions) or through court decisions. However, section 1 GWB may not be enforced against an undertaking if the undertaking does not have the discretion to act differently and such government approval is compatible with the German and EU law (especially articles 101 and 102 of the Treaty on the Functioning of the European Union).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Investigations by the competition authority can be initiated by a leniency application, complaints of other market participants or ex officio (eg, based on information from sectoral inquiries, proceedings concerning a neighbouring market, or even press releases).

In cases where there are sufficient indications of an infringement of a cartel prohibition, the competition authority will initiate formal administrative proceedings and gather further evidence by, for example, executing dawn raids that include the seizure or inspection of hard copies of documents and electronic files, or the hearing of witnesses. If the competition authority suspects an infringement is being carried out, the undertakings and individuals suspected of involvement will be informed of the authority's accusation in a statement of objections. They will be given the opportunity to state their cases and will be granted access to the case files. The proceedings may be terminated by the imposition of an administrative fine or by the issuance of a termination letter. The competition authority may also discontinue the investigation.

There is no specific timeframe for cartel investigations. The duration of the proceedings depends on the circumstances of each case, but they usually last for several years. For example, in a recent cartel case involving technical building equipment, the proceedings were initiated in November 2014 following a leniency application and completed in December 2019 with the imposition of fines.

Investigative powers of the authorities

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

The investigative powers of the competition authority are generally laid down in the German Code of Criminal Procedure which applies, mutatis mutandis, to administrative fine proceedings, as well as section 82b of the German Act Against Restraints of Competition (GWB). It may, for example, issue requests for information, conduct dawn raids and search premises, take testimonies from witnesses and seize objects, including data.

Information requests

As a result of the 10th amendment to the GWB, the competition authority's power to issue requests for information has been significantly extended. Accused undertakings and associations of undertakings are now obliged to provide, upon the request of the competition authority, all available documents and information. While they may still not be forced into self-incrimination regarding their involvement in a cartel infringement, they may have to disclose information which can (by way of circumstantial evidence) be used as indications or evidence against them (similar to the powers of the European Commission under article

18 of Council Regulation (EC) NO 1/2003, as reinforced by the European Court of Justice in its *Orkem* judgment).

Individuals (eg, employees or representatives of the undertakings concerned) who are addressees of the competition authority's information request may refuse to answer questions if the reply would place them or a member of their family at risk of being prosecuted. However, this does not apply if the risk of prosecution is limited to an administrative fine proceeding and the competition authority has, within the scope of its discretion, committed itself to not prosecute the individual.

Dawn raids

The competition authority may carry out dawn raids on business and private premises, including private homes and cars. If evidence (both electronic and paper-based) is found, it will be secured. If the evidence is not handed over voluntarily it can be seized. Generally, dawn raids are ordered by a judge. In exigent circumstances, the competition authority may conduct searches without a warrant. This power is rarely used. Should it be necessary for the purposes of the dawn raid the competition authority also has the power to seal rooms or documents.

In addition, employees or representatives of the undertakings concerned may be interviewed during searches and are legally obligated to cooperate. The scope of the right against self-incrimination is the same as in cases of information requests, (ie, the subject may refuse to answer questions if the reply would place them or a member of their family at risk of being prosecuted).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Cooperation between competition authorities is mainly based on bilateral agreements or takes place within international networks.

Bilateral agreements

The most important bilateral agreement is the one between the government of the United States and the government of Germany relating to the mutual cooperation regarding restrictive business practices (effective since 23 June 1976), which determines, in particular, the exchange of information, the cooperation during cartel investigations and a regular exchange on competition policy.

International networks

At a worldwide level, one of the most important associations of competition authorities is the International Competition Network. It was founded in 2001 by representatives of 14 jurisdictions and has now more than 130 members.

In Europe, the European Commission and the national competition authorities of the member states work closely together on ensuring the coherence of the EU competition policy in the framework of the European Competition Network (ECN). More details on the cooperation system of the ECN are provided in the Commission Notice on cooperation within the ECN of 27 April 2004 (2004/C 101/03).

Interplay between jurisdictions

14 | 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 framework for interplay between the German competition authority and other jurisdictions is mainly set out in the system of the ECN and sections 50a German Act Against Restraints of Competition et seq.

Generally, if cross-border agreements or other concerted practices restricting competition also have an appreciable effect in the territory of Germany, the cartel prosecution is based on a system of parallel competences between the Federal Cartel Office and the national competition authorities of the other affected countries. However, under Council Regulation (EC) No. 1/2003, the competition authority that first receives a complaint or starts an ex officio procedure remains in charge of the case. If the same complaint is brought before several competition authorities, others shall suspend their proceedings or reject the complaint on the grounds that another competition authority is already dealing with the case. When it is found to be necessary, especially due to the material link between the infringement and the territory of a certain member state (eg, the agreement is implemented within its territory), the case shall be reallocated to the competition authority of this member state, or to the European Commission if the infringement has effects on competition in more than three member states.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Generally, the Federal Cartel Office (FCO) is the decision-making institution. In case a cartel infringement only has effects within a federal state, the competition authority of the respective state will be competent for the case. Both the FCO and the competition authorities of the federal states can only investigate and prosecute cartel infringements in the course of administrative proceedings. Should a case involve infringements of the criminal code (eg, bid rigging) the competition authority has to refer these parts to the criminal prosecutor.

Burden of proof

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

In cartel proceedings, the competition authority generally bears the burden of proof. Pursuant to section 261 of the German Code of Criminal Procedure which applies, mutatis mutandis, to the administrative fining proceedings, the level of prove shall be free judicial conviction without reasonable doubts. If the accused undertaking or individual claims an exemption (eg, pursuant to section 2 German Act Against Restraints of Competition (GWB) or an EU block exemption regulation), the defendant has to prove that the statutory requirements for the exemption are met.

Circumstantial evidence

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

Yes, but this is only possible if the level of proof required (eg, free judicial conviction without reasonable doubts) is reached.

Appeal process

18 | What is the appeal process?

The subject of a decision imposing a fine in a cartel case can appeal the competition authority's final decision. The appeal has to be filed in writing with the competition authority within two weeks of the decision being served. The authority may initiate further investigations at this time and will then decide whether to uphold or withdraw its decision. If it does not withdraw, the files will be forwarded to the appeal court (for decisions of the FCO, this is the Higher Regional Court Düsseldorf) for the purpose of a full judicial review of the case. The appeal court will independently investigate the case and hand down its own decision (ie, the imposition of an administrative fine, acquittal of the accused undertakings or individuals, or to discontinue the proceedings).

During the court proceedings, the competition authority has the same rights as the public prosecutor's office (section 82a(1) GWB) and is therefore fully empowered to participate in the court proceedings and to exercise all the procedural rights that the public prosecutor's office is entitled to under the rules of the German Code of Criminal Procedure, which applies mutatis mutandis. This includes:

- the right to make formal applications;
- the right to ask or object to questions to witnesses and experts;
- the right to approve a settlement between the court and the defendant independent of the approval of the public prosecutor's office;
- the right to give consent if the defendant withdraws the appeal against the decision to fine after the beginning of the main hearing;
- the right to issue an independent counter declaration; and
- the right to further appeal against the judgment of the appeal court.

A further appeal to the Federal Court of Justice on points of law against the judgment of the appeal court is possible. In this case, the functions of the prosecuting authority shall be assumed solely by the Federal Prosecutor General.

In purely administrative cases (eg, an order to desist) an appeal may be filed within one month from the rendering of the decision. An appeal to the Federal Court of Justice is only possible if the Higher Regional Court grants leave to appeal. Should the leave to appeal be denied, it is possible to file an appeal against the refusal of leave to appeal.

SANCTIONS

Criminal sanctions

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

In Germany, cartel infringements are generally not criminalised, unless they fulfil the requirements for bid rigging which incurs a fine or imprisonment for a term not exceeding five years (section 298 of the German Criminal Code), or for fraud which incurs a fine or imprisonment for a term not exceeding five years (or in especially serious cases of fraud (eg, a major financial loss was caused) a prison term of six months to 10 years (section 263 of the German Criminal Code)). Both provisions only apply to natural persons, as in Germany undertakings are not subject to criminal sanctions.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Under German civil law, any agreement which infringes the prohibition on restricting competition is null and void.

Administrative sanctions are set out in form of fines that can be imposed by the competition authority against undertakings, associations

of undertakings, and their representatives in cases of the latter participating in an infringement or violating their supervisory duties. The amount of the fine is stipulated in section 81c GWB. If an administrative fine is imposed against a natural person, the fine is limited to €1 million. An undertaking can be fined up to 10 per cent of the turnover it achieved in the business year preceding the competition authority's decision. When calculating this turnover, all the undertakings or individuals acting as one economic entity will be taken into account.

With regard to fines imposed on associations of undertakings, the 10th amendment to the GWB contains important changes.

Previously, the competition authority could impose a fine of up to 10 per cent of an association's annual turnover. Pursuant to section 81c(4) GWB, the 10 per cent threshold is now based on the aggregate turnover of the association's members operating in the market affected by the infringement. The turnover of member undertakings on which a fine has been imposed for the same infringement, as well as the turnover of member undertakings that have obtained full immunity are deducted when calculating the relevant turnover.

Pursuant to section 81b GWB, if the fine cannot be paid in full by the association, the competition authority may ask the association to request the necessary amount from the member undertakings, request the amount directly from undertakings whose representatives have been part of the association's bodies, or, as a last resort, demand payment from a member of the association operating in the market affected by the infringement (up to a maximum of 10 per cent of its annual group turnover).

The individual fines for the undertakings and associations involved in an infringement are usually substantive. The FCO imposed aggregated administrative fines of €376 million in 2018 and €848 million in 2019.

The competition authority may also oblige undertakings to terminate a cartel infringement. This may involve behavioural measures (ie, stop the behaviour causing the infringement) as well as structural measures (eg, sale of business divisions, or parts of undertakings or shareholdings), whereby structural measures may only be imposed if there are no behavioural measures which would be equally effective, or if the behavioural measures would entail a greater burden for the undertakings concerned.

Guidelines for sanction levels

21 | 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?

Before the 10th amendment to the GWB came into force, there were no uniform criteria regarding the calculation of fines. While the Federal Cartel Office followed its guidelines for the setting of fines in cartel administrative offence proceedings (as revised in June 2013) and provided an initial 'cap' of the fine on the basis of the turnover relevant to the offence, the appeal court (the Higher Regional Court Düsseldorf) primarily qualified the 10 per cent threshold provided in the GWB as the maximum penalty, which, in some cases, led to a significant increase of fines in the appeal proceedings.

Currently, section 81d GWB provides a non-exhaustive list of criteria for the calculation of fines, such as:

- the gravity and duration of the infringement;
- the turnover relevant to the offence;
- the importance of the products affected by the infringement;
- previous infringements committed by the undertaking concerned; and
- the undertaking's behaviour after the infringement (eg, establishment of a compliance programme).

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Section 81d(1) No. 6 GWB allows the competition authority and the court to recognise the establishment of a compliance programme to close existing compliance gaps as a mitigating factor when setting fines. Also, compliance programmes are essential for the early detection of infringements, which can result in full immunity or a substantial reduction of a fine under the terms of a leniency programme.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Apart from the administrative fine of up to €1 million and the criminal rules concerning bid rigging and fraud, there are no additional sanctions such as director disqualification. However, in order to avoid debarment from government procurement procedures, the undertaking concerned must prove that it has taken personnel measures (eg, dismissal of responsible individuals in management function) that are appropriate to prevent further misconduct (section 125(1) No. 3 GWB).

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Pursuant to section 124(1) No. 4 GWB, public contracting authorities may exclude an undertaking from participating in the procurement procedure if there are sufficient indications that the undertaking is involved in a cartel infringement, irrespective of whether the infringement is related to the specific procurement procedure.

The public authorities must exclude an undertaking from participating in the procurement procedure if they are aware that a person whose conduct is attributable to the undertaking has been convicted by a final judgment or if a final administrative fine has been issued against the undertaking for a criminal offence as mentioned in section 123(1) GWB. This is especially the case if the cartel infringement in question qualifies as fraud (section 263 of the German Criminal Code), provided that the offence is directed against the budget of the EU or against budgets administered by the EU or on its behalf (section 123(1) No. 4 GWB).

Parallel proceedings

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

Criminal, civil and administrative sanctions against the same cartel infringement can be pursued by competent authorities in parallel. In practice, public prosecutors will pursue the case against individuals, while the competition authorities take the case against the undertaking. Sometimes the public prosecutors suspend the criminal investigation until the competition authority has rendered its decision.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Pursuant to section 33a(1) German Act Against Restraints of Competition (GWB), any person affected by a cartel infringement shall be entitled to claim damages. Therefore, indirect buyers, in addition to direct buyers, are also entitled to claim damages from cartel members, if the direct buyers passed the cartel's excessive prices on to them. In this regard, section 33c(2) GWB contains a rebuttable presumption that price increases are passed to an indirect buyer. The 10th amendment to the GWB also introduces a rebuttable presumption that contracts with cartel members falling within the cartel's product and regional scope are affected by the cartel. Buyers who have purchased a product or service from a competitor of the cartel's members can also be entitled to claim damages if the competitor has raised his prices under the umbrella of the cartel. The same applies, mutatis mutandis, to suppliers that have become a victim of a purchasing cartel.

Individuals or undertakings damaged by a cartel infringement can claim full compensation (ie, damages and interest, reimbursement of court and legal fees and, to a certain extent, fees of economic experts).

Class actions

27 Are class actions possible? If so, 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 for individuals and undertakings affected by a cartel infringement. They can, however, submit bundled claims through a third party. If the third party brings the claims through a vehicle that was only established to claim damages on its own behalf, the foundation of this vehicle must comply with the rules governing legal representation and advisory services. In a recent case regarding the bundling of damage claims against the members of the truck cartel, in its judgment of 7 February 2020 (37 O 18934/17), the Munich district court indicated that such business models were not permitted under the German Act on Out-of-Court Legal Services.

COOPERATING PARTIES

Immunity

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

The leniency programme is regulated by sections 81h German Act Against Restraints of Competition (GWB) et seq. The competition authority can, under the general conditions laid down in section 81j GWB (esp. full and continuous cooperation with the competition authority), grant cartel members full immunity from, or a reduction of, administrative fines imposed by the competition authority which will, however, not affect the criminal prosecution against the responsible individuals.

Pursuant to sections 81i, 81j GWB, full immunity from fines will be granted to a cartel member that:

- is the first providing sufficient evidence which, for the first time, enables the competition authority to obtain a search warrant;
- discloses an infringement and its participation in the infringement;

- immediately ends his or her participation in the cartel, unless asked otherwise by the authority;
- cooperates fully and continuously with the authority; and
- keeps the leniency application and its cooperation with the competition authority confidential.

The competition authority shall refrain from imposing a fine if:

- a cartel member is, even though the competition authority is already in a position to obtain a search warrant, the first one submitting evidence which allows the competition authority to prove the offence for the first time;
- no other cartel member has already been granted full immunity; and
- the leniency applicant cooperates fully and continuously with the authority.

An undertaking that has coerced other undertakings to participate in a cartel will not be eligible for full immunity under any circumstances.

In addition, there is a limited joint and several liability in follow-on cartel damage proceedings: an undertaking granted full immunity is generally only liable to its own buyers or suppliers for the damages they suffered from the cartel (yet not limited to own supplies).

Subsequent cooperating parties

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

If a cartel member is no longer entitled to apply for immunity, the fine can be reduced if the participant provides the competition authority with evidence which makes a decisive contribution to proving the offence. The amount of the reduction will be based on the value of the evidence provided and the position of the applicant in the sequence of leniency applications. This option is also available for the third and following applicants.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The GWB does not offer any special treatment for the second leniency applicant. The fine can be reduced if the cartel member provides the competition authority with evidence that forms a decisive contribution to proving the offence. The amount of the reduction will be based on the value of the evidence provided and the position of the applicant in the sequence of leniency applications. This option is, however, also available for the third and following applicants.

Approaching the authorities

31 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 long as the proceedings are not terminated, it is possible to place a marker or to file a leniency application. A cartel member can contact the competition authority and declare their willingness to cooperate to ensure their respective position in the sequence of leniency applicants (ie, place a marker). The contact can be made with, for example, the Special Unit for Combating Cartels or the chairman of the competent decision-making division of the Federal Cartel Office (FCO). The marker can be made orally or in writing and must contain details about the

infringement, including the names of other cartel members, the products and regions concerned, the duration of the infringement and the cartel member's own involvement. The competition authority will then set an appropriate time limit for the drafting of a formal leniency application.

Cooperation

32 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 that are seeking partial leniency?

The leniency applicant must cooperate fully and continuously with the competition authority through the entire proceeding, in particular, they must:

- hand over all information and evidence available and answer the competition authority's requests for information in a timely manner;
- cooperate fully in the clarification of the case by making board members and employees available for interrogations;
- end its involvement in the cartel immediately unless the competition authority considers that this would be damaging with a view to preserving the integrity of the investigation; and
- keep its cooperation with the competition authority confidential until the authority relieves it from this obligation.

Confidentiality

33 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 current leniency programme does not include any provisions regarding confidentiality. However, the previous leniency programme of the FCO stated that the FCO will treat the identity of the leniency applicant and its trade and business secrets as confidential until a statement of objections is issued. It is to be assumed that the FCO will continue with this practice within the scope of the statutory limits. However, the FCO must disclose the identity of a leniency applicant as part of the other undertakings' right to access the case files and to the public prosecutor if the infringement may constitute a criminal offence.

It should be noted that undertakings or individuals under investigation will have access to the case files once they have received a statement of objections. The FCO can agree to remove certain trade and business secrets from the file that are irrelevant to the proceedings, but there is no guarantee that such information will not be discovered as the FCO must not redact business secrets when granting defence counsel access to the file.

After the proceedings have been concluded by a formal decision, the FCO will publish press releases and case summaries which include the information required by law, such as information on the facts established in the decision imposing fines, information on the type of the infringement and the period during which the infringement occurred, as well as information on the undertakings which were involved in the infringement (section 53 (5) GWB). The published information must also include information on leniency applicants, including undertakings which were granted full immunity from fines.

For leniency applicants that are granted full immunity, the FCO will not issue a formal decision and usually limits the rights of third parties (eg, buyers or suppliers for the purpose of claiming damages) to access the case files, as far as the leniency statements and any evidence created during the proceedings are concerned.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 authority may, and regularly does, enter into settlements to terminate administrative fine proceedings.

Settlement discussions can be initiated by the competition authority and the accused individuals or undertakings at any time. If there is a general willingness to terminate the proceedings by settlement, the competition authority will inform the accused party of the facts of the infringement and grant (often limited) access to the case files. After hearing the accused individual or undertaking, the competition authority will propose a settlement declaration based on the latest state of its investigations containing:

- a description of the offence;
- information on the circumstances that are relevant for setting the fine; and
- a statement from the accused party acknowledging the facts of the alleged infringement, and accepting a fine up to the amount announced in the settlement which usually includes a settlement discount of 10 per cent.

If a settlement is reached, the proceedings will normally be concluded through a 'short decision' that only contains the minimum information required by law. A court's approval is not needed for the settlement to come into force. If the short decision is appealed in spite of the settlement, the competition authority will usually withdraw the short decision and hand down a detailed decision imposing a fine without the settlement rebate.

Corporate defendant and employees

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

Unless stated otherwise, a leniency application filed by an undertaking will also be qualified as made on behalf of the individuals participating in the cartel (eg, former or current employees of the undertaking). This, however, does not relieve individuals from the risk of criminal prosecution for infringements that constitute bid rigging or fraud.

Dealing with the enforcement agency

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

A cartel member may first contact the competent competition authority (especially the Special Unit for Combating Cartels or the chairman of one of the competent decision divisions at the FCO) on a confidential and anonymous basis. Once the cartel member has decided to cooperate, a marker should be placed as early as possible since full immunity is generally only granted to the first-in applicant. A marker, however, is also available for subsequent applicants. The competition authority will then set an appropriate time limit for the drafting of a formal leniency application.

DEFENDING A CASE

Disclosure

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

The competition authority shall grant the defendant full access to the case files upon request. However, the competition authority can deny access as long as the proceedings are ongoing in order to not jeopardise the purpose of the investigation. Therefore, in practice, the competition authority usually only informs the defendant that it has opened a formal investigation regarding a cartel infringement. Further information will only be disclosed after the authority has issued the statement of objections.

Besides the right of the defendant to information, the accused undertaking's defence counsel will be authorised to inspect files as well as items of evidence. However, if the cartel investigation is ongoing, the authority may deny access to inspect certain parts of the files to defence counsel, if providing access could impede the investigation.

Representing employees

38 | 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 or representation?

A defence counsel can represent an undertaking and one employee of this undertaking accused of the same cartel infringement if there is no conflict of interest (section 3 (1) of the German Professional Code of Conduct for Attorneys-at-Law). The employee should be informed about his or her right to seek independent legal representation.

Different attorneys of the same law firm can represent different individuals in addition to their employer.

Multiple corporate defendants

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

No.

Payment of penalties and legal costs

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

Yes, unless the payment concerns cartel infringements in the future which have not been committed yet.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Under German tax laws, fines set by a national authority are not tax-deductible, unless the fines do not merely sanction the unlawful behaviour committed but also recoup economic advantages achieved by the violation of the law. According to recent decisions of German tax courts, a fine imposed by the competition authority usually does not contain an element of recoupment, unless it is explicitly stated otherwise in the decision to fine, and are therefore not tax-deductible. The same applies to private damages payments.

International double jeopardy

42 | 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 fact that an undertaking or individual has been sanctioned for the same cartel infringement in another jurisdiction does not affect the ability of a German competition authority to impose fines. In particular, the statutory criteria for calculating fines do not make explicit reference to this. However, since the criteria mentioned in section 81d GWB are not exhaustive, it is at the discretion of the competition authority whether it takes sanctions that have been imposed in other jurisdictions into account.

Also, overlapping liability for damages in other jurisdictions will not be taken into account in private damage claims brought before German courts.

Getting the fine down

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

Generally, only the first-in applicant can be granted full immunity. However, the reduction of fines also depends on the sequence of the leniency applications, the prospect of success of a leniency approach should be examined as soon as possible. Besides full and continuous cooperation with the competition authority, other actions that may reduce fines are, for example, the establishment of a functional compliance programme or other measures taken by the undertaking in order to compensate for the damage caused by the infringement.

Also, undertakings and individuals concerned can try to reduce fines by reaching settlements with the competition authority.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

At the end of 2019, the Federal Cartel Office (FCO) imposed fines totalling €646 million on three steel manufacturers and three individuals responsible for exchanging information on and agreeing certain price supplements and surcharges for quarto plates from mid-2002 until June 2016 in Germany. The illegal agreement was based on the mutual understanding and aim of the participating companies to negotiate with their customers on the base prices only. All companies admitted the accusations made by the FCO and agreed to a settlement. One company was granted full immunity from fines.

Between December 2017 and December 2019, the FCO imposed fines on 11 suppliers of technical building equipment (eg, sanitation, heating and air-conditioning, electronic systems etc.) totalling €110 million. The practices involved the design and installation of technical building equipment for large building complexes such as power plants, industrial facilities and office buildings. The proceedings were initiated in November 2014 following a leniency application. The fines against eight companies are already legally binding. Three companies have each filed an appeal against the decision.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

Due to the covid-19 pandemic modifications to the German Act Against Restraints of Competition (GWB) (effective since 29 May 2020) have been made which are limited in time. In particular, section 186 (8) GWB suspends the obligation to pay interest on administrative fines until 30 June 2021 if relaxations of payment conditions have been granted by the competition authority.

* *The answers provided take the 10th amendment to the German Act Against Restraints of Competition into consideration. At the time of writing, the amendment had not yet entered into force.*

GLADE MICHEL WIRTZ
CORPORATE & COMPETITION

Markus Wirtz

m.wirtz@glademichelwirtz.com

Silke Möller

s.moeller@glademichelwirtz.com

Kasernenstrasse 69
40213 Düsseldorf
Germany
Tel: +49 211 200 520
www.glademichelwirtz.com

Hong Kong

Marcus Pollard and Kathleen Gooi

Linklaters

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Competition Ordinance is the primary source of competition law in Hong Kong. The substantive provisions of the Ordinance came into effect in December 2015.

Relevant institutions

2 | 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?

Hong Kong has a prosecutorial competition law regime. The Competition Commission is responsible for investigating alleged contraventions (including cartel conduct), and initiating enforcement proceedings before the Competition Tribunal. The Communications Authority shares concurrent jurisdiction with the Commission regarding undertakings in the telecommunications and broadcasting sectors.

The Tribunal adjudicates and decides on competition cases brought by the Commission. It is composed of judges of the Court of First Instance and has the same jurisdiction to grant remedies and reliefs, equitable or legal, as the Court of First Instance.

Changes

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

The Hong Kong government is conducting a review of the Ordinance. No significant changes to the Ordinance are currently anticipated. The key potential change would be to remove the existing exemptions for statutory bodies.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The First Conduct Rule is a general prohibition on anticompetitive arrangements, including cartel conduct. Knowledge is a pre-requisite to an agreement or concerted practice, but this may be inferred from the facts.

The Commission regards cartels as having the object of harming competition, and therefore it is not necessary to prove any anticompetitive effects.

Undertakings may still seek to rely on the economic efficiencies exclusion to argue that the alleged cartel conduct is excluded from the First Conduct Rule. In practice, the Commission and the Tribunal have been skeptical towards such use of economic efficiencies to exclude cartel conduct.

Cartels also fall within the definition of 'serious anticompetitive conduct' under section 2 of the Ordinance. 'Serious anticompetitive conduct' is subject to a stricter enforcement procedure – the Commission may initiate Tribunal proceedings without first issuing a warning notice.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures which amount to a merger are excluded from the First Conduct Rule. Such joint ventures have to be 'full function' (ie, created to perform, on a lasting basis, all the functions of an autonomous economic entity). Relevant factors include independent management, sufficient resources and the proportion of output sold to parents.

If joint ventures or strategic alliances are not 'full function', they are subject to the First Conduct Rule. For example, the Hong Kong Seaport Alliance, a contractual joint venture between four port terminals, has been the subject of an in-depth investigation relating to price alignment and capacity sharing.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Competition Ordinance applies to individuals, corporations and other entities which fall within the definition of an 'undertaking'. An undertaking must engage in economic activity. The definition includes corporations, partnerships and natural persons (eg, sole traders).

Individuals not acting in the capacity of an undertaking (eg, employees or directors) will not be liable for contravening the First Conduct Rule. However, the Commission has taken the view that individuals may be liable for accessorial liability for involvement in a contravention. To date, the Commission has sought pecuniary penalties and director disqualification orders against a number of individuals alleged to be involved in cartel conduct.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The First Conduct Rule applies to conduct that has an impact in Hong Kong, even if such conduct is carried out outside Hong Kong, or if the parties carrying out such conduct are located outside Hong Kong.

Export cartels

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

No. However, the First Conduct Rule is unlikely to apply if the conduct has no impact in Hong Kong.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

No. The only sector-specific issue relates to the shipping sector. In August 2017, the Commission issued a Block Exemption Order for Vessel Sharing Agreements between liner operators.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The conduct of the Hong Kong government is not subject to the Ordinance.

However, governmental approval or regulation of an undertaking's conduct is not a defence or exemption from the prohibition against cartel conduct under the Ordinance, unless the conduct is engaged for purposes of complying with a legal requirement imposed by or under any law in force in Hong Kong, or imposed by any national law of China that applies in Hong Kong.

In addition, the First Conduct Rule does not apply to an undertaking entrusted by the government with the operation of services of general economic interest.

These exclusions are applied narrowly. For example, in 2018, the Commission decided that the Code of Banking Practice, a banking industry code endorsed by the Hong Kong Monetary Authority, does not benefit from the legal requirement exclusion.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Commission generally conducts its investigations in two phases.

The first is the Initial Assessment Phase, during which the Commission obtains information from publicly available sources, or seeks information from parties on a voluntary basis.

The second is the Investigation Phase. This formal investigation phase begins once the Commission has formed a view that it has reasonable cause to suspect a contravention. During this phase, the Commission can exercise its compulsory investigative powers under the Ordinance.

There is no specific time frame for such investigations – the varies on a case-by-case basis.

Investigative powers of the authorities

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

The Commission has the power to:

- require the production of documents and information relevant to the investigation;
- require individuals to attend interviews before the Commission; and
- enter and search any premises with a warrant issued by a judge of the Court of First Instance.

A search warrant typically grants the Commission the power to use reasonable force to gain entry to the premises and to take possession of any documents or devices found on the premises that are relevant to the investigation.

The Commission only requires a court's approval in order to conduct dawn raids. It does not require such approval to exercise its other investigative powers.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Commission signed a memorandum of understanding with the Canadian Competition Bureau in December 2016. The Commission also actively participates in the International Competition Network and the Organisation for Economic Cooperation and Development.

The Commission also collaborates with other Hong Kong regulators, including the Securities and Futures Commission and the Communications Authority.

Interplay between jurisdictions

14 | 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, there are no publicly known cross-border cases involving Hong Kong. However, both the Commission and the Tribunal have referred to case law in other jurisdictions. In the Tribunal's first ever judgments handed down in 2019, it demonstrated extensive reliance on European Union case law.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Commission will initiate Competition Tribunal proceedings if it has reasonable cause to believe that the alleged cartel contravenes the First Conduct Rule. On the basis of a trial with witness evidence, the Tribunal will determine whether a contravention has occurred and what penalties to impose.

Burden of proof

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

The burden of proof is on the Commission. The applicable standard of proof is the criminal standard (ie, beyond a reasonable doubt).

Circumstantial evidence

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

Generally, circumstantial evidence (eg, similar pricing behaviour of competitors over a period of time) will not be sufficient to establish cartel infringement. This has been confirmed by the Tribunal in the *Taching* case (CTA1/2018). Parallel conduct is not in itself illegal. Where cases are built solely based on undertakings' parallel behaviour as proof of concentration, alternative explanations of such parallel conduct should be addressed.

However, the Tribunal has stated in the *Nutanix* case (CTEA1/2017) that it may draw appropriate inferences from facts to determine whether a contravention has occurred, provided that such inferences are:

- grounded on clear findings of primary fact;
- a logical consequence of those facts; and
- 'irresistible' (ie, the only inference that can be reasonably drawn based on the facts).

Appeal process

18 | What is the appeal process?

There is a right to appeal against any decision made by the Tribunal to the Court of Appeal (including pecuniary penalty decisions). An appeal must be made within 28 days after the date on which the Tribunal's decision is made.

SANCTIONS

Criminal sanctions

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

There is no criminal cartel offence in Hong Kong. However, failure to cooperate with the Competition Commission or obstruction of an investigation may result in a criminal offence. The infringing persons may face imprisonment or financial penalties.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Competition Ordinance provides a wide range of potential sanctions, including financial penalties of up to 10 per cent of Hong Kong group turnover, for a maximum of three years of a contravention (the Ordinance does not provide any cap for financial penalties imposed on individuals (eg, employees, directors, other natural persons)) and director disqualification orders.

Schedule 3 of the Ordinance sets out the full list of other orders that may be made by the Tribunal, including disgorgement orders, injunctions and declarations that an anticompetitive agreement is void.

Guidelines for sanction levels

21 | 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 Ordinance sets out factors that the Tribunal must have regard to when determining the quantum of a pecuniary penalty:

- the nature and extent of the conduct;
- the loss or damage, if any, caused by the conduct;
- the circumstances in which the conduct took place; and
- whether there has been any previous contravention(s) of the Ordinance.

The Tribunal, having regard to the above factors, considers that the following four-step methodology, which is similar to the European Union's and United Kingdom's fining frameworks, should be followed when setting fines:

- 1 Determine the base amount of the fine, based on the value of sales, and the gravity and duration of the conduct.
- 2 Make adjustments for aggravating, mitigating and other factors.
- 3 Apply the statutory cap of 10 per cent of total group revenue in Hong Kong.

- 4 Apply any reductions due to the undertaking's cooperation with the investigation and consider any inability to pay fines.

In June 2020, the Commission published its Policy on Recommended Pecuniary Penalties (Recommended Pecuniary Penalties Policy), adopting the four-step methodology set out by the Tribunal.

Aggravating factors include where an undertaking acts as a leader or an instigator of the contravention, or where there is any senior management involvement.

Mitigating factors include an undertaking having limited participation in the contravention and having existing effective compliance programmes.

The Tribunal ultimately decides the level of pecuniary penalties. However, it has indicated that it will have proper regard to the Commission's penalty recommendations, including recommendations for cooperation discounts.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Yes, the Commission has indicated that genuine compliance with the Ordinance, through prior implementation of a proportionate and ongoing compliance programme, is a mitigating factor.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Tribunal may make orders to disqualify individuals involved in cartel activity from being a director, or from taking part in corporate management, for a period of up to five years.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is not automatic under the Ordinance. While the Tribunal has the power to make such orders, it has not yet imposed any debarment orders in practice. The Hong Kong government may also delist businesses from its supplier lists under its own initiative.

Parallel proceedings

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

There are no criminal sanctions against cartellists under the Ordinance.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private enforcement actions regarding cartel conduct are limited to follow-on damage claims. Such claims can only be made if a court has previously decided that there has been a contravention under the Competition Ordinance, or if an undertaking has made such an admission in a commitment accepted by the Competition Commission. As no claims for follow-on damages have been made in Hong Kong, it is unclear what the Tribunal's approach on direct and indirect purchasers, level of damages and cost awards will be.

The Ordinance does not allow for standalone private enforcement actions. However, competition law contraventions can be raised as a defence in civil proceedings. In the *Taching* case (CTA1/2018), the plaintiff initiated action for outstanding payments, and the defendant in turn argued that the plaintiff was price-fixing with its competitor and sought damages from the plaintiff.

Class actions

27 Are class actions possible? If so, 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?

Currently, there are no class action procedures for competition claims, or more general actions, in Hong Kong.

COOPERATING PARTIES

Immunity

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

The Competition Commission may make a leniency agreement with an undertaking that it will not bring or continue proceedings in the Tribunal that could result in a pecuniary penalty, in exchange for an undertaking's cooperation.

The Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy) was revised in April 2020.

Leniency is not available to cartel ringleaders and is only available to the first reporting cartel member. Leniency applicants are required to continuously cooperate with the Commission throughout an investigation and in any subsequent Tribunal proceeding.

Leniency applicants are categorised as Type 1 – the first leniency applicant received when the Commission is unaware of the cartel and so has not conducted an investigation – and Type 2 Leniency Applicants – the first leniency applicant received when the Commission is already assessing or investigating the alleged cartel.

The Commission has published a Leniency Policy for Individuals Engaged in Cartel Conduct. Individuals (eg, directors or employees) may report cartel conduct to the Commission and seek immunity. Immunity will only be considered, if no other individual or undertaking has already reported the same conduct to the Commission. However, the Commission has the discretion to apply immunity for further individuals reporting the same cartel conduct.

Leniency is only available for the first reporting cartel member or individual. It is therefore important to be the 'first in'.

The timing of the report may also decide whether an applicant is a Type 1 or Type 2 Leniency applicant. Type 1 Leniency applicants are unlikely to be exposed to any follow-on damage risk in Hong Kong. Type 2 Leniency applicants, on the other hand, may be required by the Commission to subsequently admit to liability via an infringement notice to facilitate follow-on actions by victims of the cartel conduct.

Subsequent cooperating parties

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

Undertakings engaged in cartel conduct that are not the first reporting cartel member are not eligible for immunity. They can however engage with the Commission within a framework of cooperation and settlement.

If satisfied with the level of assistance provided, the Commission will enter into a cooperation agreement with the cooperating party. The case will be settled on the basis of a joint application to the Tribunal. The joint application will reflect the facts as set out in a summary of facts agreed by the undertaking and the Commission. The Commission will recommend a cooperation discount to the fine of up to 50 per cent in exchange of the undertakings' cooperation throughout the investigation and in subsequent proceedings. The Commission may also agree not to take any proceedings against any current and former employees of the cooperating undertaking, provided that they fully and truthfully cooperate with the Commission.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

There are different bands of recommended discounts for cooperating parties:

- Band 1 – between 35 per cent to 50 per cent;
- Band 2 – between 20 per cent to 40 per cent; and
- Band 3 – up to 25 per cent.

The bands are applied based on the order in which undertakings express their interest in cooperating. Generally, the second cooperating party will benefit from the recommended discounts under Band 1, while the third or subsequent cooperating parties will fall within Bands 2 or 3. The actual discount within the applicable band will be decided by the Commission, having regard to the timing, nature, value and extent of the cooperation provided by the undertaking. The Commission may include more than one undertaking in each band.

An undertaking which only cooperates with the Commission after the commencement of any enforcement proceedings will be granted a lower cooperation discount (capped at 20 per cent).

The Commission also offers 'Leniency Plus', where an undertaking cooperating with the Commission in relation to its participation in one cartel (First Cartel) may find that it also has engaged in one or more separate cartels (Second Cartel). In these cases, the Commission will apply an additional discount of up to 10 per cent of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided that:

- the undertaking has entered into a leniency agreement with the Commission in respect of the Second Cartel;

- the Second Cartel is completely separate from the First Cartel; and
- the undertaking fully and truthfully cooperates with the Commission in respect of both cartels.

Approaching the authorities

31 | 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 Ordinance does not prescribe any deadline for initiating or completing any leniency or cooperation application.

Under the Commission's Leniency Policy, a marker system is used to hold a leniency applicant's place and allow the leniency applicant to gather the necessary information to perfect its leniency application.

An undertaking or its legal representative may make initial enquiries on the availability of markers on an anonymous basis. During initial enquiries, undertakings may be required to provide information on the broad nature of the cartel conduct, including the affected industry, product or service, the general nature of the conduct, and the time period.

After confirming that a marker is available, an applicant will need to disclose key information, such as its identity and the identities of undertakings participating in the cartel conduct. The applicant will be required to perfect the marker through a proffer process within time period set by the Commission (at least 30 calendar days).

To perfect the marker, the applicant is required to provide a detailed description of the cartel conduct and the Commission may also ask for evidence to support the applicant's proffer.

Cooperation

32 | 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 that are seeking partial leniency?

The leniency applicant and cooperating parties are required and expected to provide the same level and nature of cooperation. Such cooperation includes:

- providing full and truthful disclosures to the Commission, including promptly providing the Commission with information relating to the cartel conduct and preserving such information;
- making the leniency and cooperation applicant's employees and directors available at the Commission's request to provide information required at the Commission's interviews and to testify during subsequent court proceedings;
- taking prompt and effective action to terminate its participation in the cartel conduct, unless requested otherwise to avoid 'tipping off' cartel participants; and
- keeping the information relating to the leniency or cooperation application confidential.

Confidentiality

33 | 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 Commission is under a general obligation to preserve the confidentiality of any confidential information provided to it.

With respect to leniency applications, it is the Commission's policy to not release any material made available to it by a leniency

applicant for the purpose of making its leniency application, nor release its records of the leniency application process (including the leniency agreement), unless:

- the Commission is compelled to make a disclosure by a court order or is otherwise legally required to do so;
- the Commission has the consent of the leniency applicant to disclose the material; or
- the relevant information or document is already in the public domain.

The Commission is likely to request the directors or employees of the leniency applicant to testify in court proceedings, which will reveal the identity of the leniency applicant. The Tribunal is also likely to compel the Commission to disclose the leniency materials during the court proceedings. It is currently unclear the extent and limits that may apply as the first, and only, case initiated via a successful leniency application was brought to the Tribunal by the Commission in January 2020, and it is still pending a Tribunal hearing.

The Tribunal recognised that there is a strong public interest to encourage cartel members to apply for leniency and facilitate full and frank discussion. It has confirmed in the *Nutanix* case (CTEA1/2017) that the Commission can resist the disclosure of certain leniency materials in an unsuccessful leniency application on public interest immunity or without prejudice privileged grounds. In the *Nutanix* case, the leniency materials were without prejudice correspondences or communications between the Commission and an unsuccessful leniency applicant.

Where a leniency agreement was terminated by the Commission (eg, on the grounds that the applicant provided false or incomplete information), the Commission may use the leniency materials as evidence against the undertaking and other participants in the cartel conduct.

As set out in the Commission's Cooperation Policy, similar confidentiality protection will be offered to the cooperating parties which could not benefit from the leniency policy.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 may enter into cooperation or settlement agreements with undertakings engaged in cartel conduct. The cooperating undertaking and the Commission will make a joint application to the Tribunal to settle the case.

In July 2020, the Tribunal handed its first contravention decision based on a joint application by the Commission and respondents to dispose of the proceedings by way of an uncontested procedure. The Tribunal adopts the *Carecraft* procedure, which has been routinely applied in the context of directors disqualification proceedings under the Companies Ordinance and Securities and Futures Ordinance. The *Carecraft* procedure allows the limiting of facts (by way of a statement of agreed facts) on which the Tribunal will be asked to base a judgment as to the appropriate order to be made, and thereby enables the expeditious disposal of proceedings and avoids the substantial costs that would otherwise be incurred if there is a trial.

Corporate defendant and employees

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

Leniency extends to current (and possibly former) employees, agents, officers and partners of a successful applicant, provided that they fully and truthfully cooperate with the Commission.

Similarly, the Commission may agree to not bring any proceedings against the employees, agents, officers and partners of a cooperating party, provided that they fully and truthfully cooperate with the Commission.

Dealing with the enforcement agency

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

The key steps for a leniency applicant are set out below:

- 1 The undertaking, or its legal representative, contacts the Commission to ascertain if a leniency marker is available. Such requests can be made by telephone or by email.
- 2 The applicant is required to perfect the marker through a proffer process, either orally or in writing.
- 3 The applicant enters into a leniency agreement with the Commission and is required to ensure ongoing compliance with the terms of the agreement.
- 4 At an appropriate stage (usually at the end of any Tribunal proceedings against other cartel members), the Commission will issue a final letter to confirm the undertaking fulfilled all conditions under the leniency agreement.

The key steps for a cooperating party are set out below:

- 1 An undertaking subject to an investigation may indicate its willingness to cooperate by making contact with the concerned case manager of the Commission, either orally or in writing.
- 2 An applicant is required to provide documents and information through a proffer process, either orally or in writing.
- 3 Once the Commission and the applicant reach an understanding in principle on the draft Agreed Factual Summary and the draft cooperation agreement, the Commission will indicate to the applicant the maximum recommended pecuniary penalty and the recommended discount for the cooperation provided. The applicant will be asked to confirm by signing the cooperation agreement, which will include the Agreed Factual Summary.
- 4 The applicant is required to ensure ongoing compliance with the terms of the cooperation agreement.
- 5 At an appropriate stage (usually at the end of any proceedings before the Tribunal against other cartel members), the Commission will issue a final letter to confirm that all conditions under the cooperation agreement have been fulfilled.

DEFENDING A CASE

Disclosure

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

During the Investigation Phase, the Competition Commission generally does not disclose any evidence or information gathered to the subject of the investigation. Where the undertaking is a cooperating party, the Commission will offer the undertaking limited disclosure of a selection of key evidence as part of the cooperation process.

Once the Commission has brought proceedings to the Competition Tribunal, the respondent may apply to the Tribunal for an order for discovery and production of a document from the Commission for inspection. The Tribunal may make or refuse to make such an order having regard to all circumstances of the case (eg, the balance between the interests of the parties and whether the document sought is necessary for the fair disposal of the proceedings).

Following the approach in directors disqualification proceedings under the Securities and Futures Ordinance, the Tribunal generally orders that the Commission disclose both used and unused materials in its possession. In certain circumstances, the Commission's internal documents, including reports concerning the investigation and enforcement steps taken, and certain internal communications, may be protected by public interest immunity and the Commission may object disclosure of such documents. However, the Commission is required to justify its claims for public interest immunity in each case.

Representing employees

38 | 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 or representation?

There are no legal restrictions prohibiting a law firm from representing both an undertaking and its employees under investigation. In practice, lawyers may act for both the employees and the undertaking, so long as the potential clients give informed consent to joint representation during a Commission investigation and the risk of conflict arising from joint representation has been considered.

Multiple corporate defendants

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

There are no legal restrictions restricting lawyers to represent multiple corporate defendants in the same cartel. In practice, lawyers may act for multiple corporate defendants as long as the potential clients give informed consent to joint representation during a Commission investigation and the risk of conflicts of interest arising from joint representation has been considered.

Payment of penalties and legal costs

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

An undertaking is prohibited from indemnifying its employees for the payment of a pecuniary penalty and costs incurred in defending proceedings. However, funds can be provided to its employees to meet expenditure incurred by them in defending proceedings, provided that the employees repay such funds in the event the employees are required by the Tribunal to pay the pecuniary penalty.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

The Ordinance does not specify that fines and private damages payments are tax-deductible.

International double jeopardy

42 | 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?

Currently, there are no publicly known cases in which multiple jurisdictions are involved.

Getting the fine down

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

Mitigating factors that may lead to reduction of fines include limited participation in the contravention, or the presence of a genuine and effective compliance programme prior to the cartel conduct.

The Commission may also recommend a cooperation discount to the Tribunal. The percentage of the discount would depend on the timing, nature, value and extent of the cooperation provided by the undertaking.

In exceptional circumstances, the Tribunal may also take an undertaking's inability to pay into account and reduce the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In the past year there have been a number of developments in the Hong Kong competition regime, including many 'firsts'.

In January 2020, the Competition Commission initiated Competition Tribunal proceedings against an IT company and its director for exchanging pricing information with a competitor. This was the Commission's first case initiated by a successful leniency application.

In March 2020, the Commission initiated Tribunal proceedings against three publishers for alleged price-fixing, market sharing and bid rigging in relation to sales of textbooks in Hong Kong. This was the first time the Commission took action against a parent company. The textbook companies were allegedly engaging in cartel conduct since 2011 and continued their conduct after the Competition Ordinance came into effect in December 2015.

In May 2020, the Commission accepted commitments from three online travel agencies (Booking.com, Expedia and Trip.com) to remove certain contractual restrictions from their agreements with accommodation providers in Hong Kong. This was the first commitments decision by the Commission and the first publicised investigation on vertical agreements.

The Tribunal handed down its first pecuniary penalty judgment in April 2020. This judgment sets out a four-step methodology used to calculate pecuniary penalties under the Ordinance. The Commission subsequently published its penalties policy which adopts the methodology endorsed by the Tribunal.

The Commission also published a revised Leniency Policy and a new Leniency Policy for Individuals in April 2020.

The Hong Kong Seaport Alliance, a contractual joint venture between four port terminals, has been the subject of an in-depth investigation relating to price alignment and capacity sharing. In August 2020, the Commission conducted public consultation on the proposed commitments offered by the Alliance. Among others, the Alliance has proposed to cap their prices in the affected market and implement measures to ensure no exchange of anticompetitive information between the members of the Alliance.

Linklaters

Marcus Pollard

marcus.pollard@linklaters.com

Kathleen Gooi

kathleen.gooi@linklaters.com

11th Floor Alexandra House
Chater Road
Hong Kong
Tel: +852 2842 4888
www.linklaters.com

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Hong Kong government is conducting a review of the Ordinance. No significant changes in the Ordinance are currently anticipated. A key potential change would be the removal of existing exemptions under the Ordinance for statutory bodies.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In March 2020, the Commission published a statement on the application of the Ordinance during the covid-19 outbreak. Specifically, the Commission recognises that competitors may need to have additional cooperation on a temporary basis, particularly to maintain the supply of essential goods and services to consumers. While the Commission encourages businesses to conduct self-assess their own conduct, it also initiated an informal engagement process for covid-19 cooperation, whereby businesses may informally engage with the Commission to discuss how the Ordinance may apply to such cooperation. There is no public information on whether the Commission has considered or allowed any cooperation between competitors based on this informal engagement process.

Through its press release in August 2020, the Commission cautioned participants in government anti-epidemic subsidy programmes to comply with the Ordinance. Potential collusive conduct linked to these subsidy programmes has been reported in the media and has come to the Commission's attention. There is no indication whether the Commission is also investigating this matter.

India

Anima Shukla and Subodh Prasad Deo

Saikrishna & Associates

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is the Competition Act 2002 (the Act).

Relevant institutions

2 | 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 Director General investigates cartel matters upon receiving a direction from the Competition Commission of India (CCI), the prosecution authority. Cartel matters are adjudicated and determined by the CCI.

Changes

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

There has been no significant change in the regime, except for certain changes in the combination regime, most notable of which is the introduction of an automatic system of approval for combinations under the Green Channel.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The substantive law on cartels is contained in the Act. The Act, among other things, prohibits agreements that cause or are likely to cause an 'appreciable adverse effect on competition' (AAEC) in India. The term 'agreement' is very widely defined under the Act and includes any arrangement, understanding or action in concert. Under the Act, cartels are agreements between competitors to fix prices or limit output or share markets or indulge in bid rigging. Once an agreement to indulge in any of the aforesaid prohibited conduct is established, a presumption in law is made that such an agreement has caused an AAEC in India.

Consequently, the onus to prove that there is no AAEC is on the charged parties. Unless the presumption of AAEC is rebutted to the satisfaction of the CCI by the charged parties, the CCI will issue an order prohibiting the cartel and impose penalties as provided for under the Act. If the charged parties furnish evidence to dispel the presumption of AAEC, then the CCI will consider any or all of the following factors given under the Act to determine AAEC:

- the creation of barriers for new market entrants;
- the driving of existing competitors out of the market;
- the foreclosure of competition by hindering market entry;
- the accrual of benefits to consumers;

- improvements in production and the distribution of goods and services; and
- the promotion of technical, scientific and economic development.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are potentially subject to the cartel laws, except for those that increase efficiency.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The law applies to individuals, corporations and to government departments except those dealing with atomic energy, currency, defence and space.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The regime applies to conduct that takes place outside India if such conduct has an effect on competition in India. The Act empowers the CCI to inquire into extra-territorial conduct relating to agreements, abuse of dominant position or a combination thereof if they have or are likely to have an AAEC on competition in India and pass such orders as it may deem fit in accordance with the Act.

Export cartels

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

Export cartels have been specifically exempt under the Act. Thus, a defence that the impugned conduct does not cause an AAEC in India, but only affects customers or other parties outside India, is valid.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements and the Act applies universally to all sectors and industries.

However, there are certain sector-specific laws which are administered by the respective sector regulators, such as the Telecom Regulatory

Authority of India (TRAI), the Central Electricity Regulatory Commission and the Petroleum and Natural Gas Regulatory Board. The Act provides for the option of mutual consultation between the CCI and such statutory authorities on a non-binding basis. In a matter involving an alleged overlap of jurisdiction between the CCI and the TRAI, the Supreme Court of India has observed in the case of *Competition Commission of India v Bharti Airtel Limited and Others* (Civil Appeal No. 3546 OF 2014, judgment dated 1 October 2018) that the CCI, in the specific facts of the case, can exercise its jurisdiction and see if the same amounts to 'abuse of dominance' or 'anticompetitive agreements' once the mandate of TRAI and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) has been exercised and they have determined that the violation of the TRAI Act was due to a concerted practice.

The Act exempts intellectual property right holders from the purview of section 3 of the Act (prohibition on anticompetitive agreements) in exercising of their right to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of their rights that have been or may be conferred upon them under:

- the Copyright Act 1957;
- the Patents Act 1970;
- the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999;
- the Geographical Indications of Goods (Registration and Protection) Act 1999;
- the Designs Act 2000; and
- the Semi-conductor Integrated Circuits Layout-Design Act 2000.

In a matter involving an alleged overlap of jurisdiction between the CCI and the Controller General of Patents, the Delhi High Court vide judgment dated 20 May 2020 in WP (C) 1776/2016 and WP (C) 3556/2017, while reaffirming the earlier judgment passed in *Telefonaktiebolaget LM Ericsson v CCI & Anr* (WP(C) 464/2014 decided on 30.03.2016, held that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. The Court also clarified that the decision of the Supreme Court in *Bharti Airtel Ltd* cannot be construed to mean that wherever there is a statutory regulator, the complaint must be first brought before the statutory regulator and examination of a complaint by the CCI is contingent on the findings of the statutory regulator.

The Act exempts export cartels if such agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for export from India.

Further, the central government, vide notification dated 4 July 2018, has also extended the exemption granted to the vessel sharing agreements of the liner shipping industry from the provisions of section 3 of the Act for a period of three years, in respect of carriers of all nationalities operating ships of any nationality from any Indian port provided that the central government may withdraw the said exemption, if any complaint about the fixing of prices, limitation of capacity or sales, or allocation of markets or customers come to its notice.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no defence or exemption for state actions, government-approved activity or regulated conduct except that the sovereign functions being carried out by the central government related to atomic energy, currency, defence and space are exempt from the purview of the Act. Further, the CCI has ruled that only those activities of the government that are not regulatory or policy formulation functions fall within the ambit of the Act.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Commission of India (CCI) may initiate an investigation suo moto, on reference by any statutory authority or receipt of information from any person, consumer or consumer association or trade association based on a prima facie satisfaction that the Act has been violated. On such satisfaction, the CCI directs the Director General to investigate the matter and submit a report within a specified period. On consideration of such a report, and any objections thereto from the parties concerned, the CCI may either close the case or impose such penalties as deemed fit. The Director General cannot initiate an investigation on its own or appeal against the directions or orders of the CCI.

The investigation commences upon the passing of an order by the CCI, directing the Director General to carry out an investigation. Although there are no formal milestones in an investigation, the Director General typically sends multiple notices to the parties from time to time, seeking exhaustive information from the charged parties, third parties and the informant. The Director General also summons the parties to record their statements on oath and seek clarification on documents and evidence on record. The investigation concludes with the submission of the report to the CCI, recommending whether a violation of the Act has occurred.

The CCI will consider such reports and may direct further investigation or forward a copy of the non-confidential version of the investigation report to the parties for comments. On receipt of such comments, the CCI will hear the parties and adjudicate the case by passing its final order.

Investigative powers of the authorities

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

The CCI and the Director General have the power to:

- summon and enforce the attendance of any person and examine such person under oath;
- require the discovery and production of documents;
- receive evidence on affidavit;
- issue commissions for the examination of witnesses or documents; and
- requisition any public record, document or copy of such record or document from any office.

Further, the Director General may conduct search and seizure operations but only after obtaining a warrant from the chief metropolitan magistrate in Delhi.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes, there is cooperation with competition agencies in several jurisdictions. Proviso to section 18 of the Act states that the CCI may, for the purpose of discharging its duties or performing its functions under the Act, enter into any memorandum or arrangement with the prior approval of the central government, with any agency of any foreign country.

As per the information available on the CCI's website, the CCI has entered into memoranda of understanding with the following authorities as of March 2019:

- the Federal Trade Commission and the Department of Justice of the United States;
- the Director-General Competition of the European Union;
- the Federal Antimonopoly Service of Russia;
- the Australian Competition and Consumer Commission;
- the Competition Bureau of Canada; and
- the competition authorities of the 'BRICS' countries Brazil, China, and South Africa.

Interplay between jurisdictions

14 | 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 information regarding the effect of cross-border cases on the investigation, prosecution and penalising of cartel activity in India is very scant.

The CCI has thus far issued only one decision involving cartel activity in a cross-border case, namely, *Suo Motu Case No. 07 (01) of 2014 in respect of Cartelisation in the supply of Electric Power Steering Systems against NSK Limited, Japan and Others*. It is noted from the public version of the order that based on leniency application filed by NSK Ltd Japan, the CCI ordered an inquiry in the matter on 17 September 2014. During the course of investigation by the Director General, JTEKT Corporation, Japan also filed leniency application before the CCI. As per the CCI's decision in the matter dated 9 August 2019, the period of inquiry was from 2005 to only 25 July 2011, the date on which the Japanese Fair Trade Commission conducted an on-site inspection of four Japanese companies including NSK and JTEKT, in connection with alleged cartelisation in another product. There are no further details regarding the said order of the CCI.

Considering the fact that NSK provided vital disclosures by submitting evidence of the cartel, which enabled the CCI to form a prima facie opinion regarding the existence of the cartel and cooperated genuinely, fully, continuously and expeditiously throughout the investigation and further proceedings before the CCI, it was granted the benefit of 100 per cent reduction in its penalty. Further, JTEKT which was second to approach the CCI as a lesser penalty applicant was also granted the benefit of 50 per cent reduction in penalty in terms of the Lesser Penalty Regulations. The concerned individuals of these companies, who were found liable for the infringing conduct, were granted reductions in penalty amount as granted to NSK and JTEKT respectively.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel proceedings are adjudicated by the CCI after considering the investigation report submitted by the Director General and the written submissions of the charged parties on the same, including on the quantum of penalty. Further, the charged parties are also accorded opportunity to make oral submissions before the CCI.

Burden of proof

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

The burden to prove that there is an 'agreement' amongst the competitors, to fix prices or limit output or share markets or indulge in bid rigging, is upon the Director General. Thereafter, the burden shift to the charged parties to prove that there is no agreement or that such

agreement has not caused any AAEC. The level of proof required is only 'balance of probabilities'. As per the decisional practice of CCI, it is observed that the threshold for the same is very low.

Circumstantial evidence

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

Infringement can be established by using circumstantial evidence without direct evidence of the actual agreement. The CCI has relied on circumstantial evidence to determine cartel in large number of cases. Circumstantial evidence such as emails, call records, similar IP addresses, hiring of same agents, meetings between parties, timing of filing of bids, similar documentation, time of submission of documentations for bids and such like have been relied upon to infer and determine the existence of cartels, even when no direct evidence was found.

Appeal process

18 | What is the appeal process?

Any party aggrieved by any direction, decision or order of the CCI, passed under certain sections specified in the Act, may prefer an appeal to the Appellate Tribunal, namely, the National Company Law Appellate Tribunal (NCLAT) within 60 days from the date of receipt of such direction, decision or order of the CCI. The NCLAT may entertain an appeal even after the expiry of the 60 days, if it is satisfied that there was sufficient cause for not filing it within that period. While an order of the CCI directing initiation of an investigation by the Director General is not appealable, an order regarding closure of a case or imposition of penalties on the enterprise or its officials for violation of the Act, among others, are appealable. The NCLAT may pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. In other words, there is a plenary review on merits, of fact and law. Though there are no fixed time lines for disposal of an appeal, the Act stipulates that every appeal shall be dealt with by the Tribunal as expeditiously as possible and endeavour to dispose of the appeal within six months from the date of receipt of the appeal.

The chairperson of NCLAT shall be a person who is or has been a judge of the Supreme Court or the chief justice of a High Court. The NCLAT is guided by the principles of natural justice, the provisions of the Act and the rules made thereunder by the central government. It has the power to regulate its own procedure, including the places where they shall have their sittings. Every proceedings before the NCLAT is deemed to be judicial proceedings within the meaning of certain specified provisions of the Indian Penal Code 1860. Further, the NCLAT is deemed to be a civil court for certain specified provisions of the Code of Criminal Procedure 1973. The orders of NCLAT are enforceable like a decree made by a civil court in a suit pending before it.

Any party aggrieved by any direction, decision or order of the NCLAT may prefer an appeal to the Supreme Court within 60 days from the date of receipt of such direction, decision or order of the NCLAT. The standard of review by the NCLAT and the Supreme Court is of 'balance of probabilities'.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activities.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Apart from a cease and desist order, the Competition Commission of India (CCI) may impose on an enterprise engaged in cartel activity a monetary penalty of up to three times of its relevant profit for each year of the continuance of the cartel or 10 per cent of its relevant turnover for each year of the continuance of the cartel, whichever is higher. Monetary penalties are invariably imposed in cases where an offence is made out.

However, in two of the recent cartel and bid rigging decisions, the CCI did not impose any monetary penalties but issued only a cease-and-desist order (In *Re: Cartelisation in Industrial and Automotive Bearings* – Case No. 5 of 2017 decided on 5 June 2020 and In *Re: Chief Materials Manager, South Eastern Railway v. Hindustan Composites Limited & Ors* – Reference Case No. 3 of 2016 decided on 10 July 2020).

In the *Automotive Bearing* case, though the CCI observed that the parties have been unable to rebut the presumption of AAEC raised in the matter and that contravention of the provisions of Act stands established, it held that the ends of justice would be met, in light of the peculiar facts and circumstances of the present case, if the parties ceased such cartel behaviour and desisted from indulging in it in future.

The CCI chose not to impose any monetary penalty, for the second time in a row, in the case involving bid rigging in the supply of composite brake blocks to the Indian Railways. In arriving at such a decision, the CCI considered that the companies not only cooperated but even admitted to their role in the anticompetitive agreement, the small annual turnover in the segment, the prevailing economic situation arising due to the outbreak of the covid-19 pandemic and the various measures undertaken by the government of India to support the liquidity and credit needs of viable micro, small and medium-sized enterprises to help them withstand the impact of the current shock.

Guidelines for sanction levels

21 | 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 specific guidelines or sentencing principles for calculating penalties exist. However, the CCI accords an opportunity to the parties charged and considers their written and oral submissions on the quantum of penalties. As regards to the quantum of penalty, the CCI holds that penalties must be commensurate with the seriousness of infringement and must also act as a deterrent. Penalties are imposed on the basis of the relevant turnover or the relevant profit, as the case may be, of an enterprise. Individuals and officials of enterprises are also imposed penalties of up to 10 per cent of their average income of the preceding years as reflected in their respective income tax returns.

In computing penalties, the CCI weighs in the aggravating and mitigating factors in the facts and circumstances of each case, but there is little clarity or certainty as to what could or would be considered as a mitigating and aggravating factors in any particular case.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Existence of a robust compliance programme at the time of the infringement would certainly be considered as a mitigating factor by the CCI to grant a reduction in penalties. However, there is no certainty regarding the extent to which the CCI may grant any such reduction.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is no provision in the Act to the effect that individuals involved in cartel activity can be prohibited from serving as corporate directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is not automatic but is available as a discretionary sanction subject to a show cause notice in response to cartel infringements.

Parallel proceedings

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

The Act provides for only civil sanctions.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Based on the CCI's findings or the findings of the appellate tribunal in an appeal, a claim for compensation can be made by any authority or enterprise or any person for any loss or damage shown to have been suffered as a result of any contravention committed by an enterprise. However, no case of damages has been decided by the Appellate Tribunal. Thus, there is no clarity on the issues whether damage claims are limited only to direct purchasers or whether the indirect purchasers are also permitted to raise such claims, including the manner in which the pass-through would be dealt with. Similarly, there is no clarity whether the purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid. Further, there is no clarity also regarding the level of damages and costs that can be recovered.

Class actions

27 | Are class actions possible? If so, 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?

With the permission of the Appellate Tribunal, one or more such person having the same interest may make an application for class action. Thereafter, the appellate tribunal shall give notice of the institution of the compensation case to all interested persons, either by personal service or public advertisement. Further, any person on whose behalf or for whose benefit the compensation case has been instituted may apply to the Appellate Tribunal to be made a party to such case.

COOPERATING PARTIES

Immunity

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

A leniency programme is available under the Act, which is contained in the Competition Commission of India (Lesser Penalty) Regulations 2009. A leniency applicant must be included in the cartel and must make 'full, true and vital disclosures' to the CCI about the cartel. An applicant may be granted the benefit of a reduction in a penalty of up to 100 per cent if it 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 the cartel, and the CCI did not have sufficient evidence to form such an opinion at the time of application.

The applicants subsequent to the first applicant may also be granted the benefit of a reduction in the penalty on making a disclosure by submitting evidence that, in the CCI's opinion, may provide significant added value to evidence already in the CCI's or Director General's possession. The applicant marked second in the priority status may be granted a penalty reduction of up to 50 per cent while the applicant marked as third, and all subsequent applicants in the priority status may be granted a reduction of up to 30 per cent. The CCI has discretion in regard to the reduction in penalty, which may be exercised with due regard to:

- the stage at which the applicant has come forward with the disclosure;
- the evidence already in the CCI's possession;
- the quality of the information provided; and
- the full facts and circumstances of the case.

Subsequent cooperating parties

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

Those applying to the leniency programme following the first applicant may also be granted the benefit of a reduction in the penalty on making a disclosure by submitting evidence that, in the CCI's opinion, may provide significant added value to evidence already in the CCI's or Director General's possession. The applicant marked second in the priority status may be granted a penalty reduction of up to 50 per cent while the applicant marked as third, and all subsequent applicants in the priority status may be granted a reduction of up to 30 per cent. The CCI has discretion in regard to the reduction in penalty, which may be exercised with due regard to:

- the stage at which the applicant has come forward with the disclosure;
- the evidence already in the CCI's possession;
- the quality of the information provided; and
- the full facts and circumstances of the case.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

There is no provision for an 'immunity plus' or 'amnesty plus' option.

Approaching the authorities

31 | 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 applicant may make an application containing all the material information as specified in the schedule to the Competition Commission of India (Lesser Penalty) Regulations 2009, or may contact, orally or through email or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. However, no such application can be entertained if the Director General has already submitted its investigation report in the matter.

Upon consideration of the matter within five working days, the CCI shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant either by telephone, email or fax.

If the information received is oral or through email or fax, the CCI shall direct the applicant to submit a written application containing all the material information as specified in the schedule within a period not exceeding 15 days. The date and time of receipt of the application by the CCI shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.

Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the CCI.

Where the application, along with the necessary documents is not received within a period of 15 days or during the further period as may be extended by the CCI, the applicant may forfeit its claim for priority status and consequently for the benefit of a lesser penalty.

Where the CCI is of the opinion that the applicant has not provided full and true disclosure of the information and evidence as referred and described in the schedule or as required by the CCI, from time to time, it may take a decision after considering the facts and circumstances of the case and upon providing an opportunity of hearing to such applicant, reject the application.

The CCI, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application but merely on that basis, it shall not entitle the applicant to a lesser penalty. Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the CCI.

Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the CCI and the procedure prescribed above, as in the case of the first applicant, shall apply mutatis mutandis.

Leniency applicants are required to:

- cease further participation in the cartel from the time of the disclosure, unless otherwise directed by the CCI;
- provide vital disclosure in respect of the violation;
- provide all relevant information, documents and evidence as may be required by the CCI;
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI; and
- not conceal or destroy any relevant document that may contribute to the establishment of the cartel.

Accordingly, the CCI may decline or withdraw leniency if the leniency applicant breaches any of the conditions stipulated above for grant of leniency.

Cooperation

- 32 | 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 that are seeking partial leniency?

Leniency applicants must furnish full, true and vital information regarding the existence of a cartel before the report of the investigation has been submitted by the Director General to the CCI. An application for a reduced penalty must include the following:

- the name and address of the applicant and its authorised representative, as well as of all other enterprises in the cartel;
- where the applicant is based outside India, an address and contact details for them in India for communication purposes;
- a detailed description of the alleged cartel arrangement, including its aims and objectives, and the details of activities and functions carried out for securing such aims and objectives;
- the goods or services involved;
- the geographic market covered;
- the commencement and duration of the cartel;
- the estimated volume of business affected by the cartel;
- the details of all individuals, including their position, office and residence locations, who are or have been associated with the cartel, including those involved on behalf of the applicant;
- the details of other competition authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel;
- a descriptive list of evidence regarding the nature and content of the evidence; and
- any other material information.

In addition to the above, the leniency applicant may also be required to provide other information, documents or evidence as may be required by the Director General or the CCI.

There are no differences in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency.

Confidentiality

- 33 | 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 the leniency applicants and the information, documents and evidence furnished by them are accorded confidentiality protection. However, the identity of an applicant or the information, documents and evidence submitted by them may be disclosed if:

- such disclosure is required by law;
- the applicant has agreed to such disclosure in writing; or
- there has been a public disclosure by the applicant.

In cases where the Director General deems it necessary to disclose the information, documents and evidence to any party for the purposes of investigation, and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party after recording the reasons in writing and taking prior approval from the CCI.

In cartel cases, the CCI issues two versions of its final order, namely, a non-confidential qua parties version and a public version with a view to protect and maintain the confidentiality of the parties.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Settlements, plea bargains or other negotiated resolutions are not available under the Act.

Corporate defendant and employees

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

When immunity is granted to an enterprise, its current and former employees are granted reduction in penalties similar to the enterprise.

Dealing with the enforcement agency

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

The immunity applicant must reach out to the CCI at the earliest and make disclosure of full facts. Irrespective of their marker status, the subsequent cooperating parties must cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI.

DEFENDING A CASE

Disclosure

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

While the Competition Commission of India (CCI) and the Director General are mandated to treat the identity of the leniency applicants as well as the information, documents and evidence furnished by such applicants as confidential, these may be disclosed to any party for the purposes of investigation.

Representing employees

- 38 | 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 or representation?

Counsel may represent employees under investigation in addition to the corporation that employs them. In cases where there is a conflict in the stand or submissions of the past or present employees with that of the corporation, it would be advisable to obtain independent legal advice or representation.

Multiple corporate defendants

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

Counsel may represent multiple corporate defendants provided there is no conflict or conflict waiver has been granted by the corporate defendants.

Payment of penalties and legal costs

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

There is no prohibition in this regard under the Competition Act 2002 (the Act); accordingly, a corporation may pay the legal penalties imposed on its employees as well as their legal costs.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or penalties are not tax-deductible. Similarly, damages awards are also not tax-deductible as they are a fall out of punitive action for violating the Act.

International double jeopardy

42 | 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 per the decisional practice of the CCI dated 31 January 2018 in Case Nos. 7 and 30 of 2012 (against Google LLC for abusing its dominant position), it has not taken into account any penalties imposed upon Google in other jurisdictions. Thus, individuals or companies that have been penalised elsewhere are likely to be subject to double jeopardy in India.

In its fining decisions, the CCI considers only the direct sales of the companies being fined.

As regards the issue of overlapping liability for damages in other jurisdictions, there is no clarity as not even one damages decision has been handed over under the Act thus far in India. It is therefore to be seen whether the Appellate Tribunal, which is empowered to decide damages and compensation claims under the Act, will take into account overlapping liability for damages in other jurisdictions or not.

Getting the fine down

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

The CCI considers all the facts on record while deciding the quantum of penalties. Thus, the timing and extent or quality of cooperation, a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced may affect the nature or magnitude of the sanctions.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Over the last year, the Competition Commission of India (CCI) has decided three cartel cases.

Bengal Chemists and Druggists Association

The CCI, vide its decision dated 12 March 2020 (in clubbed case numbers 36/2015, 31/2016 & 58/2016), held the Bengal Chemists and Druggists Association (BCDA) et al to be guilty of anticompetitive conduct. The BCDA:

- mandated that the pharmaceutical companies will not supply drugs to its new stockists unless such stockists:
 - obtained a prior stock availability information (SAI)/no objection certificate (NOC) from BCDA; and

- collected money from the prospective stockists for issuance of SAI to them; and
- required the promotion-cum-distributor agents of pharma companies to obtain product availability information (PAI) from BCDA after paying monetary sums to them in the form of donations.

The CCI also held two pharmaceutical companies, Alkem and Macleods, guilty of entering into an anticompetitive agreement with BCDA, whereby these companies, after issuing offer letters of stock shipments to prospective stockists, demanded the stockist submit SAIs, NOCs, approval letters and circulation Letter from BCDA before supplies of drugs could be made to them. The CCI rejected the plea of the pharmaceutical companies that they were indulging in the impugned conduct under threat, duress and directions from BCDA. However, apart from issuing a cease-and-desist order, the CCI did not impose any monetary penalty on any of the parties. Further, it directed BCDA to conduct advocacy events by way of outreach activities with its district and zone committees and their office bearers to impress upon them the need to comply with the provisions of the Act in letter and in spirit.

Industrial and Automotive Bearings

The second cartel decision by the CCI during the year has been in the *Suo Moto* Case No. 05/2017 (In *Re: Cartelisation in Industrial and Automotive Bearings*). The case was pursued upon receipt of an application under the Competition Commission of India (Lesser Penalty) Regulations, 2009, which disclosed cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014. Pursuant to the investigation by the Director General, the CCI found evidence that four industrial and automotive bearings manufacturers had forged an agreement in relation to price revisions and minimum percentage of price increases to be quoted to automotive and industrial original equipment manufacturers (OEMs), which was established by way of email communications between the cartelists as well as minutes of meetings attended by the representatives of the various companies where such price-related discussions took place.

The parties contended that there was no 'appreciable adverse effect on competition' (AAEC) in the market, which was evident from the price analysis done in the Director General Report itself.

The parties further contended that even the OEMs, when asked by the Director General, stated that they could not perceive any instance of cartelisation amongst the parties. It was also contended that the OEMs, in any case, exert significant countervailing buying power in the market. In its decision, the CCI observed that the contention of the parties that the price revisions quoted to the OEMs by them were not in accordance with what had been decided between them, does not rebut the statutory presumption of AAEC under the Act. The CCI opined that the very fact of the parties meeting with each other to decide the price revisions to be quoted to the OEMs, compromised their independence, enabling them to quote price revisions to the OEMs, different than what they would have otherwise quoted independently. The CCI, therefore, concluded that the parties had indulged in cartelisation and price-fixing. The CCI also held those individuals, who were in charge of and responsible to their respective companies for the conduct of the business of the companies, to be liable for the anticompetitive conduct. Even though the CCI held that the bearings manufacturers were operating a cartel, it did not impose any monetary penalty and simply observed that 'ends of justice would be met if the parties cease such cartel behaviour and desist from indulging in it in future'.

Chief Materials Manager, South Eastern Railway v Hindustan Composites Limited & Ors

The third case pertains to bid rigging in tenders issued by different zones of the Indian Railways (In *Re: Chief Materials Manager, South Eastern*

Railway v. Hindustan Composites Limited & Ors – Reference Case No. 03 of 2016). In the information filed by the chief managers of the various divisions of the Indian railways, it was alleged that manufacturers and suppliers of composite brake blocks (CBBs) had submitted identical bids in the tenders and had also offered identical reductions in quoted rates in the subsequent negotiations. The Director General found evidence of collusion from 2007-2019 amongst the companies, including Whatsapp messages, SMS messages, and call detail records of the personnel of the companies. Further, the company officials also made admissions in their statements recorded by the Director General during the course of the investigation.

The charged parties contested by stating that even though they had indulged in bid rigging, there was no AAEC in the market for CBBs in India. Further, the parties also submitted that the Indian Railways being a monopolistic buyer controls the price and quantity to be supplied to it and that the opposite parties do not have any control over the price or quantity.

The CCI rejected both these arguments. It dismissed the plea of the charged parties that there is no contravention of the provisions of the Act because no AAEC has allegedly been caused as a result of the alleged cartel between the parties as being misdirected and untenable in the face of clear legislative intent whereby even the conduct which can potentially cause AAEC, is prohibited. With regard to the Indian Railways being a monopolistic player with power to determine prices and quantity, the CCI noted that the said contention of the charged parties are also misconceived. The CCI observed that in the presence of overwhelming documentary evidence of cartelisation, putting emphasis on market conditions in isolation is of no avail. It further held that the Indian Railways is free as a consumer to make a choice as far as selection of goods or services provider is concerned and therefore negotiations and bargaining made by the Indian Railways do not detract from the factum of bid rigging indulged in by the vendors in flagrant violation of the provisions of the Act. In light of the above, the CCI concluded that OP-1 to OP-10 and their respective individuals had indulged in cartelisation in the CBB market in India, at least from 2009 until 2017, by means of directly or indirectly determining prices, allocating markets, co-ordinating bid response and manipulating the bidding process, which had an AAEC within India.

However, the CCI chose not to impose any monetary penalty in this case, making it the second case in a row where no monetary penalty has been imposed despite the CCI returning a finding that the charged parties have indulged in the cartel or bid rigging conduct. In arriving at its decision, the CCI considered that the companies not only cooperated but even admitted to their role in the anticompetitive agreement, the small annual turnover in the segment, the prevailing economic situation arising due to the outbreak of global pandemic of covid-19 and the various measures undertaken by the government of India to support the liquidity and credit needs of viable micro, small and medium enterprises to help them withstand the impact of the current shock.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The government of India had constituted a Competition Law Review Committee (CLRC) on 1 October 2018 to review the existing competition law framework and make recommendations to further strengthen the framework to, among other things, meet new economic challenges.

The recommendations of the CLRC, which entail amendments in the Act, have not been implemented pending necessary legislative approval by both the houses of India's parliament.

The key recommendations are:

Structure and composition of the CCI

- Introducing a governing board to oversee advocacy and quasi-legislative functions, leaving adjudicatory functions to the whole-time members;
- integrating the Director General's office with the CCI to bring about administrative efficiencies in the direction and scope of investigations, accompanied by functional autonomy for the Director General and meaningful internal division of investigation and adjudication functions;
- opening regional offices of the CCI for carrying out non-adjudicatory functions such as investigation and advocacy;
- setting up of a dedicated bench of the NCLAT to expeditiously hear and dispose of competition appeals; and
- incorporating additional enforcement mechanisms in the form of settlement and commitment mechanisms In respect of anticompetitive vertical agreements and abuse of dominance, that may be achieved outside of an otherwise relatively lengthy enforcement process.

Combinations

- Introducing a 'Green Channel' for combination notifications having no major concerns regarding appreciable adverse effects on competition;
- combinations arising out of the insolvency resolution process under the Insolvency and Bankruptcy Code to be eligible for 'Green Channel' approvals;
- introducing a 'material influence' standard to determine what amounts to 'control';
- all permissible time exclusions from the 210-day timeline for assessment of mergers to be codified within the Act itself; and
- introducing additional thresholds to review combinations of business that are not structured traditionally – especially where they form part of digital markets – when considering non-notifiable mergers, if the transaction value or the deal value of a combination exceeds a certain limit.

'Hub and spoke' agreements

Incorporating express provision to identify 'hub and spoke' agreements in order to provide clarity on the liability of hubs as well as to address agreements that do not fit within typical horizontal or vertical anticompetitive agreements due to market realities shifting from traditional norms.

Penalties

CCI must be mandated to issue guidelines on the imposition of penalty.

Definitions

- 'Cartels' should include buyers' cartels;
- 'consumer' should include government departments or agencies; and
- 'turnover' (used for the purpose of determining combinations) should exclude intra-group sales, indirect taxes and trade discounts.

Leniency

Provide a 'leniency plus' regime, which incentivises applicants to come forward with disclosures regarding multiple cartels by providing a penalty reduction to a leniency applicant in the first cartel which will be over and above any other penalty reductions that such an applicant may receive under the normal lesser penalty application framework; and enable a leniency applicant to withdraw leniency application within a prescribed time period but to allow the CCI to use the information submitted by the leniency applicant in accordance with applicable laws.

Compensation

To allow applications for compensation to be filed post the determination of an appeal by the Supreme Court instead of NCLAT.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

Considering the coronavirus pandemic and the restrictions on the movement of people, CCI allowed parties to file electronically antitrust cases as well as combination notices including Green Channel notifications. and has deferred hearings of non-urgent cases. It has also made the Pre-Filing Consultation (PFC) facility available through video conference. A dedicated helpline was also set up to attend to the queries of stakeholders during the pandemic.

The CCI issued *Advisory to Businesses in time of COVID-19* on 19 April 2020. It was noted in the advisory that businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of a distribution network and infrastructure, transport logistics, R&D, production etc to ensure continued supply and fair distribution of products (eg, medical and healthcare products such as ventilators, face masks, gloves, vaccines etc and essential commodities) and services (eg, logistics, testing etc). It was highlighted that the Act prohibits conduct that causes or is likely to cause an appreciable adverse effect on competition and further that the Act presumes certain concerted actions between competitors to cause an appreciable adverse effect on competition. It was also stated that such presumption is not applicable to joint ventures if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Also, while conducting competition assessment, the Act enables the CCI to have due regard, among others, to the accrual of benefits to consumers; improvement in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. Thus, the Act's safeguards protect businesses from sanctions for certain coordinated conduct were highlighted, provided such arrangements result in increased efficiencies. However, it was cautioned that only such conduct of businesses which is necessary and proportionate to address concerns arising from covid-19 will be considered. Businesses were, however, warned not to take advantage of covid-19 to contravene any of the provisions of the Act.

The CCI has commenced virtual hearing of cases after issuing a standard operating procedure for the same.



SAIKRISHNA & ASSOCIATES
ADVOCATES

Anima Shukla

anima@saikrishnaassociates.com

Subodh Prasad Deo

subodh@saikrishnaassociates.com

8th Floor, VJ Business Tower
Plot No A-6, Sector 125, Noida
Uttar Pradesh 201301
India
Tel: +91 120 463900
www.saikrishnaassociates.com

Japan

Eriko Watanabe and Koki Yanagisawa

Nagashima Ohno & Tsunematsu

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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 Japan Fair Trade Commission (JFTC) may take against the activities of government officers involved in public bid rigging.

Relevant institutions

2 | 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. 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.

Collusion in a public bid under the Criminal Code is subject to the investigation by the Public Prosecutors' Office.

Changes

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

On 19 June 2019, the amendment to the Antimonopoly Law (2019 Amendment) was enacted by the national diet and, on 26 June 2019, was promulgated. The regime of cartel regulations (ie, administrative sanctions and the leniency programme) will substantially change when the 2019 Amendment becomes fully effective. The effective date for most of the major changes will be 25 December 2020, while some of them became effective as of 26 July 2019 and 1 January 2020, respectively.

Apart from the foregoing, no fundamental legislative amendment to the substantive law under the Antimonopoly Law or major 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, the amendment to the Antimonopoly Law that became effective as of 1 April 2015 abolished the JFTC's administrative proceedings and the JFTC orders are now 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 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.

Furthermore, the commitment procedure, the system to resolve alleged violations of Antimonopoly Law voluntarily by consent of a defendant company, was introduced on 30 December 2018, pursuant to the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws. 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, the Antimonopoly Law provides that such commitment procedure does not apply to cartel conducts.

Substantive law

4 | 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 only prohibits 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 in rebuttal thereof.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The joint ventures on a contract basis and strategic alliances among competitors are subject to the latter part of article 3 of the Antimonopoly Law and are prohibited if they substantially restrain the competition in the relevant market.

The JFTC seems to have 'per se illegal' approach to handling investigations and deciding cartel and bid rigging cases. However, the JFTC has also taken a 'rule of reason' approach towards joint ventures formed on a contract basis and strategic alliances among competitors, similar to business combinations, according to the JFTC's report on the prior consultations that are made public in each fiscal year. This was confirmed in the Report of Study Group on Business Alliance, which was made public as of 10 July 2019 by the Competition Policy Research Center, an organisation of the JFTC consisting of JFTC officers and academics. While the JFTC has no guidelines for the joint ventures on a contract basis and strategic alliances among competitors, the Report provides the basic framework for reviewing business alliances for research and development, technology use, standardisation, procurement, production, logistics, and sales.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) applies to the conduct of 'entrepreneurs', which includes both corporations and individuals. Trade associations are also subject to the prohibition under the Antimonopoly Law.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Antimonopoly Law contains no provision expressly setting forth the jurisdiction of the Japan Fair Trade Commission (JFTC). 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. The Supreme Court supported this conclusion. 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 therefor also 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.

Export cartels

8 | 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Antimonopoly Law apply all of the business and there are no industry-specific infringements under the Antimonopoly Law. Having said, there are certain guidelines dealing with the cartels formed by trade associations, such as those of agricultural cooperatives.

There are systems which allow a cartel to be exempt from the Antimonopoly Law due to the applicable business affairs laws (eg, the joint operation of non-life insurance, airlines and maritime transport). However, there are no industry-specific defences.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The systems which permit exemptions from the application of the Antimonopoly Law based on applicable business affairs laws, in principle requires approval from the relevant minister and consent from and notice to the JFTC. Other than those exemptions explicitly provided under the applicable laws, there is no defence due to the approval from the ministries and governmental agencies. There are precedents in which the JFTC has enforced the Antimonopoly Law against companies that colluded and agreed to prices they would file with the relevant government agencies for their approval in the regulated industries.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

When the Japan Fair Trade Commission (JFTC) discovers an alleged violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 the 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.

Investigative powers of the authorities

12 | 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.

When, 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 investigations by the JFTC

The JFTC may, on a compulsory basis, if necessary, during an investigation:

- 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 an ex officio basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid rigging case. 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. The Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of seized material, 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. Corporations can also be subject to a fine of up to ¥3 million.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes. 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 with Canada in 2005.

Moreover, Japan signed economic partnership agreements with various countries, such as Australia, Chile, Malaysia, Mexico, the Philippines, Singapore and Thailand.

The Japan Fair Trade Commission (JFTC) has also concluded memoranda on cooperation with competition authorities such as China, the Philippines, Vietnam, Brazil and Korea.

The JFTC may also exchange information with other competition authorities to some extent.

Interplay between jurisdictions

- 14 | 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 a number of 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

Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

If the Japan Fair Trade Commission (JFTC), as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 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 the order. The Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court. An appeal against a judgment rendered by the Tokyo High Court can be referred to the Supreme Court and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled. 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. 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 the 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 in 2015, 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 under the current Antimonopoly Law.

Burden of proof

16 | 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 an alleged cartel constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), 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'.

Circumstantial evidence

17 | 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.

Appeal process

18 | What is the appeal process?

After the JFTC conducts an administrative investigation and issues a cease-and-desist or a payment order for the administrative surcharge, or both, the defendant corporation has six months after the order is served to file a complaint with the Tokyo District Court seeking a judgment to quash the order. A judgment rendered by the Tokyo District Court can be appealed to the Tokyo High Court. An appeal against a

judgment rendered by the Tokyo High Court can be referred to the Supreme Court, and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled. There is a question whether the JFTC, having issued an order, has standing to file an action to quash its own order.

The JFTC or a plaintiff must prove that the alleged facts are 'highly probable' in order to meet the burden of proof in the aforementioned judicial proceedings.

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. 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 the 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 in 2015, 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 under the current Antimonopoly Law.

SANCTIONS

Criminal sanctions

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

For an unreasonable restraint of trade, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 work to restore roads after the East Japan Earthquake. In March 2018, the Japan Fair Trade Commission (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.

Civil and administrative sanctions

20 | 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 acts and to take any other measures necessary to eliminate such acts. The statutory limitation for the JFTC to issue cease-and-desist orders under the current Antimonopoly Law is five years after the conduct ceased. Under the amendment to the Antimonopoly Law (2019 Amendment) effective as of 25 December 2020, the statutory limitation will be seven 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 judicial proceedings for an appeal (administrative proceedings for a case commenced before the 2015 amendment to the Antimonopoly Law) 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 under the current Antimonopoly Law, (ie, before elements of the 2019 Amendment become effective on 25 December 2020).

The rate of an administrative surcharge under the current Antimonopoly Law is calculated as follows:

- Large-sized corporations:
 - manufacturers, etc: 10 per cent;
 - retailers: 3 per cent; and
 - wholesalers: 2 per cent.
- Small and medium-sized corporations (SMEs):
 - manufacturers, etc: 4 per cent;
 - retailers: 1.2 per cent; and
 - wholesalers: 1 per cent.

On and after 25 December 2020, the rate of an administrative surcharge under the Antimonopoly Law will be:

- Large-sized corporations: 10 per cent; and
- SMEs: 4 per cent (the scope of SMEs will be limited.)

An administrative surcharge at a rate of 150 per cent of the respective rates set out above is imposed on entrepreneurs 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. Note that the decrease of administrative surcharge rate by 20 per cent in certain circumstances (such as the withdrawal from the cartel at an early stage) under the current Antimonopoly Law will be abolished under the 2019 Amendment, effective of 25 December 2020.

An adjustment is 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 halving the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates are increased by 50 per cent if a corporation played a leading role by having:

- planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law;

- requested another corporation to commit such conduct 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 has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the Antimonopoly Law provides that the administrative surcharge rate be doubled.

On and after 25 December 2020, if a corporation played a leading role in the conduct constituting an unreasonable restraint of trade by having requested another corporation to obstruct a JFTC investigation (eg, conceal or disguise evidence), the administrative surcharge rate will also be increased by 50 per cent. If such a corporation had committed a conduct constituting an unreasonable restraint of trade in violation of the Antimonopoly Law within the past 10 years, the rate will be doubled.

The 150 per cent rate will also be applied to:

- the parent company that owns 100 per cent of the shares of a company that committed the aforementioned conduct within the past 10 years; or
- the company that acquired the business from a company that committed the aforementioned conduct within the past 10 years.

If any such company played a leading role in the conduct constituting an unreasonable restraint of trade, the administrative surcharge rate will be doubled.

The number of defendant companies on which the JFTC has imposed administrative surcharge orders since 2014 has been:

- 128 in the 2014 fiscal year;
- 31 in the 2015 fiscal year;
- 32 in the 2016 fiscal year;
- 32 in the 2017 fiscal year;
- 18 in the 2018 fiscal year; and
- 37 in the 2019 fiscal year.

The total amounts of administrative surcharges paid in each year since 2014 were approximately:

- ¥17 billion in the 2014 fiscal year;
- ¥8.5 billion in the 2015 fiscal year;
- ¥9.1 billion in the 2016 fiscal year;
- ¥1.9 billion in the 2017 fiscal year;
- ¥0.3 billion in the 2018 fiscal year; and
- ¥69 billion in the 2019 fiscal year.

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 24 of the Antimonopoly Law are not available for the unreasonable restraint of trade.

Guidelines for sanction levels

21 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 on defendant companies (ie, fines) and individuals for violating the Antimonopoly Law, (ie, servitude and fines) seem to be based on:

- the scale of the conduct (including the size of the business and market, and the number and levels of participants);
- the scale of its effects (effects on the business and the market); and
- the duration and maliciousness of the conduct (including whether the participant was ringleader or not).

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Unlike in the United States, there is no guidelines on evaluation of compliance programme in Japan and criminal penalties do not seem to be reduced, even if the organisation had a compliance programme in place at the time of the violation of the Antimonopoly Law.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Under the Companies Act, individuals involved in cartel activity in violation of the Antimonopoly Law are prohibited from serving as a corporate director if they are sentenced to imprisonment or a more severe penalty and have not completed their sentence, or the sentence still applies to them (excluding individuals for whom execution of the sentence is suspended).

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Each ministry and governmental agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, many corporations that have been subject to investigation by the JFTC on the suspicion of being in a cartel, or that the JFTC has rendered orders on, were suspended and such corporations were restricted from participating in bids presided over by the government agencies. The time period of suspensions seems to differ, depending on the government agency imposing it.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 also made a public announcement that it will not file a criminal accusation against the corporation, corporate officer or employee of the 'first in' who has been fully cooperative with the JFTC during an investigation. 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 officer or employee thereof, are exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

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 and whether administrative or criminal investigations are ongoing.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 Japan Fair Trade Commission (JFTC) regarding the amount of damages caused by such violations. Note that neither compensation for punitive damages nor triple damages are allowed. An indirect purchaser may file an action.

The damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- the amount of damages;
- the legally sufficient 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 are 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.

Class actions

27 Are class actions possible? If so, 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.

Under the Civil Procedure Law, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may file a complaint as co-plaintiffs. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes. Also, each plaintiff or defendant may appoint another plaintiff or defendant as a representative of each plaintiff/defendant under the 'appointed party system' provided by the Civil Procedure Law. Multiple claimants may use these schemes in bringing competition law claims before the civil court proceedings.

Additionally, qualified consumer organisations are entitled to file an action for an injunction for lawsuits under the Consumer Contract Law and injunctions under article 10 of the Law against Unjustifiable Premiums and Misleading Representations. Under the new system introduced in 2016, consumer organisations qualified by the Japanese government may file a lawsuit seeking compensation for damage under consumer contracts. In such actions, the plaintiffs may assert the defendants' violation of the Antimonopoly Law.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, 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 Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law).

The immunity and the leniency programme under the current Antimonopoly Law is as follows.

If an entrepreneur committing an unreasonable restraint of trade voluntarily and independently reports the existence of a cartel and provides related materials to the Japan Fair Trade Commission (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:

- the first applicant which filed before the initiation of an investigation – total immunity;
- the second applicant which filed before the initiation of an investigation – 50 per cent deducted;
- the third through to the fifth applicant which filed before the initiation of an investigation – 30 per cent deducted; and
- up to three applicants which filed after the initiation of an investigation – 30 per cent deducted.

The maximum number of leniency applicants is five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if the total number of applicants (including those before the dawn raid) is five or less. A joint application for leniency may be made by multiple corporations within the same business group.

The first-in corporation is 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 officers or employees thereof, are 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.

On and after 25 December 2020, the JFTC will determine the rate of reduction taking account of the degree of the cooperation by the applicants, while the current leniency programme provide the immunity and reduction only in accordance with the orders of application, and in addition, the limitation of the number of applicants who may enjoy the benefit of leniency programme is abolished.

The rate of reduction for leniency applications made before a dawn raid will be changed to:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

However, the second and subsequent applicants may receive a rate of reduction of up to 40 per cent, depending on the level of cooperation with the JFTC investigation.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, the 5 per cent rate will apply. In any event, companies that submit applications after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC investigation.

Subsequent cooperating parties

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

A leniency application is required for each good or service that is a target of the cartels, therefore separate orders of application apply to each good or service. The amendment to the Antimonopoly Law (the 2019 Amendment) does not change this basic approach.

The current Antimonopoly Law sets the maximum number of leniency applicants to five. However, from 25 December 2020, there will be no limitation of the number of applicants.

The current leniency programme only provides immunity and reductions in accordance with the order of applications received. Under the 2019 Amendment's leniency programme, the JFTC will determine the rate of reduction by taking the degree of cooperation provided by an applicant into account.

The rates of reduction for leniency applications made before a dawn raid will also change to the following:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

The second and subsequent applicants can receive a rate of reduction of up to 40 per cent, depending on the level of cooperation they provide to the JFTC.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, 5 per cent will apply. In any event, applicants after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC.

A joint application for leniency may be made by multiple corporations within the same business group.

Neither the current Antimonopoly Law nor the 2019 Amendment provides immunity from a criminal accusation to the second and subsequent applicants.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A leniency programme is available for subsequent parties after the first to report.

While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' and subsequent parties may be exempted from the administrative surcharge, or have it reduced by 100 per cent, if it applies as first-in for leniency for another cartel case (eg, one involving different products). There is no exemption from criminal and civil liability for the second in and subsequent parties.

Approaching the authorities

- 31 | 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 current Antimonopoly Law limits the number of 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 a deadline for submission – 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. On and after 25 December 2020, it is also important to complete an efficient internal investigation, as this may provide more evidence that may be used to secure a larger reduction to the administrative surcharge since the JFTC will determine the rates of reduction by taking the applicant's cooperation into account.

Cooperation

- 32 | 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 that are seeking partial leniency?

Full cooperation is required for the JFTC to grant 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.

On and after 25 December 2020, the degree of cooperation with the JFTC investigation will be an important factor in the JFTC's determination regarding reducing the administrative surcharge.

The amendments to the Rules on Reporting and Submission of Materials for Leniency will effective as of 25 December 2020.

Confidentiality

- 33 | 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 JFTC officials in general, it does not contain specific provisions with regard to the confidentiality of leniency applicants.

The JFTC made a public announcement that it will disclose the names of the applicants for which administrative surcharges do not apply or have been reduced, and the exemption or reduced ratio thereof under the leniency programme if it issues an administrative surcharge payment order for a case involving the applicant on or after 1 June 2016.

Before 31 May 2016, the JFTC would make such information public only when the applicants desired it, so that applicants may request a shorter period of suspension from doing business with the 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. However, it can be difficult to go through the entire process of the leniency application with no written materials.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 rigging, 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 in 2018 that was included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws introduced 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. If such plan is approved, the JFTC will determine to not render a cease-and-desist and administrative surcharge payment orders against the petitioner. However, such a commitment procedure does not apply to cartel conduct.

Corporate defendant and employees

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

The administrative surcharge that can be waived or reduced is imposed on corporate defendants. While an individual who is 'first in' may be exempt from criminal accusations, 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.

Dealing with the enforcement agency

36 | 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, must 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 requesting its application the leniency by fax.

DEFENDING A CASE

Disclosure

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

The Japan Fair Trade Commission (JFTC) is required to provide a defendant company with an opportunity to submit its opinion against the JFTC's allegations before the JFTC issues a cease-and-desist or an administrative surcharge payment order. During such procedures, the defendant company may request the JFTC allow the defendant company to review or make photocopies of the evidence that supports

the JFTC's fact findings (eg, notebooks and diaries seized during a dawn raid, or statements signed by the officers and others during interviews) before the closure of the process under the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) and applicable rules.

Representing employees

38 | 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 or representation?

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.

Multiple corporate defendants

39 | 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 to the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law), it seems that representing multiple suspected companies will raise an ethical issue.

Payment of penalties and legal costs

40 | 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.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

42 | 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, regardless of whether in Japan or outside Japan, 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.

Getting the fine down

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

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 and, on and after 25 December 2020, fully cooperate with the JFTC investigation.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

There are no remarkable cases regarding cartels or bid rigging. Since the fiscal year 2019, there were only domestic and small and typical price cartel and bid rigging cases.

Most of the major changes in the 2019 Amendment to the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) will become effective on 25 December 2020, which will change the regime of cartel regulations. Major changes contained in the 2019 Amendment apply to the leniency programme, the calculation of administrative sanctions, and the amount of the criminal penalty for obstructing a JFTC investigation.

Leniency programme

Under the current Antimonopoly Law, the leniency programme provided immunity and reduction only in accordance with the order of application. On and after 25 December 2020, however, the JFTC will be able to determine the reduction rate, taking account of both the orders of application and the degree of the cooperation by the applicants with the Japan Fair Trade Commission (JFTC) investigation. Moreover, a limitation of the number of applicants who may enjoy the benefit of the leniency programme will also be abolished.

The rates of reduction for leniency applications made before a dawn raid will change to the following:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

The second and subsequent applicants can receive a rate of reduction of up to 40 per cent, depending on the level of cooperation they provide to the JFTC.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, the 5 per cent rate will apply. In any event, companies that submit applications after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC.

Calculation of administrative surcharge

The calculation method (ie, sales for the goods or services by the cartel multiplied by the cartel's active period minus immunity or a reduction under the leniency programme) is the same as under the current Antimonopoly Law prior to the 2019 Amendment. However, there are a number of changes to the basis of the calculation method that enabling the JFTC to substantially increase the amount of the administrative surcharge to strengthen the enforcement of the Antimonopoly Law.

NAGASHIMA OHNO & TSUNEMATSU

Eriko Watanabe

eriko_watanabe@noandt.com

Koki Yanagisawa

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

First, with regard to the 'cartel period', the statutory limitation will be seven years (increased from five years under the current Antimonopoly Law) and the duration of the cartel period will be from the most recent activity to 10 years before the JFTC's dawn raid (increased from three years under the current Antimonopoly Law).

Second, with regard to the changes in 'sales for the goods or services by the cartel', the unjust gains owing to the infringements (eg, the financial gains as a reward for not supplying the goods or services subject to the cartel, and the sales of subsidiaries belonging to the same group as the defendant company and receiving instructions or information from the defendant company) will be added to the 'sales for the goods or services by the cartel'.

Third, with regard to the rates used for calculating the administrative surcharge, a number of changes are to be made, including:

- the rates for wholesalers and retailers will be abolished;
- the scope of a small and medium-sized corporation that is subject to the decreased rate will be limited;
- the rate for early termination of a cartel will be abolished; and
- the higher rate for a bid leader will be applied to a defendant company obstructing a JFTC investigation (eg, concealing or disguising of the evidence by the defendant).

In relation to the change in the calculation of administrative surcharges under the 2019 Amendment, the relevant government ordinance on the Antimonopoly Law and the Rules on Administrative Investigations will be amended effective as of 25 December 2020.

Increase to the criminal penalty for obstructing a JFTC investigation

An individual obstructing the investigation will be subject to the criminal penalty of ¥3 million (changed from ¥0.2 million) and a criminal penalty of ¥200 million will be introduced for the company to which such an individual obstructing the investigation belongs.

Protection of communication between licensed lawyers and clients

The JFTC introduced a new system where JFTC investigators are prevented from immediately accessing confidential communication between licensed lawyers and their clients regarding legal advice on unreasonable restraint of trade (ie, cartels), if certain conditions are met. Under this system, JFTC officers who are independent from the investigation review the lawyer-client communications and determine

whether the investigation's JFTC officers should be granted access to it. No amendment to the Antimonopoly Law has been made regarding this, but the JFTC will make those guidelines public.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

While the JFTC publicly announced their understanding towards cooperation among competitors in times of crisis after the Tōhoku earthquake and tsunami in 2011, there have been no changes in the laws, regulations and enforcement of the Antimonopoly Law.

Malaysia

Nadarashnaraj Sargunraj and Nurul Syahirah Azman

Zaid Ibrahim & Co

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

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.

Relevant institutions

2 | 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.

Changes

3 | 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, Anticompetitive 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);
- Guidelines on Leniency Regime (published on 14 October 2014); and
- Guidelines on Intellectual Property Rights and Competition Law (published 4 May 2019).

The guidelines are non-exhaustive and do not set a limit on MyCC's powers of investigation and enforcement under the Competition Act.

MCMC had issued the following guidelines on mergers in the communications and multimedia sector:

- Guidelines on Authorisation of Conduct (published on 17 May 2019); and
- Guidelines on Mergers and Acquisitions (published on 17 May 2019).

Substantive law

4 | 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 anti-competitive effect, and MyCC will have the power to take enforcement action against the parties to such agreement.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The Competition Act does not have a merger control regime. Therefore, joint ventures and strategic alliances would not require approval from MyCC under the Competition Act. That said, joint ventures and strategic alliances would need to be assessed under the Chapter 1 Prohibition on anticompetitive agreements.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The competition law provisions in the Competition Act 2010 (the Competition Act) apply to agreements between enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This means that the competition law provisions in the Competition Act do not apply to individuals.

The provisions in the Competition Act on investigation powers and enforcement however apply to individuals, corporations and other entities.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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.

Export cartels

8 | 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Competition Act applies to any commercial activity both within and outside of Malaysia 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 economic activity.

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 the 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.

The Competition (Amendment of First Schedule) Order 2016 provides further exclusion on any activities regulated under the Malaysian Aviation Commission Act 2015.

The Malaysia Competition Commission (MyCC) may grant individual or block exemptions where the criteria in section 5 of the Competition Act 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The Competition Act applies to commercial activities. The definition of 'commercial activity' in the Competition Act expressly excludes:

- 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 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.

In addition, the following activities are not subject to Chapter 1 Prohibitions or Chapter 2 Prohibitions:

- an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement; and
- collective bargaining activities or collective agreements in respect of employment terms and conditions, which are negotiated or concluded between parties that include both employers and employees or organisations established to represent the interests of employers or employees.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Trigger

The Malaysia Competition Commission (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 carried out a review of building materials in the construction industry. The specific objectives of the market review include:

- determine the market structure, supply chain and profile of industry players that are involved in the 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.

MyCC also carried out a market review of five selected sub-sectors of the food sector and the services sector (wholesale and retail for selected products).

Collection of evidence

MyCC has wide powers of investigation. It may request information by written notice and conduct unannounced raids.

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, among other things, to impose a financial penalty of up to 10 per cent of the enterprise's 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.

Investigative powers of the authorities

12 | 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

Inter-agency cooperation

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

The Competition Commission Act 2010 empowers the Malaysia Competition Commission (MyCC) 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. A number of cooperation initiatives that the 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 Programme – 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.

Interplay between jurisdictions

14 | 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

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel conduct is investigated and adjudicated by the Malaysia Competition Commission (MyCC), which has the power to impose fines and give directions as it sees fit to bring the infringement to an end.

Burden of proof

16 | 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) 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).

Circumstantial evidence

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

The rule on admissibility of evidence is relevance. Circumstantial evidence can be relied on to prove cartel conduct provided that the evidence is relevant.

Appeal process

18 | What is the appeal process?

Appeals against MyCC decisions are made to 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 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.

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. The High Court allowed MyCC's application for judicial review and upheld the decision made by MyCC in the first instance.

SANCTIONS

Criminal sanctions

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

Currently, cartel conduct under the Competition Act 2010 (the Competition Act) is not a criminal offence. However, obstructing a Malaysia Competition Commission (MyCC) 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 and reported in case law.

Civil and administrative sanctions

20 | 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 174 million ringgit. In September 2020, MyCC published its final decision to an aggregate penalty of 173,655,300 million ringgit 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 the 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 filed for an application for judicial review to the High Court against the CAT's decision. The High Court allowed MyCC's application for judicial review and upheld the decision of MyCC at the first instance.

In March 2015, MyCC imposed fines totalling 247,730 ringgit on 14 members of the Sibu 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 Sibu, 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 March 2019, it was reported in the media that MyCC issued a proposed decision against eight companies proposing fines totalling 1.94 million ringgit in penalties for bid rigging through tenders offered by the National Academy of Arts, Culture and Heritage.

Guidelines for sanction levels

21 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. MyCC issued its Guidelines on Financial Penalties, which explain how MyCC determines the appropriate fine and the factors that it may take into account in doing so. In imposing financial penalties, MyCC aims to reflect the seriousness of the infringement and deter future anticompetitive practices. In determining the amount of any financial penalty in a specific case, MyCC may take into account aggravating factors and mitigating factors.

The aggravating factors 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.

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.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Yes. In determining the amount of financial penalty to impose, MyCC has indicated in its Guidelines on Financial Penalties that it will take into account mitigating factors. Mitigating factors include the existence of a compliance programme that is appropriate having regard to the nature and size of the business of the enterprise.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

We are not aware of any published orders being issued by any regulatory authority or court to disqualify a director as a result of any cartel activities.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

No.

Parallel proceedings

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

The competition law provisions in the Competition Act are not punishable as criminal offences.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any person who suffers loss or damage directly as a result of any anti-competitive conduct under the Competition Act 2010 (the Competition Act) may bring a private action against the infringing enterprises in the civil courts regardless of whether such person dealt directly or indirectly with the enterprise. As such, indirect purchaser claims are actionable.

Such civil action may be initiated even if the Malaysia Competition Commission (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.

Class actions

27 | Are class actions possible? If so, 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 representative 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 representative may apply to the court to be added as a co-plaintiff.

COOPERATING PARTIES

Immunity

28 | Is there an immunity programme? If so, 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 2010 (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.

The Competition Act empowers the Malaysia Competition Commission (MyCC) to grant differing percentages of reductions and

provide for the 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 another 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 another 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, what would be considered as 'significant assistance' will be determined by MyCC on the specific circumstance of the case under consideration.

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.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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 the third or a 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.

Approaching the authorities

31 | 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 member 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.

The possibility of liability from follow-on actions should also be considered. MyCC cannot provide immunity from third-party damages actions.

Cooperation

32 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 that are seeking partial leniency?

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.

Confidentiality

33 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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 may potentially trigger follow-on civil actions.

Corporate defendant and employees

35 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, such as:

- 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.

Dealing with the enforcement agency

36 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.

DEFENDING A CASE

Disclosure

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

There is no automatic right under the Competition Act 2010 (the Competition Act) for disclosure of information or evidence by the Malaysia Competition Commission (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.

Representing employees

38 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 or representation?

The Competition Act does not impose personal liability on 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 in order to influence the bidding of a project.

Multiple corporate defendants

39 | 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.

Payment of penalties and legal costs

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

Not applicable. The Competition Act does not impose personal liability for employees involved in a cartel.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

No.

International double jeopardy

42 | 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.

Getting the fine down

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

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 the existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives that were undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is relatively new in Malaysia, MyCC is keen to encourage compliance and is likely to take into account genuine efforts to comply with the Competition Act.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In January 2020, the Malaysia Competition Commission (MyCC) issued a proposed decision against seven warehouse operators for infringing the Chapter 1 Prohibition in relation to price fixing of rates for Long Length Handling Surcharges and Heavy Lift Handling Surcharge for all import and export cargoes. In addition, MyCC also found, through an online platform conversation, that most of the warehouse operators had implemented the price fixing rates upon their respective customers. This is the first proposed decision of MyCC that it has not disclosed the amount of the proposed fine as the final decision has yet to be made. This is consistent with MyCC's new policy beginning 2020 that it will

Zaid Ibrahim & Co

a member of ZICO | law

Nadarashnaraj Sargunraj
nadarashnaraj@zicolaw.com

Nurul Syahirah Azman
nurul.syahirah@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

not disclosed the amount of a proposed fine for proposed infringement decisions. Only when MyCC receives representation from the relevant parties will it determine the final decision and the fine imposed, if any.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

MyCC has indicated that merger control provisions may be introduced under the Competition Act 2010 (the Competition Act).

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

There are no temporary exemptions from compliance with the Competition Act due to the covid-19 pandemic. MyCC has also not issued any statement that it will relax enforcement in light of the pandemic. The Competition Act continues to apply to businesses.

Mexico

Rafael Valdés Abascal and Agustín Aguilar López

Valdes Abascal Abogados

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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, among other things, 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.

Relevant institutions

2 | 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 (COFECE) enforces the LFCE and is in charge of preventing, investigating and sanctioning administrative infringements derived from cartel conduct. COFECE has jurisdiction over all industries, with the exception of the broadcasting and telecommunications industries, where the Federal Telecommunications Institute (IFT) enforces the LFCE.

COFECE and IFT decisions may be challenged before competition, broadcasting and telecommunications specialised federal courts, through an amparo proceeding.

COFECE 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 individuals' and collective damage claims.

Except as mentioned otherwise, any references made in this chapter to COFECE will also apply to the IFT in the context of the broadcasting and telecommunications industries.

Changes

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

In October 2019, the Regulatory Provisions for the qualification of information derived from legal counsel provided to economic agents came into force. This regulates the procedure that the Mexican Federal Competition Commission (COFECE) must follow when, for example, the COFECE seizes documentation that contains legal advice protected by the attorney-client privilege during a dawn raid.

Also, in March 2020, the Regulatory Provisions for the Immunity and Sanction Reduction Program foreseen in article 103 of the Federal Economic Competition Law came into force, which establishes, among other things, the procedure that economic agents must follow to enter into the Leniency Programme.

Substantive law

4 | 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 an 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 COFECE's Regulatory Provisions, 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 higher or lower than 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;
 - a situation where 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 from bidding or coordinate their bids in certain geographic areas.
- be integrated by persons that:
 - do not work for the commercial areas of the economic agents and to avoid contact with such areas; and
 - have signed confidentiality agreements obliging them to protect and maintain the confidentiality of the information;
 - if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate the information in its most disaggregated level and then aggregate it for analysis by the concentration; and
 - 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).

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 COFECE. 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 COFECE.

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 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;
 - indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not include strategic operational decision-making or sales; and
 - create an integrated, isolated and compact team that is in charge of the concentration.

Such a team will control the use and generation of the strategic information required by the horizontal concentration. It is recommended that this team:

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 must be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or rig bids before closing, nor impose future decisions to another party; and
- parties must inform the individuals involved in the concentration of the legal framework regarding merger control and cartel conduct.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The LFCE does not provide an exception regarding its applicability to joint ventures and strategic alliances. However, according to the latest Guidelines for Notification of Concentrations issued by COFECE, collaboration agreements (such as joint ventures and strategic alliances) may be reviewed under the merger control procedure whenever the agreements meet the characteristics of a concentration. This implies that an agreement could be analysed under a rule-of-reason basis and it represents an opportunity for the parties to obtain certainty regarding the legality of a collaboration agreement if they submit it to scrutiny by COFECE before its closing.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Federal Law of Economic Competition (LFCE) applies to individuals, corporations and other entities. Moreover, if the Federal Economic Competition Commission (COFECE) 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 COFECE owing to his alleged collaboration with tortilla producers and retailers to fix the price of tortillas (COFECE decision DE-009-2016).

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

This matter has hardly been addressed by Mexican authorities, but there are some precedents in which the Mexican Federal Competition Commission (CFC; which was replaced by COFECE in 2013) 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 an 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 Mexico's national territory.

In IO-002-2009, the COFECE 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 COFECE determined that the Mexican hermetic compressors market was affected by the global cartel as such products were imported to Mexico for their commercialisation. The COFECE fined the non-Mexican companies and their Mexican subsidiaries.

In IO-001-2013 the COFECE 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 COFECE determined that the Mexican air-conditioning compressors for automobiles 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 COFECE fined the non-Mexican companies.

Export cartels

- 8 | 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 not produce effects within this territory, the economic agents may argue lack of jurisdiction.

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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.

Government-approved conduct

- 10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

In the event that two or more competing economic agents engage in cartel conduct due to a provision or rule that forces them, for example, to exchange information, such economic agents can defend themselves by alleging the unenforceability of other conduct, which it is a substantive principle of criminal law that we consider applicable to cartel cases.

INVESTIGATIONS

Steps in an investigation

- 11 | What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the Federal Economic Competition Commission (COFECE), 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 COFECE up to four times, but only for justified causes.

During this time, COFECE 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 Federal Law of Economic Competition (LFCE). During the investigation, case files may not be accessed.

Once the investigation has finished, if COFECE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to COFECE's plenary a statement of probable responsibility (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 COFECE's plenary. Once this proceeding is concluded, COFECE'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.

Investigative powers of the authorities

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

COFECE 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 and the right to remain silent are applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by COFECE's investigative authority without the approval of COFECE's plenary or any court.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

Interplay between jurisdictions

- 14 | 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, European Free Trade Association, the European Union, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the United States. Among these jurisdictions, the most significant interplay takes place with the US.

People cooperating under the leniency programme established in article 103 of the Federal Law of Economic Competition (LFCE) are entitled to object to the Federal Economic Competition Commission (COFECE) about sharing their data and the information provided under this programme. COFECE may ask some economic agents under the leniency programme to grant an authorisation or waiver to share information with other agencies.

CARTEL PROCEEDINGS

Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the Federal Economic Competition Commission (COFECE). This body consists of seven commissioners, and decisions are taken by a simple majority.

Burden of proof

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

A systematic interpretation of articles 73 and 79 of the Federal Law of Economic Competition (LFCE) indicates that COFECE 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 statement of probable responsibility (DPR) shall contain the evidence that COFECE considered subpoenaing from the party to the administrative trial. In short, COFECE must not issue a DPR without sufficient evidence.

Defendants have 45 business days to answer a 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 COFECE 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, evidence can be submitted in an amparo trial against the final decision of COFECE).

The LFCE does not establish standards of proof to be satisfied by COFECE. Nevertheless, there are precedents in which Mexican Federal Competition Commission (which was replaced by COFECE in 2013) 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 alternative hypotheses that could reasonably explain the situations observed in the market.

Circumstantial evidence

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

A cartel can be sanctioned using circumstantial evidence. Considering that all participants in a cartel have the incentive to hide or destroy any proof of their conduct, the Supreme Court has determined 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.

Appeal process

- 18 | What is the appeal process?

The parties can initiate an amparo trial before a federal district judge against a decision of COFECE, 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

Criminal sanctions

- 19 | 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 10 years' imprisonment for entering, ordering or executing any contract or arrangement between competitors for one or more of the purposes or effects listed under article 53 of the Federal Law of Economic Competition (LFCE).

For a criminal action to be lodged, the Federal Economic Competition Commission (COFECE) must bring charges before the public prosecutor. Charges may be pressed with the statement of probable responsibility (DPR). 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 pressing charges was recently removed (previous to 2014, in order for COFECE to press charges, a final judgment of administrative responsibility was needed), there is no experience in Mexico regarding criminal sanctions for cartel conduct. There are only two cases in which COFECE has brought charges before the public prosecutor, which are currently under way.

Civil and administrative sanctions

- 20 | 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, COFECE 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 17.4 million Mexican 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 15.6 million pesos.

Guidelines for sanction levels

21 | 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, COFECE must consider the infringer's economic capacity as well as the gravity of the conduct. To determine the latter, the COFECE 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 COFECE actions.

Although COFECE has the discretion to determine the amount of the fine, said authority, in addition to considering the aforementioned elements, must also take into account the principles established in articles 176 to 186 of the Regulatory Provisions of the LFCE.

In the case of recidivism, COFECE may impose a penalty of up to two times the applicable fine or order the divestiture of assets. Alternatively, in 2018, a collegiate court solved that the unenforceability of another conduct as a defence against criminal liability may also apply in antitrust matters. Also, the court pointed out that such defence may only apply when the unenforceability of another conduct was proven sufficiently.

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 COFECE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Although the LFCE does not explicitly state that a compliance programme can reduce the sanction, article 130 states that one of the criteria for the imposition of a sanction can be the intention of the conduct. Article 182 of COFECE's Regulatory Provisions states that to analyse the indicia of intention, the following circumstances shall be taken into account:

- the moment of termination of the conduct, whether it was before, during or after the investigation or before, during or after the proceeding;
- confirmation that said illegal conduct was committed as a result of suggestion, instigation or encouragement of any public authority;
- actions taken to hide the conduct; and

- confirmation that said illegal conduct was committed as a result of instigation of another economic agent, clearing the fact that the offender played a leadership role in the adoption of the conduct.

In the decision issued on file IO-004-2012, an economic agent that was sanctioned for participating in a cartel claimed to have taken measures to prevent activities that imply or that may imply the execution of an absolute monopolistic practice; to have implemented a series of actions to capacitate the staff; and improve their procedures and internal controls to monitor the enforcement of the law. However, the economic agent did not present evidence of these actions, thus COFECE pointed out that it was not possible to consider that element to calculate the applicable sanctions. This consideration was formulated in the section in which the indicium of intention was analysed as an element to individualise the corresponding sanction.

Given this, it would seem that the existence of a compliance programme might be taken into account by COFECE when imposing a fine on the economic agent that implemented the programme.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals that represent or collaborate with the company in committing anticompetitive practices could face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years. According to article 178 of the Regulatory Provision of the LFCE, in order to impose that sanction, COFECE must prove the existence of malice of these individuals.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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.

Parallel proceedings

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

Yes. Once the COFECE's investigative authority has issued a 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

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Yes, private damage claims are available.

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.

Administrative responsibility is a condition to initiate individual or class actions before civil courts, which means that, according to article 134, it is not possible to claim damages to economic agents that have not been a part of a cartel.

Class actions

27 Are class actions possible? If so, 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 Federal Economic Competition Commission;
- 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 has only been one class action since then. Therefore, the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

COOPERATING PARTIES

Immunity

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

Article 103 of the Federal Law of Economic Competition (LFCE), as well as the Mexican Federal Competition Commission's Regulatory Provisions for the Immunity and Sanction Reduction Program foreseen in article 103 of the LFCE (which came into force in March 2020) contemplate the leniency, immunity or amnesty programme and the procedure to access to such programme. In June 2015, the Federal Economic Competition Commission (COFECE) issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which the COFECE 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 COFECE 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 (the basis for calculating fines in Mexico) and are updated, so that the first applicant is, in practice, awarded full immunity, while the applicable fines of second and subsequent applicants are reduced by up to 50, 30 or 20 per cent. The level of reduction depends on the amount and quality of the evidence provided to the COFECE and the cooperation provided during the proceedings.

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.

Subsequent cooperating parties

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

Yes. The applicable fine for the second and subsequent applicants may be reduced by up to 50, 30 or 20 per cent and they will be exempted from criminal responsibility.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Second and subsequent applicants who provide the Federal Economic Competition Commission (COFECE) 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.

Approaching the authorities

31 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 COFECE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity and the order in which subsequent applicants approach COFECE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. COFECE uses markers in order to determine who the first applicant is and who the subsequent applicants are.

Cooperation

32 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 that are seeking partial leniency?

The applicant must submit evidence, cooperate fully and continuously with the COFECE 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 and the information submitted by the previous applicant(s).

Confidentiality

33 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?

COFECE will keep confidential the identity of all leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, COFECE 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 the applicant, only when such disclosure does not hinder the powers of COFECE.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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, COFECE 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.

Also, the plenary of COFECE 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: an absence of pending appeals against COFECE'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.

Corporate defendant and employees

35 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 COFECE. If the corporation fails to provide full and continuous cooperation, but employees who received the extension provide such cooperation, these employees will remain protected as if they were the applicants themselves.

Dealing with the enforcement agency

36 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 COFECE 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.

- A 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.
- The identities of the individuals and legal entities involved in the collusive agreement or in the information exchange.
- The 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 (eg, 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
- Identify 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 COFECE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by the COFECE;
- 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.

DEFENDING A CASE

Disclosure

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

According to article 79 of the Federal Law of Economic Competition (LFCE), the following information or evidence should be contained in the authority's statement of probable responsibility (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 from such infringements.

Representing employees

- 38 | 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 or representation?

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.

Multiple corporate defendants

- 39 | 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.

Payment of penalties and legal costs

- 40 | 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.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Private damages awards are tax-deductible while fines are not.

International double jeopardy

- 42 | 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?

Mexican competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, sanctions for non-compliance of local legislation can co-exist 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.

Getting the fine down

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

The best 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 COFECE during investigation and sanction proceedings may lead the authority to consider a lower fine.



Rafael Valdés Abascal

rafael.valdes@vaasc.com

Agustín Aguilar López

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

For a fine to be applied, the requirements under the LFCE for confirmation of the existence of cartel conduct must be satisfied. An economic agent's conduct towards COFECE (ie, interfering or cooperating with the Commission in the execution of its powers) are considered mitigating factors when calculating the fine. Mitigation does not apply if an economic agent seeks to obtain the benefit of the Leniency Program.

The existence of a compliance programme may help reduce a fine, as it is one of the elements that COFECE may consider as indicia of intention when imposing a fine.

UPDATE AND TRENDS

Recent cases

- 44 | What were the key cases, judgments and other developments of the past year?

In April 2019, a specialised federal court issued a decision ruling that two economic agents that belong to the same economic interest group, in the context of a public procurement, can be considered competitors to each other and, therefore, can engage in cartel conduct. Considering the sense of this ruling, the Federal Economic Competition Commission (COFECE) sanctioned the economic agents for cartel behaviour. It is important to mention that, historically, it has been considered that the economic agents that belong to the same economic interest group can not be considered competitors among themselves, so they can not incur in absolute monopolistic practices.

Regime reviews and modifications

- 45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

We do not expect that the current regime will be subject to any modification soon.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

On 24 April 2020, COFECE's Emergency Regulatory Provisions of the Federal Law of Economic Competition (LFCE) to perform personal notifications via electronic mail came into force, which was applicable, among others, to cartels investigations and administrative trial.

On 26 July 2020, COFECE's Emergency Regulatory Provisions of the LFCE regarding the use of electronic media in certain procedures followed by the COFECE came into force. This abrogated the regulation mentioned in the previous paragraph and established the rules to use electronic media to perform notifications and proceedings before COFECE in, among others, the following procedures regarding cartel conduct:

- the submission of complaints;
- the investigation phase;
- applying to the Leniency Programme; and
- an administrative trial.

However, on 27 March 2020, COFECE issued a press release in which stated that in the current context of a public health emergency any collaboration agreement between economic agents that meets the following criteria would not be subject to investigation:

- is necessary to maintain or increase supply, satisfy demand, protect supply chains, avoid shortages or hoarding of merchandise;
- is temporary; and
- does not intend to fix or manipulate prices, reduce supply or segment the market in order to affect consumers or to displace competitors that also supply the market.

In order to clarify this press release, the COFECE issued another press release issued on 1 April 2020, establishing that economic agents must inform it of their intention to form such agreements, in order for the authority to analyse the agreement. Once satisfied the agreement does not have an anticompetitive purpose, the COFECE will inform the applicant that such conduct will not be investigated if it is carried out during the crisis.

Portugal

Mário Marques Mendes and Alexandra Dias Henriques

Gómez-Acebo & Pombo

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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.

Changes

3 | 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. 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.

The Act is expected to be amended along with the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (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. The deadline for the transposition of the Directive into the member states' national legislation is 4 February 2021.

Substantive law

4 | 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).

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and other forms of business collaboration can raise competition law issues. The Act may need to be considered and cartel risks may arise depending on the joint ventures and strategic alliances specific features. Attention must be paid notably if the parties could be competitors on their own for the goods or services to be offered by the joint venture or the strategic alliance in the absence of their arrangement or agreement. Competition rules need also to be considered regarding the level of separation between the parents of the joint venture and the potential information sharing between them.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The definition of 'undertaking' adopted in the Competition Act, Law No. 19/2012 of 8 May (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.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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.

Export cartels

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

No.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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) of the Treaty on the Functioning of the European Union (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 invoking the above justification must prove they meet these 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 Competition Authority (*Autoridade da Concorrência* – the AdC) if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no specific defence or exemption provided for in the Act in this respect. As far as regulated sectors are concerned, the AdC's responsibilities are carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors that establishes the terms of their reciprocal cooperation.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Competition Act, Law No. 19/2012 of 8 May (the Act), as well as infringements of article 101 Treaty on the Functioning of the European Union (TFEU) that the Competition Authority (*Autoridade da Concorrência* – 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. 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 adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

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 action, it shall inform the complainant and grant 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 a decision may be appealed to the Specialised Court. In the absence of a timely submission of 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 the 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 reopen the case closed within two years 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.

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. Within its submitted observations, the concerned undertaking may request an oral hearing. Upon a 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 evidence

collection, 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 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 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. The 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.

Investigative powers of the authorities

12 | 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 Law No. 18/2003 of 11 June (the former Competition Act). Under the Act, in investigating restrictive practices the AdC may:

- 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 of other workforces 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 a decision by the competent judge issued upon a substantiated application by the AdC, 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 it 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 of other workforces 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

Inter-agency cooperation

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

Following the decentralisation carried out under Council Regulation No. 1/2003, cooperation between national competition authorities, including the Competition Authority (*Autoridade da Concorrência* – the AdC) and the European Commission, takes place in the framework of the European Competition Network (ECN). According to the last Activity Report made available, in 2018 the AdC participated in 25 working group ECN meetings, in the ECN network Plenary and in the General-Directors' meeting, as well as in seven oral hearings and meetings of the advisory committees on restrictive practices and merger control. According to the same Activity Report, in 2018 the AdC announced the opening of 12 infringement cases regarding potential infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (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 monitored the developments in the preparation and negotiation of the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive), which aims to give EU 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 European Competition Authorities Association (ECA). Furthermore, at a multilateral level, the AdC cooperates within international organisations, including the OECD and the United Nations Conference on Trade and Development (UNCTAD). The AdC also participates in multilateral cooperation networks, such as the International Competition Network (ICN) (where the AdC's president, Margarida Matos Rosa, has assumed a place in the Directive Committee for the period 2019-2021), 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.

Interplay between jurisdictions

14 | 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?

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 ECN (see the AdC's 2004 Activity Report, page 25).

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Authority (*Autoridade da Concorrência* – the AdC) both investigates and adjudicates on cartel matters. After the investigation phase by the officials of the restrictive practices department, the final decision is taken by the Council of the AdC (its decision-making body).

Burden of proof

16 | 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 must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase, 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, the level of proof required for the final decision is the decision-maker comes to a conclusion without any reasonable doubt.

Circumstantial evidence

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

Pursuant to article 31(4) of the Competition Act, Law No. 19/2012 of 8 May (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 of the Treaty on the Functioning of the European Union (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.

Appeal process

18 | What is the appeal process?

Law No. 46/2011 of 24 June determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court) to handle competition, regulation and supervision matters, as of 30 March 2012. The 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 that enforcement would cause it considerable harm and the party offers a guarantee, provided the 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.

An appeal of the AdC's final decision condemning the concerned undertaking must be lodged within a non-extendable deadline of 30 working days. The AdC has a deadline of 30 working days, which also cannot be extended, to 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 a 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

Criminal sanctions

19 | 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 (eg, fraud, extortion, disturbance of public auction or tender), since there are no criminal sanctions for competition law offences. Cartel activity per se is considered a minor quasi-criminal offence.

Civil and administrative sanctions

20 | 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 the Treaty on the Functioning of the European Union (TFEU);
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase;
- for non-compliance with the behavioural or structural remedies imposed by the AdC; or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements are carried out by individuals held responsible under the Act, the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full calendar 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 are carried out by individuals held responsible under the Act, the applicable fine ranges from 10 to 50 'account units' (each 'account unit' currently amounts 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, with representatives which 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), and civil liability may also arise for the damage caused.

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act. 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 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 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.

Guidelines for sanction levels

21 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.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There is no legal rule nor express indication from the AdC recognising the existence of a compliance programme as a direct motive for sanction reductions. 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.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Directors' disqualification is not ruled in the Act. According to our knowledge, there is no record of orders from the AdC prohibiting individuals involved in cartel activity from serving as corporate bodies or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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.

Parallel proceedings

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

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

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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:

- the defendant had committed an infringement of competition law;
- this infringement had an additional cost for the direct client of the defendant; and

- the defendant acquired the goods or services affected by the infringement, 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 repercussions, 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.

Class actions

27 | Are class actions possible? If so, 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 as representatives 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:

- associations and foundations for the protection of consumers; and
- 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 nor frequently chosen course of action in Portugal, and only one case involves competition law is known, which is from 2015. In this case, the Portuguese court gave consumers the possibility to opt-out in September 2019.

COOPERATING PARTIES

Immunity

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

Competition Act, Law No. 19/2012 of 8 May (the Act) establishes the leniency rules in article 75 et seq. In addition, Competition Authority (*Autoridade da Concorrência* – 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 of the Treaty on the Functioning of the European Union (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 regulator:
 - 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 with 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 ways of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 rules set forth in the Act, the AdC can grant immunity to or a 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

As regards full immunity, 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 the above reduction limits are reduced by half.

There is currently no 'immunity plus' or 'amnesty plus' option.

Approaching the authorities

31 | 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 is no specific deadline for immunity or partial leniency applications, but an undertaking that wishes to take advantage of the leniency programme should approach the AdC as early as possible. It is possible to obtain a marker securing the applicant's position in relation to other possible applicants. Upon receipt of a written or oral application for immunity or reduction of a fine, the AdC may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of up to 15 days for the applicant to complete their application.

Cooperation

32 | 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 that are seeking partial leniency?

An equivalent level of cooperation applies to all leniency applicants and they must cooperate fully and continuously with the AdC from the moment of the initial request notably 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.

The applicants must also put an end to their participation in the infringement, except as reasonably required, in the AdC's opinion, to preserve the investigation effectiveness.

Confidentiality

33 | 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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 or similar agreements. 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. 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.

Corporate defendant and employees

35 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.

Dealing with the enforcement agency

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

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 the management or supervision of the sector of activity concerned in the infringement) and the corresponding contacts;
- legal entities must 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 (to +351 21 790 20 93/30);
- postal 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 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 a 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 at least 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, 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 at least 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 add 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 do 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.

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled. The final decision on immunity or reduction of fines shall be taken in the final decision of the procedure adopted by the AdC at the end of the investigation.

DEFENDING A CASE

Disclosure

- 37 | 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 Competition Authority (*Autoridade da Concorrência* – 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. 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.

Representing employees

- 38 | 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 or representation?

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.

Multiple corporate defendants

- 39 | 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 under article 99 of the Portuguese Bar Association Legal Regime.

Payment of penalties and legal costs

- 40 | 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.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or other penalties and private damages awards are not tax-deductible.

International double jeopardy

- 42 | 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. 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 an 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 in the Portuguese jurisdiction.

Getting the fine down

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

Timely leniency applications and thorough collaboration with the AdC as well as the settlement proceedings may avoid or reduce the amount of the fine. 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. 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.

UPDATE AND TRENDS

Recent cases

- 44 | What were the key cases, judgments and other developments of the past year?

The Competition Authority (AdC), which completed 16 years of existence in 2019, continues very active.

In November 2019, the AdC reported that it had carried out dawn raids in five premises of five undertakings in the private surveillance sector. In the same statement, the AdC underlined that since the beginning of 2017 it had carried out search and seizure operations in 22 investigations, corresponding to 56 facilities, in several sectors.

Then in December 2019, the AdC issued a Statement of Objections (SO) to two telecommunications companies, regarding a possible cartel for market sharing and price fixing of mobile services, sold separately or in packages of fixed and mobile telecommunications services. The same two telecommunications companies, together with another two, are involved in a second investigation with respect to a cartel agreement to limit competition in advertising on the Google search engine, which the AdC issued a corresponding SO on in July 2020. According to the AdC, both investigations started following complaints submitted under its leniency programme.

In June and July 2020, respectively, the AdC sent SOs to three large food retail groups and a supplier of pre-packaged bread and substitutes and cakes, for price fixing, as well as SOs to six large food retail chain groups and two suppliers (one of non-alcoholic beverages and juices and the other of wine and alcoholic drinks), for price fixing. According to the AdC, these are part of a large group of alleged 'hub-and-spoke' cases investigated in Portugal involving retailers and suppliers.

Again in July 2020, another SO was issued by the AdC regarding a non-competition agreement entered into by six waste management companies.

As for final decisions, in March 2020 the AdC announced that it had adopted a sanctioning decision which concluded proceedings against railway maintenance companies and board members involved in a cartel, with a total fine of €3.4 million and the disqualification of participation in public tenders. It was the first time that the AdC applied this ancillary sanction, disqualifying two of the involved companies, which did not use the settlement procedure, from participating in certain contracting procedures for a period of two years.

Finally, on 30 September 2020 the specialised court created to handle competition, regulation and supervision matters upheld the AdC's decision from 2017 in which the authority imposed a fine of €38.3 million on two operators for entering into a non-competition agreement, but reduced the penalty to €34.4 million. The court acknowledged the existence of the agreement and the involvement of both parent companies.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Competition Act, Law No. 19/2012 of 8 May (the Act) is expected to be amended along with the transposition of the Empowering National Competition Authorities Directive (EU) No. 2019/1 (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 European internal market.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In its first public statement after the start of the pandemic, issued on 16 March 2020 (Notice 3/2020), the AdC ensured that it was particularly vigilant in the mission of detecting any abuses or anticompetitive

G A _ P

Gómez-Acebo & Pombo

Mário Marques Mendes

marquesmendes@ga-p.com

Alexandra Dias Henriques

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

practices that could exploit the current situation, to the detriment of people and the economy (eg, colluding on pricing or market sharing). The AdC said that any person or company could report suspected anti-competitive practices electronically using the AdC Complaints Portal and underlined that it was also in permanent coordination with sectoral regulators and public entities, with a view to proactively detecting competition problems that could aggravate the situation of society.

Meanwhile, as a member of the European Competition Network (ECN) and through Notice 5/20, of 23 March 2020, the AdC joined its European counterparts in the simultaneous disclosure of the joint declaration on the application of competition rules during the covid-19 crisis (the Declaration).

The Declaration emphasises that the current extraordinary situation may require cooperation between companies in order that consumers are guaranteed fair distribution of products of limited availability.

The AdC and its counterparts said that, in the current circumstances, they would not actively intervene against necessary and temporary measures that were implemented in order to prevent the scarcity of supply, clarifying that such measures are unlikely to constitute a problem, as they would not entail a restriction of competition or would generate efficiency gains that would most likely outweigh any restriction. Companies were invited to contact the AdC at any time for informal guidance if they had doubts about the compatibility of such cooperation with competition law.

At the same time, ECN competition authorities stressed that they would not hesitate to act against companies that take advantage of current circumstances, notably through cartelisation.

Singapore

Lim Chong Kin and Corinne Chew

Drew & Napier LLC

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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);
- infringement of the section 34 prohibition in relation to the fresh chicken distribution industry, 12 September 2018;

- information sharing between competing hotels in relation to the provision of hotel room accommodation to corporate customers In Singapore, 30 January 2019; and
- bid rigging in the provision of construction and maintenance services for Wildlife Reserves Singapore, 4 June 2020.

Relevant institutions

2 | 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.

Changes

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

On 10 September 2020, the CCCS announced that it was seeking public feedback on proposed changes to the CCCS Guidelines on Market Definition (Market Definition Guidelines), among other items, after conducting a review of its Guidelines on the Act. The proposed changes to the Market Definition Guidelines seeks to provide greater clarity on issues related to market definition that may be relevant in the digital era.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

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 (Section 34 Guidelines) that many other types of arrangements may have the effect of preventing, restricting or distorting competition (including, among other things, 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 Section 34 Guidelines, 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.

Joint ventures and strategic alliances

- 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Whether a joint venture would be subject to cartel laws depends on, among other things, the function that the joint venture performs. Section 54(5) of the Act provides that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity, constitutes a merger and would thus fall within the merger provisions of the Act.

However, a joint venture would not be considered a merger and would likely be subject to the section 34 prohibition if it merely undertakes a specific function of its parent companies' business activities without having access to the market.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

The prohibition on activities contained in section 34 Singapore Competition Act (Cap 50B) (the Act) (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.

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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.

Export cartels

- 8 | 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.

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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. On 26 August 2020, the Minister extended the BEO for one year until 31 December 2021. 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

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.

INVESTIGATIONS

Steps in an investigation

11 | 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 activities prohibited by section 34 of the Singapore Competition Act (Cap 50B) (the Act) (the section 34 prohibition) in one of two ways. First, the Competition and Consumer Commission of Singapore (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. Second, 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.

Investigative powers of the authorities

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

The CCCS has the following investigatory powers:

- order the production of specific documents or information;
- carry out compulsory interviews with individuals;
- carry out unannounced searches of business premises (requires the authorisation by a court or another body independent of the competition authority);
- carry out unannounced limited searches of residential premises (requires the authorisation by a court or another body independent of the competition authority);
- right to 'image' computer hard drives using forensic IT tools;
- right to retain original documents (in certain circumstances);
- right to require an explanation of documents or information supplied; and
- right to secure premises overnight (eg, by seal)

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 equipment or article relating to any matter relevant to the investigation (eg, computers).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Competition and Consumer Commission of Singapore (CCCS) has the ability, under section 88 of Singapore Competition Act (Cap 50B) (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 three cooperation agreements with overseas enforcement agencies, namely, a memorandum of understanding to facilitate cooperation on competition enforcement with Indonesia's Commission for the Supervision of Business Competition, a memorandum of cooperation with the Japan Fair Trade Commission to increase cross-border enforcement cooperation between both authorities, and a memorandum of understanding to facilitate competition and consumer protection law enforcement between the CCCS and the Competition Bureau Canada. The CCCS has also joined multilateral frameworks that facilitate cooperation on competition cases, such as the ASEAN Competition Enforcers' Network and the International Competition Network's Framework on Competition Agency Procedures.

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.

Interplay between jurisdictions

- 14 | 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

Decisions

- 15 | 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 Competition Appeal Board (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.

Burden of proof

- 16 | 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. In *JJB Sports plc and Allsports Limited v OFT* [2004] CAT 17) it stated that:

[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.

Circumstantial evidence

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

Yes.

Appeal process

18 | 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 of 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, 2014 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

Criminal sanctions

19 | 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 Competition and Consumer Commission of Singapore (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.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The CCCS, under section 69 of Singapore Competition Act (Cap 50B) (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 (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.

Guidelines for sanction levels

21 | 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 Penalty Guidelines). 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 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 are taken with a view to ensuring compliance with the section 34 prohibition, for example, the 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.

Compliance programmes

- 22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CCCS has stated in its Penalty Guidelines that the existence of a compliance programme is a mitigating factor that can be taken into consideration in the adjustment of a financial penalty. In considering the mitigating value to be accorded to the existence of a compliance programme, the CCCS will take into account the following:

- whether there are appropriate compliance policies and procedures in place;
- whether the programme has been actively implemented;
- whether the programme has the support of and is observed by senior management;
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
- whether the programme is evaluated and reviewed at regular intervals.

Director disqualification

- 23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Act does not contain any provisions that expressly prescribe for orders to be issued to disqualify individuals involved in cartel activity from serving as corporate directors or officers. However, involvement in cartel activity may constitute a breach of directors' duties in company law.

Debarment

- 24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

It is understood that in cases where the CCCS has issued an infringement decision finding that two or more undertakings have been involved in bid rigging in connection with a government tender, the CCCS will issue a recommendation for debarment action to be taken by the Standing Committee on Debarment, which decides on all cases of debarment. The recommendation will be made by the CCCS as soon as possible after the timeframe for the filing of an appeal against the infringement decision has expired. Where an appeal has been filed, the recommendation will be made as soon as possible after the resolution of the appeal, where appropriate. In general, the debarment period will be commensurate with the financial or material losses suffered by the government agency.

Notwithstanding the above, 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.

Parallel proceedings

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

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

Private damage claims

- 26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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, among other things, 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.

Class actions

27 | Are class actions possible? If so, 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

Immunity

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

The Competition and Consumer Commission of Singapore (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. Paragraphs 2.2 and 2.4 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.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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.

Approaching the authorities

31 | 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.

Cooperation

32 | 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 that are seeking partial leniency?

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. However, any reduction in the level of financial penalty is subject to the CCCS's discretion, which will take into account the stage at which an applicant comes forward, the evidence already in the CCCS's possession, and the quality of information provided by the applicant.

Confidentiality

33 | 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 disclosing 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 proposed infringement decision (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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 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.

Corporate defendant and employees

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

Employees contravening the prohibited actions contained in section 34 Singapore Competition Act (Cap 50B) (the Act) (the section 34 prohibition) 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.

Dealing with the enforcement agency

36 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.

DEFENDING A CASE

Disclosure

37 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.

Representing employees

- 38 | 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 or representation?

Cartel involvement does not give rise to liability for individuals or employees. Accordingly, representation is at the corporation level.

Multiple corporate defendants

- 39 | 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.

Payment of penalties and legal costs

- 40 | 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.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

- 42 | 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.

Getting the fine down

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

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.

DREW & NAPIER

Lim Chong Kin

chongkin.lim@drewnapier.com

Corinne Chew

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

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 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.

UPDATE AND TRENDS

Recent cases

- 44 | What were the key cases, judgments and other developments of the past year?

On 4 June 2020, the CCCS issued an infringement decision against three construction companies for infringing prohibitions on activities contained in section 34 Singapore Competition Act (Cap 50B) (the Act) (the section 34 prohibition) by participating in anticompetitive agreements to rig the bids for the provision of building, construction and maintenance services under a tender by Wildlife Reserves Singapore. The CCCS took the view that bid rigging is one of the most harmful types of anticompetitive conduct. A total of S\$32,098 in financial penalties was imposed on the parties involved.

Regime reviews and modifications

- 45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Currently, there are no specific proposed changes to the legal framework relating to cartels or the immunity and leniency programmes.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

On 20 July 2020, the CCCS announced that it has issued a Guidance Note on Collaborations between Competitors in Response to the COVID-19 Pandemic. Given the exceptional nature of the pandemic, for a temporary period, the CCCS will assume that collaborations that sustain or improve the supply of essential goods or services in Singapore, which do not involve price-fixing, bid rigging, market sharing or output limitation, are likely to generate net economic benefits and therefore unlikely to infringe the Act. The CCCS will generally not investigate such collaborations put in place from 1 February 2020 and which will expire by 31 July 2021.

It would be best for clients seeking to collaborate during this period to ensure that:

- the efficiency brought about by the collaboration is objective and quantifiable;
- there is a direct causal link between the agreement and the efficiency;
- both the collaboration and restrictions imposed are necessary to help increase supply or bring about more efficiencies than in their absence and there are no better alternatives to do so; and
- the collaboration is limited in nature to a particular good or market and limited in time.

Slovenia

Irena Jurca, Katja Zdolšek and Stojan Zdolšek*

Odvetniska družba Zdolšek

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

Relevant institutions

2 | 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.

Changes

3 | 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.

Substantive law

4 | 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 European Union 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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

See www.lexology.com/gtdt.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

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.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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.

Export cartels

8 | 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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) of the Treaty on the Functioning of the European Union (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 the case of 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

See www.lexology.com/gtdt.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Slovenian Competition Agency (the Agency) initiates the procedure ex officio with an order on the commencement of the 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.

Investigative powers of the authorities

12 | 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 a 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

Inter-agency cooperation

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

The Slovenian Competition Agency (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. The Agency is a member of the European Competition Network (ECN), International Competition Network (ICN) and the Competition Committee of the OECD. In 2017, the Agency participated in 28 meetings of the working groups of the ECN and responded to 41 requests for information received through that network.

Interplay between jurisdictions

- 14 | 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 of the Treaty on the Functioning of the European Union (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

Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

The Slovenian Competition Agency (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 Slovenian Act on Prevention of the Restriction of Competition (the Competition Act) or article 101 of the Treaty on the Functioning of the European Union (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.

Burden of proof

- 16 | 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.

Circumstantial evidence

- 17 | 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.

Appeal process

- 18 | 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

Criminal sanctions

19 | 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 Slovenian Competition Agency (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.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Pursuant to the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act), a fine for a 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 the prohibition of restrictive agreements in article 6 of the Competition Act and article 101 of the Treaty on the Functioning of the European Union (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.

Guidelines for sanction levels

21 | 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 only obliged to act in accordance with the provision of the Minor Offences Act, which apply to minor offences in general. This Act stipulates the following aggravating and mitigating circumstances that are relevant for determining the level of the fine:

- the level of responsibility of the perpetrator;
- the 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 the damage.

For legal persons and entrepreneurs their economic power and previous convictions are considered.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The only official criteria for determining the level of the fine are the ones laid down by the Minor Offences Act. There is currently no case law indicating how a compliance programme would be considered in the context of mitigating factors in determining a fine.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is no concept of 'director disqualification' in Slovenian competition law; however, directors may be held personally liable for a criminal offence, punishable by imprisonment between six months to five years or a misdemeanour, punishable by a fine in the amount between €5,000 and €10,000, or in the case of offences of a particularly serious nature between €15,000 and €30,000.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 the 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. The decision on debarment lies with the contracting authority. Complex provisions of the Slovenian Public Procurement Act regulate the exact conditions for this measure.

Parallel proceedings

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

In Slovenia, penalties imposed by the Agency have the nature of minor offence penalties. A minor offence procedure before the Agency may not be initiated against a person or an entity that 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

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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.

Currently there is no case law dealing with the question of the 'umbrella damages' in cartel cases. This issue would likely be addressed by the courts in the context of examining the causal link between the cartel behaviour and the damage suffered by the claimant. It can be expected that in addressing this issue, the national courts would follow the case law of the European Court of Justice (ECJ).

Class actions

27 Are class actions possible? If so, 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 of the Treaty on the Functioning of the European Union.

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. So far only two collective actions have been filed in Slovenia and neither of them has a basis in competition law.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, 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 Slovenian Act on Prevention of the Restriction of Competition (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 Slovenian Competition Agency (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 and 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 of the Treaty on the Functioning of the European Union (TFEU) in connection with the alleged cartel;
- the offender cooperates with the Agency throughout the procedure;
- the offender ends his or her 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 his or her 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.

Subsequent cooperating parties

- 29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 relevant conditions are fulfilled.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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.

Approaching the authorities

- 31 | 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 to be considered in the ranking order granted by the marker.

Cooperation

- 32 | 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 that are seeking partial leniency?

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. It 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; and
- 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.

Confidentiality

- 33 | 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.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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.

Corporate defendant and employees

- 35 | 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.

Dealing with the enforcement agency

- 36 | 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.

DEFENDING A CASE

Disclosure

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

Parties in the procedure before the Slovenian Competition Agency (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.

Representing employees

38 | 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 or representation?

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.

Multiple corporate defendants

39 | 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.

Payment of penalties and legal costs

40 | 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 Slovenian Act on Prevention of the Restriction of Competition (the Competition Act), but certain tax and justification issues regarding such expenses may arise.



Irena Jurca

irena.jurca@zdolsek.com

Katja Zdolsek

katja.zdolsek@zdolsek.com

Stojan Zdolsek

zdolsek@zdolsek.com

Miklošičeva cesta 5

1000 Ljubljana

Slovenia

Tel: +386 1 3078 300

Fax: +386 1 3078 310

www.zdolsek.com

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

42 | 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.

Getting the fine down

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

The optimal way to achieve immunity from or a reduction of the fine is by submitting a leniency application as soon as possible. Unless it is 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.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

No updates at this time.

Regime reviews and modifications

- 45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

See www.lexology.com/gtdt.

Coronavirus

- 46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

See www.lexology.com/gtdt.

* *The information in this chapter was verified between October and November 2019.*

South Korea

Hoil Yoon, Chang Ho Kum and Yang Jin Park

Yoon & Yang LLC

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is the Monopoly Regulation and Fair Trade Act (MRFTA).

Relevant institutions

2 | 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 KFTC is an independent administrative branch of the Korean government responsible for administrative investigations, prosecution and adjudication. It has nine commissioners, consisting of a chair, a vice-chair, three standing commissioners and four non-standing commissioners. Within the Secretariat of the KFTC, 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 KFTC, only then does the Prosecutors' Office have the authority to investigate and prosecute cartels for criminal punishment.

Meanwhile, article 315 of the Korean Criminal Code and article 95 of the Framework Act on the Construction Industry provide for the offence of bid rigging, which may be prosecuted by the Prosecutors' Office without regard to receiving any criminal referral from the KFTC. Consequently, both administrative sanctions and criminal sanctions may be imposed for the same conduct. Further, the prosecutor may directly commence an investigation and indict even without a criminal referral from the KFTC in cases of objectively obvious and serious collaborative acts (ie, hardcore cartel behaviour, including price-fixing, output restriction cartels, market allocation cartels and bid rigging) among unreasonable collaborative acts.

Changes

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

There have not been any significant changes to the regime regarding cartels in the past year.

The MRFTA amendment bill which the government submitted to the National Assembly in November 2018 was automatically repealed due to the expiration of the term of the 20th National Assembly. However, in August 2020, the government resubmitted an MRFTA amendment bill that is effectively the same as the former bill. The major amendments related to cartels are as follows:

- abolish the KFTC's exclusive complaint right for hardcore cartel behaviour (eg, price-fixing, market allocation and bid rigging);

- supplement statutory presumptions so that exchange of information may be regulated as a cartel;
- simplify and clarify overlapping requirements for permitting cartel behaviour; and
- double the cap for administrative surcharges.

Substantive law

4 | 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:

- 1 fix, maintain or alter prices;
- 2 determine the terms and conditions for trade in goods or services or for payment of prices or compensation thereof;
- 3 restrict the production, shipment, transportation or the trading of goods or services;
- 4 restrict the territory of trade or customers;
- 5 hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for the manufacturing of products or the rendering of services;
- 6 restrict the types or specifications of goods at the time of production or trade thereof;
- 7 establish a corporation or the like with other undertakings to jointly conduct or manage important parts of businesses;
- 8 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
- 9 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 (1) to (8) 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 hardcore 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. 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 proposed amendment 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 KFTC will file a criminal referral with the Prosecutors' Office if the violations are so objectively obvious and serious as to greatly restrain competition. If, however, the MRFTA amendment bill passes the resolution stage in the plenary session of the National Assembly, the KFTC's right to be the exclusive complaint regarding hardcore cartel actions, such as price-fixing and bid rigging, will likely be abolished.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The MRFTA regulates joint ventures or strategic alliances by treating them as cartels if they unreasonably restrain competition (article 19(1) (vii) of the MRFTA). However, joint ventures and strategic alliances are not illegal if they aim to achieve a justifiable business purpose and increase efficiency. Therefore, the business purpose, scope and effect of the joint venture or strategic alliance are comprehensively considered in determining whether they unreasonably restrain competition. For example, through a joint venture at the R&D level, development of new products or technology, which a single company alone cannot achieve, may be done by combining the know-how or assets of each entity and pro-competitive effects, such as cost reductions, may be created. On the other hand, joint ventures at the production level are more likely to be regulated than R&D-level joint ventures, as engaging in anticompetitive conduct such as price-fixing through production facility combination or exclusion of competitors is easier in production-level joint ventures.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The MRFTA applies to an 'enterprise', which is defined as entities conducting manufacturing business, service business or other business. Thus, irrespective of the type of business and irrespective of the forms of these entities (such as corporations) and whether they have profit-making purpose or not, entities that continuously and repetitively provide economic benefits based on their own calculations and receive considerations therefor may constitute an 'enterprise' under the MRFTA.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The law applies to conduct that takes place outside Korea if it has an effect on the Korean market. For example, in 2002 and 2003, the Korea Fair Trade Commission (KFTC) imposed administrative fines on the foreign companies that participated in the Graphite Electrodes and Vitamins cartels, respectively. In addition, in December 2008, the KFTC 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 KFTC 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.

Export cartels

8 | 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 United States), Korea does not have a separate waiver provision for export cartels.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are some 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

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 where administrative agencies are granted by other laws with 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.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

In the Korea Fair Trade Commission (KFTC) proceedings, before an adjudication or decision is made, there are two stages: an investigation and a deliberation. In an investigation, the KFTC typically conducts an on-site inspection of the suspected violators, seizes or requests documents, questions witnesses and requests information from the suspected

violators. The KFTC 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 complex, 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 made by the full college of the KFTC commissioners. After making a final decision internally, the KFTC issues a written decision several weeks thereafter or, in a complex case, several months thereafter.

It is difficult to generalise about the timing of cartel cases. However, from the 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 have 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.

Investigative powers of the authorities

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

Under article 50 of the MRFTA, the KFTC has broad administrative investigative powers which is essentially based upon the voluntary cooperation of the investigated parties (including suspected violators and witnesses). The KFTC may request the suspected violators and witnesses, etc. to submit or produce information, documents or other materials (including computer records and electronic data), oral statements or written answers to questions. The KFTC may appoint expert witnesses and request them to give their opinions. The KFTC may seize any documents or materials so produced.

The KFTC 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 KFTC may seize any documents or materials so produced. No court approval is required for the above investigation procedures.

Anyone who obstructs the KFTC investigations or refuses to comply with any of the KFTC'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 KFTC investigations; however, the amendment provides for criminal sanctions (ie, imprisonment of up to three years or a criminal fine of up to 200 million Korean won, or both) for refusing, obstructing or evading a KFTC investigation through means such as a verbal or physical assault or intentionally delaying or obstructing the entry of KFTC officials onto the business premises. However, the KFTC officials have no power of forcible entry or search and seizure. Also, KFTC officials have no general surveillance powers (including wiretapping).

As for criminal investigations by the Prosecutors' Office, upon receipt of a criminal referral from the KFTC, 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 and search and seizure, warrants issued by the court are required.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Korea cooperates with several other countries either through cooperation agreements (eg, with the European Union) or memoranda of understanding (eg, with Brazil, China, Japan and the United States). 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 *Auto Parts*, *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.

Interplay between jurisdictions

14 | 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?

Cartel investigations in the US and the EU may increasingly lead the Korea Fair Trade Commission (KFTC) launching investigations 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

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Korea Fair Trade Commission (KFTC) both investigates and adjudicates on cartel matters. Following an investigation by the officials of the KFTC Secretariat, the full college of commissioners (except in minor matters on which the decision may be made 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 made by the full college of the KFTC commissioners.

Burden of proof

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

The KFTC has the burden of proof in the KFTC 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 must 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 judge's mind regarding the facts of the charges. This may be understood as requiring evidentiary value similar to that of beyond a reasonable doubt.

Circumstantial evidence

17 | 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 'unreasonable 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 may be legally presumed. The Review Guidelines on Unreasonable 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;
- 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, an unreasonable collaborative act may 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 several 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 it is difficult to substantiate the existence of an unreasonable collaborative act.

Appeal process

18 | What is the appeal process?

The KFTC's decisions may be reconsidered by the full college of commissioners upon application by respondents. The respondents may object to the KFTC's decision within 30 days from receipt of the written decision from the KFTC. The respondents may also appeal the KFTC's decisions to the Seoul High Court. The KFTC's decisions made 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 KFTC 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

Criminal sanctions

19 | 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 3 years or a criminal fine of up to 200 million won, or both. Under the Monopoly Regulation and Fair Trade Act (MRFTA), the Korea Fair Trade Commission (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, 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 KFTC 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, this 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.

The number of criminal referrals made per year since 2007 are as follows:

- 2007: 7 criminal referrals;
- 2008: 5 criminal referrals;
- 2009: 5 criminal referrals;
- 2010: 1 criminal referrals;
- 2011: 8 criminal referrals;
- 2012: 2 criminal referrals;
- 2013: 12 criminal referrals;
- 2014: 36 criminal referrals;
- 2015: 9 criminal referrals;
- 2016: 22 criminal referrals;
- 2017: 27 criminal referrals;
- 2018: 44 criminal referrals;
- 2019: 19 criminal referrals; and
- 2020 (to August): 2 criminal referrals.

Civil and administrative sanctions

20 | 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' refers to the total revenue generated during the period of the cartel with respect to the products or services directly or indirectly affected by the cartel. Corporate violators are also subject to a cease-and-desist order and other appropriate administrative corrective orders. While in some cases, 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:

- 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).

During 1981 to 2001, there were 359 cartel cases that resulted in guilty verdicts or pleas. The average total of fines issued for each of those years was 22,187 million Korean won. The total number of guilty verdicts and fines in subsequent years were:

- 2002: 47 cartel cases resulting in a guilty verdict, for which fines totalling 53,109 million Korean won were imposed;
- 2003: 23 cartel cases resulting in a guilty verdict, for which fines totalling 109,838 million Korean won were imposed;
- 2004: 35 cartel cases resulting in a guilty verdict, for which fines totalling 29,184 million Korean won were imposed;
- 2005: 46 cartel cases resulting in a guilty verdict, for which fines totalling 249,329 million Korean won were imposed;
- 2006: 45 cartel cases resulting in a guilty verdict, for which fines totalling 110,544 million Korean won were imposed;
- 2007: 44 cartel cases resulting in a guilty verdict, for which fines totalling 307,042 million Korean won were imposed;
- 2008: 65 cartel cases resulting in a guilty verdict, for which fines totalling 197,479 million Korean won were imposed;
- 2009: 61 cartel cases resulting in a guilty verdict, for which fines totalling 52,932 million Korean won were imposed;
- 2010: 62 cartel cases resulting in a guilty verdict, for which fines totalling 585,822 million Korean won were imposed;
- 2011: 71 cartel cases resulting in a guilty verdict, for which fines totalling 577,902 million Korean won were imposed;
- 2012: 41 cartel cases resulting in a guilty verdict, for which fines totalling 398,866 million Korean won were imposed;
- 2013: 46 cartel cases resulting in a guilty verdict, for which fines totalling 364,731 million Korean won were imposed;
- 2014: 76 cartel cases resulting in a guilty verdict, for which fines totalling 769,428 million Korean won were imposed;
- 2015: 88 cartel cases resulting in a guilty verdict, for which fines totalling 504,919 million Korean won were imposed;
- 2016: 64 cartel cases resulting in a guilty verdict, for which fines totalling 756,040 million Korean won were imposed;
- 2017: 69 cartel cases resulting in a guilty verdict, for which fines totalling 229,439 million Korean won were imposed;
- 2018: 157 cartel cases resulting in a guilty verdict, for which fines totalling were imposed of 237,950 million Korean won;
- 2019: 64 cartel cases resulting in a guilty verdict, for which fines totalling 92,097 million Korean won were imposed; and

- 2020 (to July): 74 cartel cases resulting in a guilty verdict, for which fines totalling 82,659 million Korean won were imposed.

Guidelines for sanction levels

21 | 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. Administrative fines for unreasonable collaborative acts are calculated by multiplying the imposition rate by the degree of violation depending on the severity of violations (0.5 per cent to 10 per cent) with the total revenue generated during the period the cartel operated with respect to products or services directly or indirectly affected by the cartel ('relevant sales'). The severity of violations may be classified into very 'severe', 'severe' or 'less severe' violations by considering the details of violation (eg, whether there was restraint on competition and whether monitoring or sanction measures were prepared and undertaken to implement the agreement) and extent of violation (eg, participating enterprise's market shares in the relevant market, relevant sales, scope of unreasonable gain and damage and regional scope of the effect of the violation).

Key factors for an increase in administrative fines include:

- if the statutory violation was repeated and was subject to the KFTC's measures in the past five years, and if the latter, the number of times;
- 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:

- where there was agreement on collaborative act, but such agreement was not implemented;
- cooperation in the KFTC investigation; and
- voluntary correction of the statutory violation (here, voluntary violation should be beyond simply discontinuing the violation, but rather it should involve an affirmative removal of any effect caused by the violation (ie, price reduction)).

The KFTC may make a criminal referral of a violator to the Prosecutors' Office, and has prepared criminal referral guidelines that stipulate such referral matters. Under the criminal referral guidelines, penalty points are assigned to the violation depending on the specific type of violation and severity of the violation, and if the total penalty points exceed a certain level, the violator shall be subject to such referral. For example, in case of cartels, high penalty points are assigned to hardcore cartels (ie, price-fixing, output restriction cartels, market allocation cartels and bid rigging). With respect to the severity of violation, higher penalty points would be assigned the higher the total market share of cartel participants; the wider the area affected by the cartel (ie, geographic scope); the more coercive the participation in the cartel; and longer the cartel period are. The total penalty points would be calculated pursuant to a certain formula, and if the penalty points for the violator is 1.8 points or more, the violator would be subject to referral. The referral guidelines stipulate the criteria for calculating penalty points for enterprises as well as individuals.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The KFTC established and operates 'Rules on Operation of Fair Trade Compliance Programs, Offering of Incentives, etc'. According to said Rules, if an organisation receives a certain grade or higher for its compliance programme from an agency designated by the Korea Fair Trade Mediation Agency or agency designated by the KFTC (which does not currently exist), it may be exempt from the duty to officially announce the fact that it is subject to the KFTC's corrective order or such duty may be attenuated.

- Evaluation of 'AAA (Best)': exempt from the duty to publicly announce that the organisation is subject to KFTC's corrective order.
- Evaluation of 'AA (Outstanding) or A (Better than Most)': reduction of the size of posting of public announcement in publications and the number of publications in which such announcement will be published by one level, and a reduction of the period of the announcement at the business's website and on electronic media.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The MRFTA and the Korean Commercial Code do not contain provisions restricting individual employees involved in unreasonable collaborative acts from serving as corporate directors or officers. However, individual employees who participated in a leading manner in unreasonable collaborative acts may be subject to criminal punishment if the KFTC makes a criminal referral to the Prosecutors' Office. In the case of companies under strict supervision for establishment and operation, such as financial institutions and public companies, the individual employees' history of criminal punishment is stated as a ground for disqualification from serving as corporate directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

In case of a party engaging in a cartel regarding government or public institution procurement, such party may 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 Act on Contracts to Which the State is a Party restricts the right of a party to participate in tenders for two years in the case where the party led the cartel and was the successful bidder; for one year in the case where the party led the cartel; and six months in case the party participated in a cartel.

Parallel proceedings

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

The MRFTA provides for both administrative sanctions that may be pursued by the KFTC and criminal sanctions that may be pursued by the Prosecutors' Office. However, article 71 of the MRFTA provides for criminal prosecution only when the KFTC files a criminal referral with the Prosecutors' Office. Under the MRFTA, the KFTC 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 KFTC 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. However, as mentioned above, according to the bill of amendment to the MRFTA pending for legislation, with respect to hardcore cartels such as price-fixing, output restriction cartels, market allocation cartels and bid rigging, the Prosecutors' Office may commence an investigation and indict without a criminal referral from the KFTC.

In addition, article 315 of the Korean Criminal Code and article 95 of the Framework Act on the Construction Industry 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 KFTC. Consequently, both administrative sanctions and criminal sanctions may be pursued in respect of the same conduct.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Article 56 of the Monopoly Regulation and Fair Trade Act (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 and purchasers that acquired the affected product from non-cartel members may bring a damages lawsuit but may, depending on the case, have difficulty in establishing causation and the amount of damages.

According to the recent amendment to the MRFTA, a carteliser is stipulated to be liable up to treble the damages that actually occurred. However, the 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 and umbrella 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 damages compensation 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 amount of damages compensation at the stage of limiting the liability of the defendants.

Class actions

27 | Are class actions possible? If so, 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 several parties 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 also has an effect on 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's economic policy package', 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

Immunity

28 | Is there an immunity programme? If so, 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 a cartel. In 2001, the MRFTA was amended to provide for leniency for a company which reported or cooperated in the investigation of a cartel. On 1 April 2005, the KFTC 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 KFTC. On 1 July 2006, the KFTC 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 KFTC 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 KFTC prior to the KFTC's commencement of investigation would be given a reduction in administrative fine of no less than 75 per cent. After the commencement of a KFTC investigation, the first to come forward to the KFTC would be given a reduction in administrative fine of no less than 50 per cent. Other parties to come forward to the KFTC 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 KFTC and cooperates with the KFTC, even if it is not the first or second to do so, such company would benefit from the leniency programme. The KFTC 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 KFTC 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 company to come forward to the KFTC before or after the commencement of the KFTC investigation and cooperate would be given an automatic reduction in the fine of 100 per cent. The second to come forward to the KFTC before or after the commencement of the KFTC 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 KFTC and cooperate, such company will not benefit from the leniency programme. The KFTC 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 that 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 for 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 KFTC 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 KFTC 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 a 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 KFTC 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 KFTC filed a criminal referral against several participants other than the two leniency applicants, the Prosecutors' Office indicted the two leniency applicants as well as all the other participants, based on the belief that under the Criminal Procedure Act a KFTC 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 KFTC 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 KFTC. 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 criminally refer a leniency applicant for cartel activities is explicitly recognised.

On 21 July 2011, the KFTC 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 KFTC to grant a longer supplemental period of total of 75 days, 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 KFTC. 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 of leniency application procedures;
- specification of amnesty plus standards;
- enhancement of the requirements for a succession of ranks; and
- amendment to the standards for determining repetitive cartels.

Among the changes, the standards for amnesty plus stipulated in detail the leniency ratio by comparing the scale of the collaborative acts that

have been additionally voluntarily reported and the scale of the relevant collaborative acts. For example, if the additionally reported cartel is smaller than or the same scale as the relevant cartel, a maximum mitigation of 20 per cent is possible, while if the scale of the additionally 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 the 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, to obtain the first rank, the relevant applicant has to satisfy the requirement of 'the KFTC lacking sufficient evidence'. In other words, even when a second-ranked applicant could succeed the first-ranked one, if the KFTC had already secured sufficient evidence at the time of the leniency application by the second-ranked applicant, such second-ranked applicant cannot succeed the first-rank position notwithstanding the revocation of the first-rank position since the second-ranked applicant had failed to satisfy the relevant requirement.

Over the past several years, the number of cartel cases in which the KFTC accepted leniency applications has increased dramatically:

- in 1999 the KFTC accepted 1 leniency applications and imposed fines totalling 314 million Korean won;
- in 2000 the KFTC accepted 1 leniency applications and imposed fines totalling 43 million Korean won;
- in 2001 the KFTC accepted no leniency applications;
- in 2002 the KFTC accepted 2 leniency applications and imposed fines totalling 1,288 million Korean won;
- in 2003 the KFTC accepted 1 leniency applications and imposed fines totalling 3,433 million Korean won;
- in 2004 the KFTC accepted 2 leniency applications but did not impose any fines;
- in 2005 the KFTC accepted 7 leniency applications and imposed fines totalling 173,673 million Korean won;
- in 2006 the KFTC accepted 7 leniency applications and imposed fines totalling 54,992 million Korean won;
- in 2007 the KFTC accepted 10 leniency applications and imposed fines totalling 221,373 million Korean won;
- in 2008 the KFTC accepted 21 leniency applications and imposed fines totalling 150,600 million Korean won;
- in 2009 the KFTC accepted 17 leniency applications and imposed fines totalling 42,000 million Korean won;
- in 2010 the KFTC accepted 18 leniency applications and imposed fines totalling 557,100 million Korean won;
- in 2011 the KFTC accepted 32 leniency applications and imposed fines totalling 552,200 million Korean won;
- in 2012 the KFTC accepted 13 leniency applications and imposed fines totalling 275,128 million Korean won;
- in 2013 the KFTC accepted 23 leniency applications and imposed fines totalling 352,312 million Korean won;
- in 2014 the KFTC accepted 44 leniency applications and imposed fines totalling 769,428 million Korean won;
- in 2015 the KFTC accepted 48 leniency applications and imposed fines totalling 406,020 million Korean won;
- in 2016 the KFTC accepted 27 leniency applications and imposed fines totalling 753,319 million Korean won;
- in 2017 the KFTC accepted 41 leniency applications and imposed fines totalling 221,386 million Korean won;
- in 2018 the KFTC accepted 41 leniency applications and imposed fines totalling 205,242 million Korean won;
- in 2019 (to July) the KFTC accepted 34 leniency applications and imposed fines totalling 67,585 million Korean won; and
- in 2020 the KFTC accepted 30 leniency applications and imposed fines totalling 67,204 million Korean won.

Subsequent cooperating parties

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

After the Enforcement Decree of the MRFTA was amended in 2005, if a company is not first or second to come forward to the KFTC 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 KFTC's Notification on Detailed Standards Regarding Imposition of Administrative Fines.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A company that satisfies all of the requirements below will be accepted as the second leniency applicant and so will be given a reduction in administrative fine by 50 per cent, and will be exempt from the corrective order and from criminal referral:

- applies for leniency before the KFTC commences its investigation or cooperate with the KFTC after it commences its investigation, and be the second company to voluntarily provide evidence necessary to prove the cartel;
- cooperates in good faith, such as providing statements of all the facts related to the cartel and the relevant materials until the committee's deliberation end; and
- discontinues participation in the cartel.

The status of second leniency applicant shall not be granted in the event that there are only two cartel participants and two years have elapsed since the first leniency applicant applied for leniency or cooperated with the investigation.

In addition, an 'amnesty plus' treatment is available. If a company participated in cartel A becomes the first leniency applicant or the first to cooperate with the investigation into cartel B, which it also participated in, it may also be given a reduction in its administrative fine and be exempt from the corrective measures for cartel A. The extent of additional reduction of administrative fines differs, according to the size of the cartel (determined by the sales of products or services):

- cartel B is equal to or smaller than cartel A: reduction of administrative fine by less than 20 per cent;
- cartel B is greater than cartel A by less than two times: reduction of administrative fine by 30 per cent;
- cartel B is greater than cartel A by two times but less than four times: reduction of administrative fine by 50 per cent; and
- cartel B is greater than cartel A by four times or more: exempt from an administrative fine.

Approaching the authorities

31 | 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, the second-ranked leniency applicant must file its application for leniency within two years from the date on which the voluntary report of the first-ranked 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 KFTC, the KFTC 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 KFTC. 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 KFTC, then such application will be deemed to have been filed as of the time when the initial application was made.

Cooperation

32 | 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 that are seeking partial leniency?

Under article 35 of the Enforcement Decree of the MRFTA, a leniency applicant must faithfully cooperate until the conclusion of the KFTC investigation by, among other things, making statements regarding all the relevant facts of the unreasonable 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 Unreasonable Collaborative Acts, 'until the end of the investigation' refers to the period 'until the end of deliberation by the KFTC', 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.

However, recently, the Korea Supreme Court deemed that leniency applicants did not faithfully cooperate with the KFTC if such leniency

applicants destroyed evidence about cartels or leaked the fact of such leniency application 'to third parties, including cartel participants' without the KFTC's approval before the conclusion of deliberation by the KFTC (see Korean Supreme Court, case No. 2016Du46458, rendered on 11 July 2018 and case No. 2016Du45783 rendered on 26 July 2018).

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 and a lower-ranked leniency applicant receiving a 50 per cent reduction of the administrative fine.

Confidentiality

33 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 KFTC may disclose the information 'if necessary for 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 KFTC's disposition or 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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 bargains or settlements for cartel activities are not permitted in Korea. Also, under the amended MRFTA, the consent decree system under the MRFTA applies only to other MRFTA violations excluding cartel activities.

Corporate defendant and employees

35 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 KFTC 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.

Dealing with the enforcement agency

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

Generally, leniency is granted according to the following steps.

The undertaking submits a leniency application form to the KFTC which includes:

- a summary of the cartel;
- evidence necessary to prove the cartel exists and an evidence list;
- a statement that the applicant will cooperate in good faith; and
- a statement that the applicant has discontinued participation in the cartel.

Applications may be submitted by visiting the KFTC, by email, fax or orally. However, submissions by phone are not permitted. For oral submissions, the applicant's responses to the case examiner's questions are recorded or videotaped.

Immediately after receiving the application, the case examiner marks the application form with the date and time of the application and the applicant's registration ranking, and issues a copy to the applicant. This ranking only refers to the registration of the application.

A 'first revision' interview between the leniency applicant and the KFTC is then held within seven days of the leniency application being received. If the applicant requires additional time to collect evidentiary materials, they may request for the interview to be held within 15 days. At this interview, the applicant submits their initial evidence and material to the case examiner. The applicant may also negotiate for a 'second revision' period and a deadline to submit further material. If the applicant can prove it has a justifiable cause to be granted more time to collect evidence, they may apply for a second revision period of up to 60 days. If the case examiner determines additional time is needed to collect evidence and obtain statements, they may extend this period beyond 60 days.

Generally, a face-to-face meeting with the case examiner and the director-in-charge must be held within 14 days from the date the applicant submits its second revision. The case examiner then submits a separate examiner's report to the committee, determining the applicant's status and ranking as a leniency applicant. The committee then deliberates and decides the applicant's ranking and issues the decision to the applicant.

DEFENDING A CASE

Disclosure

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

Among the materials attached to the examiner's report, the Korea Fair Trade Commission (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.

Representing employees

38 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 or representation?

Subject to the Bar rules on conflicts of interest, counsel may represent or give legal advice to those employees under investigation, as well as the corporation.

Multiple corporate defendants

39 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.

Payment of penalties and legal costs

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

A corporation's payment of the legal fees or penalties on behalf of the individual employees who participated in unreasonable collaborative acts might be subject to criminal punishment under the relevant Korean laws.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

42 | 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 Korean Criminal Code, the criminal sanctions imposed in Korea may be reduced or exempted in case criminal sanctions had already been imposed on a party 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.

Getting the fine down

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

The best way to obtain leniency and reduce any administrative or criminal fine is to be the first to come forward to the KFTC and cooperate fully, completely and in good faith.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The Korea Fair Trade Commission (KFTC) found that the agreement and application of the rate and period of increase of domestic bearing sale price between December 1998 to March 2012 by A, B, and C – manufacturers and suppliers of bearings for commercial use – was a violation of article 19(1) of the Monopoly Regulation and Fair Trade Act (MRFTA). The KFTC imposed a corrective order and administrative surcharge to B and C and filed a criminal referral with the Prosecutors' Office (KFTC Decision No. 2015-064 dated 15 March 2015). A, as the first-ranking leniency applicant, was exempt from the corrective order, administrative surcharge and criminal referral.

In response, B filed a lawsuit seeking annulment of the KFTC's disposition. The Seoul High Court annulled the KFTC's disposition stating that the five-year period for imposing a disposition under the previous MRFTA had expired for the cartel prior to June 2007 (Cartel 1) because the cartel had effectively broken down by June 2007, through repetitive price competition among A, B, and C, and that the court could not conclude that the cartel after June 2007 (Cartel 2), had formed an agreement based only on exchange of information, even if B exchanged information on sales performance with another enterpriser and B's price fluctuation appeared to coincide with that of A's and C's (Seoul High Court Decision No. 2016Nu39257 rendered on 17 June 2016). The KFTC appealed the court's decision, but the appeal was denied by the Supreme Court (Supreme Court Decision No. 2016 Du 46113 rendered on 14 March 2019).

C also filed suit with regard to the KFTC's disposition above and the Seoul High Court annulled the KFTC's disposition against C for the reasons similar to the above decision regarding B (Seoul High Court Decision No. 2015Nu39240, rendered on 23 June 2016). The KFTC appealed but unlike the case for B, the Supreme Court reversed and remanded the Seoul High Court's ruling with regard to C's Cartel 2 (Supreme Court Decision No. 2016Du46687 rendered on 31 January 2019). The major reasons were:

- 'Agreement' under article 19(1) of the MRFTA essentially requires mutual communication of intent between or among two or more enterprises. Thus, an agreement cannot naturally be found, even if the outer appearances coincide with the situation where an unlawful cartel listed under each subclause of the above provision existed. Rather, evidence of circumstances showing reciprocity of communication of intent between the enterprisers must exist.
- Considering that the sales personnel of A, B, and C collected and shared sales information such as other entities' import prices, sales prices and discounted prices, the price fluctuations of A and C appeared to coincide as their price increases were approximately one month apart, and A's employee stated that A increased price with C upon C's request to do so and planned to persuade B to do the same. The fact that A and C engaged in Cartel 2 is included as the reason for disposition in the KFTC's disposition, therefore, C is highly likely to be deemed to have engaged in Cartel 2, even if it is unclear whether B participated in Cartel 2.

The above decision is significant because the Supreme Court held, without ordering a change in the KFTC's reasons for disposition, that the KFTC's reason for disposition not only included a tripartite cartel but also a bilateral cartel between A and C even though the KFTC's disposition was based on the KFTC's finding that an agreement was formed among A, B, and C. For reference, the lower court on remand held that C engaged in Cartel 2 for the same reasons provided in the Supreme Court decision above and such decision was finalised (Seoul High Court Decision No. 2019Nu34502 rendered on 23 October 2019).

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The bill to amend the MRFTA, which includes substantially restricting competition by exchanging sensitive information, such as future prices, between competitors as a type of an unreasonable collaborative act (ie, cartel behaviour) is pending legislation. In the European Union and the United States, among others, the exchange of sensitive information between competitors is deemed to cause considerable anticompetitive effects and is prohibited as a concerted practice, or information exchange agreements themselves are subject to regulation. As the

MRFTA currently does not contain relevant provisions, so it has been challenging to regulate the exchange of sensitive information as an unreasonable collaborative act. In this respect, to making the regulation of the anticompetitive exchange of information more effective, the bill to amend the MRFTA was proposed in August 2020. The amendment stipulates that the existence of an agreement between enterprises may be legally presumed if there exists external conformity of conduct that could be deemed as a cartel between the enterprises, and there is an exchange of information necessary for such concerted conduct to occur. Further, the amendment provides that an agreement between enterprises about exchanging information, including price and sales volume, that substantially restricts competition may be deemed as a type of unreasonable collaborative act (ie, cartel behaviour).

Initially, the Prosecutors' Office was unable to indict entities for conducting unreasonable collaborative acts without a criminal referral from the KFTC. However, the MRFTA amendment would enable a prosecutor to directly indict in cases of objectively obvious and serious collaborative acts (ie, hardcore cartels, including price-fixing, output restriction cartels, market allocation cartels and bid rigging) and the KFTC and Prosecutors' Office may share case materials, among other information.

In addition, if a cartel is engaged in for the purpose of rationalisation of industry, research and development of technology, overcoming recession, industrial restructuring, rationalisation of trade terms or enhancement of competitive power of small and medium-sized companies, the requirements determined by an Enforcement Decree of the MRFTA are satisfied, and KFTC approval is given, article 19(1) of the MRFTA does not apply. The MRFTA amendment bill simplifies and clarifies some of the overlapping requirements to receive such approval from the KFTC so that the requirement only entails industrial restructuring to overcome recessions, research and development of technology, rationalisation of trade terms or enhancement of competitive power of small and medium-sized companies.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The KFTC has not established a policy or expressed its views on cartel investigation or enforcement of laws in relation to covid-19. It appears, however, that effective enforcement of the law has slowed down due to KFTC employees working from home and the KFTC refraining from dawn raids.

Entities may be able to receive a mitigation of administrative surcharges if exacerbated financial standing and economic conditions resulting from covid-19 are detailed to the KFTC, as it has the discretion to reduce administrative surcharges, taking into account an entity's realistic ability to pay and market or economic conditions.



YOON & YANG
법무법인(유) 화우

Hoil Yoon

yoon.hoil@yoonyang.com

Chang Ho Kum

chkum@yoonyang.com

Yang Jin Park

parkyj@yoonyang.com

34th Floor, ASEM Tower
517 Yeongdong-daero, Gangnam-gu
Seoul 06164
South Korea
Tel: +82 2 6003 7000
Fax: +82 2 6003 7800
www.yoonyang.com

Spain

Andrew Ward, Irene Moreno-Tapia, Carlos Alberto Ruiz and Marta Simón

Cuatrecasas

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartels in Spain are regulated by Law No. 15/2007 of 3 July for the Defence of Competition (LDC) and its implementing regulation approved by Royal Decree 261/2008 of 22 February. Article 101 of the Treaty on the Functioning of the European Union (TFEU) also applies in cartel cases where there is an effect on trade between EU member states.

Relevant institutions

2 | 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 public enforcers of Competition law in Spain are the National Commission for Markets and Competition (CNMC), which was set up by Law No. 3/2013 of 4 June on the Creation of the National Commission for Markets and Competition, with nationwide jurisdiction for any infringement with effects extending beyond a single region and the Regional Competition Authorities (RCAs), that has jurisdiction for infringements with effects within the autonomous region in question.

The CNMC consists of a collective decision-making body, the Council, which has two chambers (one for competition and the other for regulatory matters), including several directorates responsible for investigating different sectors (competition, energy, telecommunications and audiovisual media, and transport and postal). The Competition Chamber of the Council decides on competition infringements, including cartel cases, while the Directorate for Competition is the unit in charge of investigating cartel infringements at a national or supra-regional level.

The autonomous regions of Andalusia, Aragon, the Basque Country, Castilla y León, Catalonia, the Community of Valencia, Extremadura and Galicia have competition authorities mirroring the structure of the CNMC, with an investigative and a decision-making body. The RCAs of Canarias, Madrid, Murcia and Navarra also have an investigative body but no decision-making body; instead, the Council of the CNMC makes the final decision. The other Spanish autonomous regions (Asturias, Baleares, Cantabria, Castilla La Mancha, and la Rioja) do not have their own competition authority; all cartel infringements are dealt with directly by the CNMC.

Law No. 1/2002 of 21 February on the Coordination of the Competences of the State and the Autonomous Regions in Competition matters, regulates the allocation of antitrust investigation powers between the CNMC and the RCAs, which may only conduct investigations concerning infringements whose effects are limited to the territory of their regions.

Spanish commercial courts are also entitled to apply article of the 1 LDC (and 101 of the TFEU) and could therefore theoretically declare the existence of a cartel, and to award damages, even in cases where there has been no previous decision to that effect by the CNMC or an RCA (although, in practice, cases in the courts involving cartels tend to be follow-on claims).

Changes

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

In July 2020, the Spanish government published a draft proposal to amend the LDC. The main purpose of the draft is to implement the ECN+ Directive, although the government has also taken the opportunity to introduce additional changes to the current LDC.

The draft proposal was open for consultation until 15 September 2020, and the final version of the proposed law is currently in preparation. The main changes introduced in the draft proposal regarding cartel infringements can be summarised as follows:

- all anticompetitive agreements (essentially, article 101 of the TFEU) and abuses (article 102 of the TFEU) will be considered very serious infringements and will therefore be punishable with fines of up to 10 per cent of the turnover of the infringing undertaking in the financial year before the imposition of the fine. Fines will be calculated taking into account the worldwide turnover of the companies involved in the infringement proceedings;
- the maximum amount of fines that can be imposed on legal representatives and directors for participation in cartels will be increased to €400,000 (up from €60,000);
- the possibility of settlement decisions, in which parties receive a discount on the fine of up to 15 per cent in return for accepting the responsibility of an infringement will be introduced;
- the maximum duration of infringement procedures in cartel cases from 18 months to a maximum of 24 months. Additionally, the time for undertakings to submit observations to Statements of Objections and Proposals for a Resolution will be extended from 15 days to one month; and
- a specific procedure for interrupting investigation deadlines when other competition authorities or the European Commission open a parallel investigation, or during a court review, is introduced.

Also, the draft provides for improved cooperation with the European Commission and other competition authorities, including sharing confidential information or authorising other officials to assist in dawn-raids, and strengthens the investigatory powers of the competition authority. The possibility for the authority not to pursue every complaint, for strategic reasons or otherwise, is also provided for in the draft proposal.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 1 of the LDC prohibits agreements, collective decisions or recommendations, and concerted or consciously parallel practices, which have as their object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market, including:

- direct or indirect price-fixing or any other trading or service conditions;
- the limitation or control of production, distribution, technical development or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others; and
- entering agreements subject to the acceptance of supplementary obligations that have no connection with the object of these agreements.

Principally, the LDC includes in its Fourth Additional Provision, amended by Royal Decree 9/2017 of 26 May 2017, the definition of a cartel as any agreement or concerted practice among two or more competitors that aims to coordinate or influence competitive behaviour in the market by, inter alia:

- fixing or coordinating purchase or selling prices or other trading conditions (even concerning intellectual and industrial property rights);
- allocating production or sales quotas;
- allocating markets and customers, including collusion in tenders, restrictions on imports or exports; or
- any other practice generally against competitors.

Since no form is specified, it is understood that no written agreement or other formality is required, and one of the notable features of Spanish cartel enforcement is the extension of the concept of a cartel to exchanges of information.

No express intention is needed for a finding of infringement, which can be based on the object. In theory, a fine can only be imposed in an infringement is carried out intentionally or negligently, although in practice the threshold for negligence is low. The competition authorities need not demonstrate that an agreement or concerted practice produced effects or was even successfully executed.

Although not generally relevant in the context of cartels, agreements, decisions or concerted practices may nonetheless benefit from an exemption under article 1.3 of the LDC (mirroring article 101.3 of the TFEU) if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements. Further, according to article 4 of the LDC, the prohibitions under article 1 of the LDC do not apply to agreements resulting from the application of the law.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Non-concentrative joint ventures and strategic alliances would be assessed in the same way as any other agreement and are potentially subject to the cartel laws. Particularly, several CNMC investigations into cartel conduct related to public contracting have alleged the use of temporary joint ventures or even long-lasting strategic alliances as part of an anticompetitive cartel strategy.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Competition rules in Spain apply to both individuals and undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in economic activity, also covering trade associations, individuals operating as sole traders and state-owned corporations.

Where a company is found to have participated in an infringement, the Spanish competition authorities can also impose fines up to €60,000 on legal representatives and directors found to have participated in that conduct. For this to happen, the following requirements are met, namely:

- that the individual has the status of a legal representative or member of the management bodies of the offending company (this has been interpreted broadly by the courts, that consider this condition met if the individual can adopt decisions that 'mark, condition or direct' the actions of the company); and
- that the individual participated in the agreements or decisions contrary to the competition rules.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Theoretically, any conduct taking place outside Spain that affects or may affect competition in all or part of the Spanish market has the potential to be covered by the cartel prohibition and is subject to investigation by Spanish authorities. In cases in which the anticompetitive agreement could be considered as capable of affecting trade between EU member states, the National Commission for Markets and Competition (CNMC) would also apply article 101 of the Treaty on the Functioning of the European Union (TFEU). In practice, the Spanish competition authorities would likely seek to coordinate with the competition authorities of the other EU member states and even the European Commission in those cases.

Export cartels

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

No, there is no such express exemption in Spain. However, the conduct can only be caught under article 1 of Law No. 15/2007 of 3 July for the Defence of Competition (LDC) if it affects customers or other parties in Spain. In this regard, an effect on a Spanish customer seeking to operate in overseas markets could, in principle, be sufficient.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements, offences or exemptions. However, specific rules at EU level concerning the application of article 101 of the TFEU could be also applied in Spain (eg, rules concerning the agricultural and transport sectors).

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Under article 4 of the LDC, the prohibitions set out in the LDC do not apply to conducts – including agreements that could be considered cartels – that result from the application of the law. However, article 4 of the LDC is narrowly interpreted and applied. First, the government regulation authorising the conduct must be a law with at least the same rank as the LDC – secondary legislation will not suffice. Second, article 4 of the LDC will not apply if the law in question merely permits conduct – for article 4 of the LDC to apply the conduct must be mandatory under that law.

Alternatively, government agencies other than the CNMC or the Regional Competition Authorities have no jurisdiction to determine whether conduct falls within article 1, 2 or 3 of the LDC. As such, the mere fact that conduct is government-approved, or even that government agencies participate in it, is no defence. Spanish courts have, however, ruled out the possibility to consider the existence of an infringement when the regulatory context of the practices under investigation was misleading and the administration had actively participated in the conduct (eg, see the High Court ruling of 15 October 2012 in Appeal No. 608/2011 referring to the Spanish competition authority's decision in case S/0167/09 *Productores Uva y Mosto Jerez*).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The main steps carried out by the National Commission for Markets and Competition (CNMC) during an investigation are as follows:

- origin of the investigation: the competition authorities may start an investigation ex officio when the authority is aware of indicia of infringement, or after the receipt of a complaint or leniency application, although in practice most cartel cases are started as a result of a leniency application;
- reserved investigation: before opening a formal investigation, the competition authority will typically carry out a reserved investigation. The reserved investigation is fully confidential and parties are not made aware of it or allowed to access the file, and at this stage, the competition authority may conduct dawn-raids. There is no maximum duration for the reserved investigation, which can vary in length between a few months and even a few years; and
- formal investigation: if the CNMC decides to open a formal investigation it will notify the parties under investigation and publish the decision to do so. From the formal opening of the investigation, the CNMC has 18 months to adopt a final decision. The formal investigation is divided into two separate phases of approximately 12 and six months respectively (although the 12 and six-month deadlines are not binding):
 - investigation phase: during about the first 12 months from the opening of the formal investigation, the Directorate for Competition will review the evidence gathered and may send information requests to the investigated parties or conduct further inspections. If the Directorate for Competition finds sufficient evidence of an infringement, it will send a Statement of Objections (SO) to all interested parties. After receiving the SO, the parties will have access to any leniency applications and supporting materials in the offices of the competition authority (no copies are provided or permitted, but parties can review the materials in situ) and the parties will be granted 15 working days (with a possible extension of seven additional days) to submit observations and propose evidence in

response to the SO. After receiving the responses to the SO, the Directorate for Competition will draft a proposed resolution, taking into consideration its findings and the arguments of the parties, including the available evidence. The proposed resolution will be notified to the interested parties who, again, will be granted 15 working days (with a possible extension of seven additional days) to submit observations. The Directorate for Competition will then refer the case to the Council of the CNMC, together with a report (the proposed report) including the proposed resolution and the written submissions made by the interested parties; and

- decision phase: the Council will then have a period of around six months to adopt a final decision. During this period, the Council is entitled to order the Directorate for Competition to gather further evidence or carry out other actions. Principally, the Council may agree to an oral hearing with the parties. In cases where the competition authority intends to apply EU law, they must send a draft of the decision to the European Commission, during which time the deadlines will usually be suspended. The Council will issue the final decision, which may:
 - declare the existence of an infringement and the undertakings responsible;
 - order the parties to bring the anticompetitive conduct to an end;
 - order the parties to restore the situation to eliminate the effects of the prohibited conducts;
 - impose fines;
 - impose conditions or obligations; or
 - impose any other measures authorised by competition rules. (In the final decision, the Council will also decide on whether the immunity or leniency applicant has complied with all the requirements for immunity or reduction and the amount of any reduction of the fine.)

If the maximum period of 18 months (which may be extended on several grounds) lapses without a decision being taken, the proceedings are considered to have expired and the investigation null and void. Nevertheless, the competition authorities are expressly authorised to open a new investigation in these circumstances – provided that the infringement has not been prescribed in the meantime.

Investigative powers of the authorities

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

Both the CNMC and the Regional Competition Authorities have broad powers of investigation that include the right to:

- access premises, land and the means of transport of companies and associations, including private homes (in the latter case, with a court order);
- seize and make copies of documents to support an investigation (hard copies or electronic copies);
- retain original documents that have been seized;
- affix seals to premises under inspection; and
- request oral explanations on the spot.

The competition authorities can access the premises of an undertaking to carry out inspections either with the consent of the undertaking subject to inspection or with judicial authorisation. In determining whether to authorise access for the inspection, the undertaking has the right to be informed whether a judicial authorisation has been applied for or not and whether it has been granted or refused.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The National Commission for Markets and Competition regularly cooperates with the European Commission and the national competition authorities in other EU member states through the European Competition Network (ECN).

ECN members closely cooperate in the application of articles 101 and 102 of the Treaty on the Functioning of the European Union. Particularly, the ECN competition authorities cooperate by exchanging information on the following:

- new cases or evidence and expected enforcement decisions;
- coordinating investigations where necessary;
- providing mutual assistance on investigations; and
- discussing issues of common interest.

Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on Cooperation within the Network of Competition Authorities.

Interplay between jurisdictions

- 14 | 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 difficult to single out any jurisdiction with significant interplay. Spanish competition authorities have coordinated investigations with several authorities across the European Union.

CARTEL PROCEEDINGS

Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

The Directorate for Competition of the National Commission for Markets and Competition (CNMC) investigates cartel matters and proposes a decision to the Council of the CNMC, that adopts the final decision.

There are also Regional Competition Authorities (RCAs) in several autonomous regions within Spanish territory that also have investigative and decision powers concerning infringements whose effects are limited to their regions (ie, Andalusia, Aragon, the Basque Country, Castilla y León, Catalonia, the Community of Valencia, Extremadura and Galicia). Other regions only have an investigative body (ie, Canarias, Madrid, Murcia and Navarra), and then the Council of the CNMC adopts a final decision.

Burden of proof

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

The burden of proof lies with the competition authority to establish the facts and the existence of a cartel. However, if a party is claiming the application of an exemption under article 1(3) of the Law No. 15/2007 of 3 July for the Defence of Competition, the burden of proof lies with the party making that claim. The legislation does not establish precise rules regarding the standard of proof. However, according to settled Spanish case law, proof of an infringement must be beyond any reasonable doubt.

Circumstantial evidence

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

The existence of a cartel may be proved based on circumstantial evidence, which, as a whole, must be sufficiently precise and consistent of the existence of a cartel for the authority, and subsequently the courts, to reach a firm conviction in each case. Where circumstantial evidence is used in this way, the parties are entitled to submit a reasonable alternative explanation.

Appeal process

- 18 | What is the appeal process?

The CNMC's final decision issued by the Council may be appealed to the Spanish High Court two months following notification. As part of the appeal, the parties may request interim measures including the suspension of the obligation to pay the fine (subject, in most of the cases, to the provision of a suitable guarantee). If the decision is by an RCA, the Superior Court of Justice of the corresponding autonomous region will receive the appeal.

The High Court or the Superior Court of Justice can rule on both fact and law and have full jurisdiction to review any aspect of the competition authority decision.

The duration of the appeal process varies widely between around 12 months and upwards of three years. Depending on the outcome, a further appeal may be possible to the Supreme Court, but only on the grounds of a noteworthy legal interest. If accepted, that further appeal could also last several years, and, in this case, the Supreme Court is only entitled to rule on points of law unless factual findings are found to be mistaken.

SANCTIONS

Criminal sanctions

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

Law No. 15/2007 of 3 July for the Defence of Competition (LDC) does not establish any criminal sanction for competition law infringements. However, some provisions of the Spanish Criminal Code (Law No. 10/1995 of 23 November 1995) could apply to competition law infringements. Particularly, articles 262 and 281 of the Spanish Criminal Code provide for criminal sanctions for bid rigging or limiting the output of raw materials or essential products and article 284 of the Spanish Criminal Code provides for criminal sanctions for those who alter prices through violence, intimidation or deceit.

Civil and administrative sanctions

- 20 | What civil or administrative sanctions are there for cartel activity?

The LDC qualifies cartels as a very serious infringement of competition rules that can be fined with up to 10 per cent of the total turnover of the infringing undertaking in the financial year before the imposition of the fine. When the turnover of the infringing undertaking cannot be calculated, the National Commission for Markets and Competition (CNMC) may impose a fine of up to €10 million. Legal representatives or members of management bodies who have directly participated in the cartel can also be fined up to €60,000.

Significant fines are imposed frequently in cartel cases. Between 2017 and 2019, nine cartels were sanctioned, with fines amounting to a total of €359.6 million (€317 million after the deduction of exemptions and reductions under the leniency programme). Generally, fines have

increased significantly in recent years, particularly for larger undertakings, as a result of jurisprudence requiring the competition authorities to calculate fines based on a percentage of total turnover rather than affected sales. In this regard, 2019 represents almost half of the fines imposed by an amount in the last three years, with only two cartels being sanctioned in that year (22 per cent of the total number of cartels fined).

Fines imposed on directors have also progressively increased. In 2017 a single fine of €12,000 was imposed on one director. In 2018, three directors were fined a total amount of €109,000 for participating in a cartel. In contrast, during 2019, 22 directors received fines amounting to a total of €946,500 (€790,800 after deducting the exemptions under the leniency programme).

Guidelines for sanction levels

21 | 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 November 2018, the CNMC published provisional guidelines on setting fines for competition law breaches (the Provisional Fines Guidelines). Guidance had been eagerly awaited since, in a judgment of 29 January 2015, the Spanish Supreme Court annulled the Guidelines that the CNMC had issued in 2009, thus requiring the CNMC to change the method used until then for setting fines and leading to the annulment and recalculation of a large number of penalties in the interim.

The Provisional Fines Guidelines are consistent with the practice the CNMC applied in the nearly four years following the judgment of the Supreme Court. In essence, the fine is calculated as a percentage of between zero and 10 per cent of the total turnover of the infringing undertaking. To calculate that process the CNMC establishes a general figure for the infringement of between zero and 10 per cent depending on the seriousness of the infringement as a whole. The circumstances that are usually taken into account to calculate this general figure are:

- characteristics of the market affected by the infringement;
- market shares of the undertakings investigated;
- the scope of the infringement;
- the effect of the infringement on the market and any illicit profit; and
- any adoption of measures to enforce compliance with the cartel agreement.

For cartel infringements, the CNMC generally applies a general figure of between 5 per cent and 8 per cent as a basis for setting the fine, adjusting that figure to the individual circumstances of each undertaking to establish the individual figure. The circumstances that are usually taken into account to calculate this individual figure are:

- the duration of the firm's participation in the infringement;
- the firm's share of the infraction (the percentage of the affected sales that were by that firm); and
- any aggravating and mitigating circumstances.

As to the aggravating and mitigating factors, the LDC provides for the following aggravating circumstances (it is not a closed list):

- the repeated commission of infringements;
- the position of leader in, or instigator of, the infringement;
- the adoption of measures to impose or guarantee the enforcement of the infringement; and
- the lack of collaboration or obstruction of the inspection tasks, notwithstanding the possible consideration of this conduct as an independent infringement.

Alternatively, the following mitigating circumstances, among others, shall also be taken into account to set the amount of the penalty:

- the performance of actions that terminate the infringement;
- the effective non-application of the prohibited conduct;
- the performance of actions intended to repair the damage caused; and
- the active and effective collaboration with the authority outside the framework of the leniency programme.

Once the CNMC has calculated the fine for each undertaking, a final check is made to ensure that the resulting fine is proportionate to the seriousness of the infringement by applying the proportionality limit, which aims to calibrate the fine with the potential illicit profits. To date, this limit has been calculated as a percentage of the total affected sales. However, the Provisional Fines Guidelines appear to introduce a new element of deterrence under which the estimated illicit profit can be multiplied by a factor between one and four according to the duration of the infringement and the size of the undertaking investigated.

The Guidelines are provisional and may be revised in light of guidance from the courts. For the meantime, they provide additional legal certainty concerning the fines for possible infringements and complement the provisions of the LDC. However, there are still many uncertainties and several appeals have been lodged regarding the calculation method of the CNMC.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CNMC has reiterated that the mere implementation of a compliance programme, whether ex-ante or ex-post concerning detection of the violation, does not per se justify mitigating the company's liability to determine the fine.

According to the CNMC's recently published Compliance Guidelines, the authority may assess, on a case-by-case basis, whether the pre-existence of a compliance programme, its improvement or its subsequent implementation after the investigation, can be considered as a mitigating circumstance to adjust the amount of the fine (eg, see cases S/0482/13, Car Manufacturers; S/DC/0544/15, International Removals; S/DC/0557/15, Nokia; case S/DC/0565/15, Computer tenders; and S/DC/0612/17, Industrial Assembly and Maintenance).

In its guidelines, the CNMC indicates that it will normally view an effective ex-ante compliance programme more positively than the promise to implement or improve an ex-post compliance programme, although it should be noted that according to those guidelines to benefit from a compliance programme the party involved, in effect, would need to apply for leniency and collaborate fully in the competition authority investigation.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There are no specific provisions in this regard under Spanish law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

According to the Spanish Law No. 9/2017 of 8 November 2017 for Public Sector Contracts (LCSP), since 2015, persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for a maximum period of up to three years. This also

applies to cartels and can be applied in addition to the other penalties provided for under Spanish rules.

Article 72 of the LCSP states that the debarment can be imposed in two ways:

- by a decision of the competition authority in which there is an express pronouncement on the scope and duration of said debarment; or
- if the decision of the competition authority does not expressly rule on this issue, through the appropriate *ad hoc* procedure.

In 2019, the CNMC sought to have undertakings involved in bid rigging banned from future public contracts for the first time (case S/DC/0598/16, *Electrificación y Electromecánica Ferroviarias*). Since then, the CNMC has issued three more decisions by which it declares the debarment as applicable (cases S/DC/0612/17 *Industrial Assembly and Maintenance*, SAMUR/02/18 *Transporte Escolar Murcia*, and S/DC/0626/18 *Radares Meteorológicos*). However, the CNMC has not fixed the scope or duration of the prohibition in any of these cases. Since the LDC does not grant it the power to do so it instead has referred those cases to the State Advisory Board for Public Contracts. Those cases are currently suspended pending appeal. The Regional Competition Authority for Catalonia, however, has itself directly imposed the ban on two occasions (cases 94/2018 *Licitacions Servei Meteorològic de Catalunya* and 100/2018 *AEROBUS*), although the legal basis for those bans is not clear.

Parallel proceedings

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

The CNMC cannot bring criminal proceedings based on competition infringements, those proceedings and the upcoming consequences are administrative (eg, fines against companies or directors, or prohibitions for participating in contracts with the public administration). However, some conducts could both infringe competition law and constitute criminal activity (eg, the alteration of prices through fraud or bid rigging (article 262 of the Spanish Criminal Code)). Criminal proceedings arising from anticompetitive conducts can be brought by any affected party or by the public prosecutor. If criminal proceedings are initiated, civil claims will be suspended if:

- the parties' pleas are based on one or more grounds that are being investigated as a criminal matter; and
- the decision of the criminal court may have a decisive influence on the civil case (article 40 of the Spanish Code of Civil Procedure).

Article 46 of the LDC also provides that the existence of a question referred for a preliminary ruling in criminal matters which cannot be left out of the decision or which directly affects the content of the decision shall lead to a suspension of proceedings until the matter has been resolved by the corresponding criminal courts.

There is no provision under Spanish law that prevents the development of private and public (administrative) enforcement in parallel, although in practice most private enforcement cases take the form of follow-on actions.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any natural or legal person who has suffered harm caused by the anti-competitive conduct has the standing to bring a damages claim. That includes both direct and indirect purchasers.

The Supreme Court has expressly accepted the passing-on defence (in a judgment predating Directive 2014/104/EU (the Damages Directive), in the context of the Spanish sugar cartel). In that case, the Supreme Court held that, for that defence to succeed, the defendant must prove both that the claimant passed on the overcharge down the supply chain to its customers, and that the overcharge did not result in the claimant's sales volume being reduced. Since then, that position has been confirmed by new provisions of Law No. 15/2007 of 3 July for the Defence of Competition (LDC) explicitly recognising that the defendant in an action for damages can invoke as a defence mechanism towards a claim for damages the fact that the claimant passed on all or part of the overcharge resulting from the infringement of competition law. It is important to underline that the burden of proving that the overcharge was passed on is on the defendant, who may reasonably require disclosure from the claimant or third parties (article 78.3 of the LDC).

Following the case-law of the ECJ's *Kone* judgment, umbrella purchaser claims could also be pursued under Spanish law. So far, there are no successful precedents in that respect.

As to the level of damages, damages actions under Spanish law are compensatory in nature and only the amount of damages that the claimant provides evidence for can be granted. Those who have suffered harm can claim compensation for the damage suffered, which may encompass:

- direct damage;
- lost profits; and
- interest.

Nevertheless, the loser-pays principle applies under Spanish law (article 394 of the Spanish Code of Civil Procedure). Although the Spanish Code of Civil Procedure requires a party to win the case in its entirety to recover its costs, there is also Supreme Court case law that has established a doctrine of proportionate loser-pays, which allows costs to be recovered from the other party even if not all claims or defences are successful (judgment of the Supreme Court of 4 July 2017). If a specific court thinks that there were reasonable doubts of fact or law, it may decide not to impose costs on the losing party. A court may also impose costs when it deems that a party has litigated with a bad intention. According to Spanish law, recoverable costs include attorney fees, expert fees and court fees, although these are often determined by the court applying standard scales that do not fully cover real costs.

Class actions

27 Are class actions possible? If so, 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 Spain, there are general rules on joinder of parties, which allow several claimants to file their claims in a single lawsuit. The Spanish Code of Civil Procedure also provides for a collective action regime that may be used not only in cases involving competition law infringements

but in any case in which a group of consumers or users have been affected by the same illegal conduct. However, collective actions are rare; it is more common for law firms to bring large numbers of claims on behalf of the many potentially affected plaintiffs, particularly because this allows those law firms to take advantage of the costs rules.

COOPERATING PARTIES

Immunity

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

A leniency programme is available to any undertaking or person who participates or has participated in a cartel affecting all or part of the Spanish market. The programme extends only to cartels and not to any other type of prohibited behaviour.

Full immunity is available for applicants that are the first to provide the competition authority with evidence that may enable the authority to prove the existence of a cartel or to provide sufficient legal grounds to carry out an unannounced inspection (article 65 of (Law No. 15/2007 of 3 July for the Defence of Competition (LDC))). Subsequent applicants may benefit from a reduction of the fine where the evidence provides significant added value above the evidence already in the possession of the authority (article 66 of the LDC).

An application for immunity must include all information available and at least sufficient information to correctly identify the cartel and its participants. Subject to that, the authority will grant, upon a reasoned request by the applicant, a deadline for submitting additional evidence if the applicant does not have all the necessary information at the time of the application. Provided the evidence is submitted within the deadline, the date of submission of the application for exemption is deemed to be the date of the initial request.

To qualify for immunity an applicant must:

- cooperate fully, continuously and diligently with the authority throughout the administrative investigation procedure;
- end its involvement in the infringement (unless the authority requests otherwise);
- not destroy evidence or disclose its intention to present a leniency application; and
- not have been the instigator in the creation of the cartel.

Besides the immunity for fines in the administrative proceedings, leniency applicant also receives beneficial treatment in the framework of follow-on damage claims. Article 73.4 of the LDC states that immunity recipients are jointly and severally liable to their direct or indirect purchasers or suppliers, and other injured parties only if full compensation cannot be obtained from the other undertakings that were involved in the same infringement.

Subsequent cooperating parties

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

The competition authority may reduce the amount of the fine corresponding to undertakings or natural persons that, without meeting the requirements to qualify for full exemption of the fine:

- provide evidence of the alleged infringement which represents significant added value concerning the evidence already in the possession of the competition authority;

- cooperate fully, continuously and diligently with the authority throughout the administrative investigation procedure;
- end their involvement in the infringement (unless the authority considers otherwise); and
- do not destroy evidence or disclose its intention to present such an application.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The level of reduction of the amount of the fine, provided that the applicant complies with the requirements of article 66 of the LDC, depends on the order in which the applications are received and the amount of value-added evidence provided, calculated in line with the following rule:

- the first undertaking or individual that fulfils the legal requirements by providing value-added evidence may benefit from a reduction of between 30 per cent and 50 per cent depending on the amount of value that was added;
- the second undertaking or individual that may benefit from a reduction of between 20 per cent and 30 per cent, again depending on the value that was added; and
- the successive undertakings or individuals may benefit from a reduction of up to 20 per cent of the amount of the fine.

There is currently no immunity plus or amnesty plus treatment available.

Approaching the authorities

31 | 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 is no deadline for submission of a leniency application. Provided the competition authority concerned does not have evidence concerning the cartel immunity may still be available.

However, once an application is made the authority may grant, upon a reasoned request by the applicant, a deadline for submitting additional evidence if the applicant does not have all the necessary information at the time of the application. Provided the evidence is submitted within the deadline, the date of submission of the application for exemption is deemed to be the date of the initial request.

Cooperation

32 | 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 that are seeking partial leniency?

According to article 65 of the LDC, the applicant must cooperate fully, continuously and diligently with the National Commission for Markets and Competition (CNMC) throughout the investigation and must end its participation in the alleged infringement the moment it provides the corresponding evidence to the competition authority (except in those cases where the authority deems necessary for such participation to continue to preserve the effectiveness of an inspection). Additionally, the company must have neither destroyed evidence related to the application nor revealed its intention to apply for leniency to third parties. Finally, the applicant must not have forced other companies to take part in the infringement.

The same obligations apply for applicants for reduction or partial leniency, except for the one related to the coercion of other

undertakings, and, additionally and most importantly, applicants must provide evidence of the alleged infringement that offer significant added value concerning that element already known to the authority (article 66 of the LDC).

Article 52 of Royal Decree 261/2008 of 22 February (RDC) provides for the following obligations that must be met to consider that the leniency applicant has cooperated 'fully continuously and diligently' with the investigation:

- the applicant has provided the Directorate for Competition without delay with all relevant information and evidence relating to the alleged cartel in its possession or available to it;
- the applicant has remained at the disposal of the Directorate for Competition to respond without delay to any request that may contribute to the clarification of the facts;
- the applicant has allowed the Directorate for Competition to conduct interviews with the company's current employees and managers and, where appropriate, with former managers;
- the applicant has refrained from destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
- the applicant has refrained from disclosing the submission of the application for exemption or reduction of the amount of the fine, as well as the content of the application, before the notification of the statement of objections or the time agreed with the Directorate for Competition, as appropriate.

Confidentiality

33 | 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 authorities must treat the submission of a leniency application and the identity of the leniency applicant as confidential. The other parties will have access to the content of the leniency application, which forms part of a separate confidential file, only after the Statement of Objections is issued and for the parties to submit observations, but they will not be able to obtain copies of the oral or written statements (they can obtain copies of the annexes submitted along with the application). Instead, they will have to access to the leniency application at the premises of the competition authority.

The same regime is applicable both for immunity applicants and for subsequent cooperating parties.

In proceedings under judicial review, the competition authorities will not provide courts with copies of the leniency statements unless specifically required to do so, and only if requested by the courts it will send them on a confidential basis granting their protection from third parties.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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?

Spanish law does not establish any settlement procedure for cartel cases, although the LDC is currently under review and, if the legislative proposal is approved, the new version will provide for a cartel settlement procedure (with a discount of the fine up to 15 per cent) in line with EU legislation.

Until that legislative reform is adopted, the current state of the law is that parties subject to a competition investigation may in theory offer commitments that solve the effects on competition and that ensure that the public interest is guaranteed to terminate the proceedings without the declaration of the existence of the infringement and therefore with no fine. However, this is not possible for cartel cases or other infringements with serious anticompetitive effects.

Corporate defendant and employees

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

The immunity or reduction of the amount of the fine corresponding to an undertaking shall be applicable, in the same percentage, to the fine that may be imposed on its representatives or on the persons that comprise the management bodies that have taken part in the agreement or decision, at the undertaking's request and providing they have cooperated with the competition authority.

Dealing with the enforcement agency

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

Article 47 of the RDC states that the Directorate for Competition will review the information and evidence submitted by the immunity applicant and, if it concludes that the application complies with the requirements in article 65.1 of the LDC (being the first company to provide evidence that allows the authority to conduct an inspection or to prove a cartel), it will grant the conditional exemption from the payment of the fine.

At the end of the proceedings, if the leniency applicant has complied with the requirements established in article 65.2 of the LDC (full cooperation with the investigation, terminating its participation in the infringement, not having destroyed evidence or disclose the submission of the application and not having forced other companies to participate in the infringement), the Council of the CNMC will exempt the leniency applicant from payment of the fine in the decision ending proceedings, following the Proposal for a Resolution by the Directorate for Competition.

Regarding applications for reduction, article 50 of the RDC states that the Directorate for Competition will not examine the evidence submitted by an undertaking or natural person applying for a reduction of a fine without first deciding on conditional immunity relating to the same cartel. The article further states that the Directorate for Competition, no later than the notification of the Statement of Objections, will inform the leniency applicant of its proposal to reduce the fine, provided that the applicant has fulfilled the requirements in article 66.1 of the LDC (the evidence submitted proved to have significant added value for the investigation, the applicant cooperated fully with the investigation, the applicant terminated its participation in the infringement at the time of applying and did not destroy evidence or disclose the submission of said application to third parties).

The Directorate for Competition may also accept an application for reduction after the notification of the Statement of Objections and, if that is the case, it will inform the leniency applicant of its proposal for reduction of the fine in the Proposal for a Resolution. Finally, the Council of the CNMC may or may not accept the proposed reduction, and will set the percentage of reduction in its final decision.

All the foregoing applies equally to proceedings before the Regional Competition Authorities.

DEFENDING A CASE

Disclosure

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

Under Spanish competition law, all parties involved in antitrust investigations have the right to access the file once the investigation has been formally opened and to obtain individualised copies of all the documents in it, except for the business secrets of other interested parties or third parties and any other confidential information. In this regard, Spanish competition law allows for confidential treatment of business secrets during the investigation and in the publication of the decision, although confidential treatment may be denied on public interest grounds where the information concerned is necessary for the authorities to prove their case.

Leniency applications receive special treatment and form a separate file, to which parties to the proceedings may only access after a Statement of Objections has been issued. No copies of leniency applications or statements can be obtained, but parties to the proceedings can only have access in the premises of the competition authority.

Representing employees

38 | 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 or representation?

Absent a conflict of interests, there is no formal requirement under Spanish competition or corporate law requiring a company and its employees to be represented by separate counsel. Neither do the competition authorities have the power to require separate legal representation.

Multiple corporate defendants

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

There are no specific regulations on this matter. As such, and absent a conflict of interests, counsel is not prevented from representing multiple corporate defendants which are parties to the same proceedings.

Payment of penalties and legal costs

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

There are no specific provisions on this matter. As such, a corporation is not forbidden from paying the legal penalties imposed on its employees.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines imposed by a public authority are not deductible. However, contractual penalties, including payments for damages, are deductible.

International double jeopardy

42 | 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?

Sanctions imposed in other jurisdictions are not taken into account. As for damages claims, the general rule is that the same damage cannot be recovered twice, so even if an infringer is sued in a different jurisdiction because that infringer participated in the anticompetitive conduct, that could not lead to an unfair enrichment of the victims. The new regime under Royal Decree-law 9/2017 specifically establishes that each of the undertakings that have jointly infringed competition law is jointly and severally liable for the harm caused. In line with the Damages Directive, an exception is provided for small and medium-sized enterprises and immunity recipients (article 73 of the Spanish Competition Act). If a joint and several defendant (even if that defendant is based in a different jurisdiction) has paid some debt (ie, damages to the claimant or victim), it has the right to claim reimbursement from its co-infringers for the relative part corresponding to each of them.

Getting the fine down

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

There is no doubt that the optimal way at present to minimise the fines themselves is via the leniency programme. Cooperation with the investigation short of the leniency programme does not seem to have a significant impact on the amounts of the fine, while compliance initiatives, whether before or after the investigation has commenced, will typically only be given credit if they coincide with a leniency application (which, for the National Commission for Markets and Competition, is a logical consequence of a commitment to compliance).

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The most relevant developments during 2019 regarding cartel infringements were the following.

Electrificación y Electromecánica Ferroviarias

National Commission for Markets and Competition (CNMC) decision of 14 March 2019 in case S/DC/0598716, *Electrificación y Electromecánica Ferroviarias* where the CNMC fined 15 companies and 14 individuals for their participation in three different cartels for the allocation of public tenders related to railway infrastructures for conventional and high-speed lines during 14 years. The companies were fined a total of €118 million and the individuals received sanctions amounting to €666,000. It was also the first time that the CNMC sought to have undertakings involved in bid rigging banned from future public contracts for the first time and referred the decision to the corresponding administrative body to fix the scope and duration of the prohibition. The parties have, however, appealed the decision, some of them have asked for the suspension of the payment of the fines as well as any further steps regarding the debarment. The decision was prompted by a leniency application for immunity and a further company also cooperated within the leniency programme. Both undertakings benefitted from the corresponding exemptions and reductions on the fines, as did some of their managers.

Montaje y Mantenimiento Industrial

The CNMC decision of 1 October 2019 in case S/DC/0612/17, *Montaje y Mantenimiento Industrial* where the CNMC fined 19 industrial assembly and maintenance companies for taking part in a cartel from 2001 until 2017 to allocate private tenders of around 20 clients, mainly in the oil and gas sector. In this case, the CNMC imposed fines of up to €53.2 million on the companies and also fined eight directors with a total of €280,500. Again, the CNMC declared applicable the prohibition to contract with the public administration (even if the clients concerned were private companies) and sent the decision to the Advisory Board for Public Procurement. The decision has also been appealed before the High Court.

Fabricantes de automóviles

High Court judgments of December 2019, concerning CNMC decision of 23 July 2015 in case S/0482/13 – *Fabricantes de automóviles* where in 2015, the CNMC imposed fines amounting to €171 million on 21 manufacturers and distributors of car brands and two consultancy firms for having exchanged commercially sensitive information in the Spanish market for the distribution and after-sales services of vehicles. The CNMC qualified these conducts as a cartel, even if the information exchanged did not include prices or future sales quantities and the investigation was prompted by the information supplied under the leniency programme by one of the car manufacturers. Most of the car manufacturers appealed the decision before the High Court on the basis that the decision had wrongfully qualified the exchanges of information as a cartel because they never concerned prices or had as their object the fixing of prices. In December 2019, the Spanish High Court dismissed the appeals (except for the one filed by one of the car manufacturers) and confirmed the CNMC decision and its assessment regarding the qualification as a cartel of the exchange of information and the position of the consultancy firms as cartel facilitators. The judgements by the High Court have been appealed before the Supreme Court.

Additionally, and following a public consultation, in June 2020, the CNMC published its awaited Compliance Guidelines concerning anti-trust infringements, containing the criteria that the authority will take into consideration when analysing the effectiveness of a compliance programme. The Guidelines also consider the possibility of obtaining a reduction in the fines imposed by the CNMC, and other benefits, to encourage Spanish businesses to adopt compliance programmes.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

In July 2020, the Spanish Government published a draft proposal to amend the Spanish Law for Law No. 15/2007 of 3 July for the Defence of Competition (LDC). The main purpose of the draft is to implement the ECN+ Directive into Spanish legislation, but the Government has also taken the opportunity to introduce additional changes to the current LDC.

The draft proposal was open for consultation until 15 September 2020 and is currently undergoing the legislative steps corresponding to the approval of a final version draft to be submitted to parliament. The main changes introduced in the draft proposal that can be most relevant for cartels infringements can be summarised as follows:

- all anticompetitive agreements (essentially article 101 of the TFEU) and abuses (article 102 of the TFEU) will be considered very serious infringements and will therefore be punishable with fines of up to 10 per cent of the turnover of the infringing undertaking in the financial year before the imposition of the fine. Fines will be calculated taking into account the worldwide turnover of the companies involved in the infringement proceedings;



Andrew Ward

andrew.ward@cuatrecasas.com

Irene Moreno-Tapia

irene.moreno@cuatrecasas.com

Carlos Alberto Ruiz

carlosalberto.ruiz@cuatrecasas.com

Marta Simón

marta.simon@cuatrecasas.com

Diagonal, 191
08018 Barcelona
Spain
Tel: +34 932 905 500

C/ Almagro, 9
28010 Madrid
Spain
Tel: +34 915 247 100

www.cuatrecasas.com

- the maximum amount of fines that can be imposed on legal representatives and directors for participation in cartels will be increased to €400,000 (up from €60,000);
- the possibility of settlement decisions, in which parties receive a discount on the fine of up to 15 per cent in return for accepting the responsibility of an infringement will be introduced;
- the maximum duration of infringement procedures in cartel cases from 18 months to a maximum of 24 months. Additionally, the time for undertakings to submit observations to Statements of Objections and Proposals for a Resolution will be extended from 15 days to one month; and
- a specific procedure for interrupting investigation deadlines when other competition authorities or the European Commission open a parallel investigation, or during a court review, is introduced.

Also, the draft provides for improved cooperation with the European Commission and other competition authorities, including sharing confidential information or authorising other officials to assist in dawn-raids, and strengthens investigation powers of the competition authority. The possibility for the authority not to pursue every complaint, for strategic reasons or otherwise, is also provided for in the draft proposal.

Coronavirus

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

No formal decisions to exempt filings or conduct from an investigation were taken during the covid-19 pandemic.

The CNMC published on its website the joint statement by the European Competition Network on the application of competition law during the emergency, in which it declared that it would not actively intervene against necessary and temporary measures put in place to avoid shortages of supply.

On 31 March 2020, the CNMC set up a dedicated email address encouraging consumers to report anticompetitive practices and submit enquiries related to the covid-19 pandemic. The CNMC subsequently declared that this mailbox had been successful, with over 500 complaints received in its first two months. The CNMC also confirmed that it had been contacted by companies with doubts as to the enforcement of competition rules and that it had given guidance where necessary, reminding operators of the limits imposed by competition rules on cooperation agreements, and that any temporary measures intended to deal with this exceptional situation must be abolished as soon as normality is restored in the sector.

The CNMC announced that most consultations on cooperation agreements it had received during the first months of the pandemic were related to the financial sector, the insurance sector, the health sector and the provision of assistance services. The CNMC is providing informal advice, analysing the proposals submitted by the companies, the possible efficiencies and eventual risks, under article 101(3) of the Treaty on the Functioning of the European Union and the Temporary Framework for assessing antitrust issues stemming from the current covid-19 outbreak approved by the European Commission.

In May 2020, the CNMC adopted an updated version of its Plan of Action for 2020 in the context of the covid-19 pandemic, to include additional considerations regarding potential breaches of competition law as a result of the crisis.

Sweden

Johan Carle, Fredrik Sjövall and Stefan Perván Lindeborg

Mannheimer Swartling

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Swedish rules on anticompetitive agreements are laid down in the Swedish Competition Act (2008:579) (the Act), which entered into force on 1 November 2008 and replaced the previous legislation from 1993. An English version of the Act is accessible through the website of the Swedish Competition Authority (SCA).

The Act contains two general prohibitions: one against anticompetitive agreements between undertakings (Chapter 2, section 1) and one against the abuse of a dominant position (Chapter 2, section 7). The Act is modelled on European Union law and, as an extension of that, block exemptions have also been adopted in Sweden in the form of separate regulations largely incorporating their EU counterparts.

The Swedish rules on anticompetitive agreements are interpreted in accordance with case law from the European Commission, as well as the Court of Justice of the European Union.

Relevant institutions

2 | 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 investigates cartel matters and other suspected breaches of the Act. The SCA is an independent governmental body. It does not have the power to impose fines, other than in settlement-style cases.

Following an investigation, if the SCA decides that a breach has occurred, it must file an application before the Patent and Market Court (other than when its findings are accepted by the investigated parties). This kind of application leads to civil litigation under the general procedural framework.

There are no criminal sanctions for cartel activity or any other violation of the Act and there is no separate prosecution authority. The SCA is independent of the European Commission but is required to cooperate with it.

Changes

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

In February 2020, the Swedish government published a proposal for the legislative amendments required to implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive).

The proposed changes include provisions to grant the SCA decision-making powers for issuing competition fines, as well as other procedural fines levied for non-cooperation in the context of an investigation. The proposal is being consulted upon during 2020.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Swedish law is, in general, consistent with EU competition law. Accordingly, the substantive provisions of the Act largely correspond to the equivalent provisions in the Treaty on the Functioning of the European Union (TFEU).

The Act contains two general prohibitions, one against anticompetitive agreements between undertakings (Chapter 2, section 1) and one against the abuse of a dominant position (Chapter 2, section 7). The Act also provides for the control of concentrations (Chapter 4). The purpose of the Act is to eliminate and counteract obstacles to effective competition with regard to 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.

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 hardcore 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. There are two main 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 (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 principles of *de minimis* do not apply to agreements that contain 'hardcore' 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.

Joint ventures and strategic alliances

- 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The Act is applicable to non-full function joint ventures, that is to say, strategic alliances which are not structured in such a way as to trigger the merger control rules.

The rules on anticompetitive agreements would also be considered within the context of the merger rules when considering any potential spill-over effects of joint ventures, for example, as regards the scope for the concentration to lead to coordination between parties active in the same or connected markets as the joint venture.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

- 6 | Does the law apply to individuals, corporations and other entities?

The Swedish Competition Act (2008:579) (the Act) applies to agreements between undertakings. According to Chapter 1, section 5 of the Act the term 'undertaking' includes any natural and legal persons engaging in commercial or economic activity, regardless of its legal status and the way in which it is financed. It is interpreted in the same way as under European Union competition law. Activities consisting of the exercise of public authority are excluded. Furthermore, the Act does not apply to agreements between employers and employees relating to wages and other conditions of employment.

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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. An agreement between undertakings situated outside Sweden may be prohibited under the Act if the agreement has actual or potential effects in Sweden according to the effects doctrine.

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 Swedish Competition Authority (SCA) is unlikely to take action against foreign undertakings unless such action can be enforced.

Export cartels

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

The prohibition under the Act is only applied to agreements that have actual or potential effects on competition in Sweden.

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The legal framework in Sweden contains similar exemption rules as the EU's competition law regime on, for example, the automotive sector. Agricultural associations and taxi undertakings are also, to some extent, covered by special rules.

With respect to hardcore cartels, however, there are no industry-specific bans, exemptions, or any specific exemptions applicable to government-sanctioned or regulated conduct. Nonetheless, the Act will not apply to behaviour that is an intended result of legislation or an inevitable consequence thereof.

Government-approved conduct

- 10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Anticompetitive conduct can be exempted if national legislation requires it of undertakings. In practice, the SCA rarely classes anticompetitive behaviour as being the direct consequence or the inevitable result of legislation, excluding anticompetitive conduct from the scope of Chapter 2 section 1 of the Act.

INVESTIGATIONS

Steps in an investigation

- 11 | What are the typical steps in an investigation?

When the Swedish Competition Authority (SCA) obtains information that suggests the existence of a cartel, either via ex officio means or from a complaint or an informant (ie, via leniency applications or tip-offs), it 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 (a dawn raid) at the premises of one or more of the suspected parties.

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, as well as issue requests for information and carry out interviews with the investigated parties to develop a case.

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:

- order the undertakings to cease the violation of the Act, subject to a fine for non-compliance (ie, issue a cease-and-desist order);
- sue the undertakings before the Patent and Market Court, requesting a judgment ordering the undertakings to pay an administrative fine for infringing the Act; or
- in the event the undertakings do not contest the SCA's claim, issue an order for the undertaking to pay fines, without needing to sue.

Resolving contentious cartel matters can take a number of years from start to finish. The only time limit to which the SCA is subject to in this regard is that fines may only be imposed if the SCA's application is served on the undertaking in question within five years of the date on which the violation ended.

In 2019, the average period of review for prioritised cases not resulting in sanctions was 248 days and for those resulting in some kind of sanction, 721 days.

Investigative powers of the authorities

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

The SCA has the competence to:

- order a suspected undertaking, or any natural or legal person, to provide information and documents at its disposal;
- ask any person considered likely to have useful information to appear before it for interrogation; and
- undertake an on-the-spot investigation (dawn raid) at the premises of an undertaking.

A fine may be imposed on an undertaking for non-compliance with an order to provide information, documents, etc or obstructing a dawn raid.

In the case of a dawn raid, the SCA must file an application with the Patent and Market Court. The authorisation will only be granted if there is reason to believe that an infringement has been committed, the undertaking has failed to comply with an earlier order to provide information, or if there is a risk of evidence being withheld or tampered with. Moreover, the importance of the measure being taken must outweigh the disruption or other inconveniences caused to the party affected by it. 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 this would reduce the value of the investigation (in particular, where the undertakings are expected to destroy or hide evidence if they are informed about the investigation). Typically, dawn raids are unannounced, that is to say, they proceed without the suspected undertakings having been alerted in advance.

During a dawn raid, the SCA may examine and take copies of, or extracts from, accounting records and other business documents (including digital records), request oral explanations from representatives or employees of the undertakings and investigate the undertakings' premises, property and means of transportation.

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. Provided the company under investigation consents, the SCA usually 'mirrors' (creates exact copies of) digitally stored material in order to review the material at the SCA's premises.

To ensure that the undertaking provides the SCA's officials with full access to the premises, the SCA officials are usually accompanied by representatives of the Swedish Enforcement Authority (a public authority more often involved in debt collection, which is also empowered to seal business premises).

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.

If there is a disagreement about whether material falls within the scope of the court authorisation, the appropriate procedure for the SCA is to seek assistance from the accompanying officials from the Swedish Enforcement Authority. This was reaffirmed in a case from the Swedish Supreme Court in 2018. The Supreme Court also confirmed that the measures taken by the SCA during a dawn raid are inadmissible for judicial review under Swedish law but that parties are, in any event, sufficiently protected as decisions by the Swedish Enforcement Authority are subject to appeal.

An undertaking may send for legal counsel when it learns its premises is about to be inspected. The investigation may not start until the lawyers have arrived, unless it would be unduly delayed by the wait or

the investigative order was made without consulting the undertaking concerned. Since the latter is typically the case, the SCA does not normally wait for legal counsel to arrive before starting.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Under European Union law, the Swedish Competition Authority (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. There is also a Nordic cooperation agreement between Sweden, Denmark, Finland, Greenland, Iceland and Norway which 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 (ICN), the Organisation for Economic Co-operation and Development's Competition Committee and the United Nation'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.

There is also scope within the rules for the SCA to enter into other legal assistance treaties, for example with non-European Economic Area countries. If such a treaty were entered into, the SCA may, upon application by an authority in a state covered by the agreement, 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 of the Treaty on the Functioning of the European Union (TFEU) if those rules had been applied to the conduct;
- there is a 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.

In 2019, the SCA joined the framework for fair and effective regulatory processes recently adopted by the ICN. The aim of the framework is to harmonise principles for efficient supervisory processes.

Interplay between jurisdictions

14 | 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 SCA cooperates closely with the European Commission and competition authorities in other EU member states, in particular the other Nordic competition authorities via the Nordic cooperation agreement.

Within the framework of the ECN the SCA assists and is assisted by other competition authorities within the EU. In accordance with Article 11 of Regulation (EC) No 1/2003, the SCA has, among other things, an obligation to inform the European Commission, as well as the other competition authorities in the EU, after initiating a formal investigation measure concerning article 101 and 102 TFEU. Moreover, the members of the ECN may, under certain conditions, exchange confidential information and use such information as evidence, as well as provide assistance by conducting dawn raids or interviews.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Swedish Competition Authority (SCA) does not have the power to impose administrative 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.

A decision by the SCA to issue a cease-and-desist order can be appealed to the Patent and Market Court.

Burden of proof

16 | 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. The Patent and Market Court of Appeal has held that the level of proof for the SCA is high, but not as high as that required in criminal cases (ie, not beyond a reasonable doubt).

Circumstantial evidence

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

The Swedish process is governed by the principle of free consideration of evidence. Therefore, circumstantial evidence can also be used to establish an infringement of competition rules.

On a practical level, proving an infringement on circumstantial evidence alone would be challenging. The SCA must prove that the conditions to impose a fine are fulfilled and the level of proof the SCA must meet is high.

Appeal process

18 | What is the appeal process?

The Patent and Market Court is the court of first instance. Its judgments can be appealed to the Patent and Market Court of Appeal, which will

review the case on its merits. Leave to appeal to 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;
- to determine the accuracy of the Patent and Market Court's decision;
- if the determination of the Court may be of importance as a precedent; or
- there are other extraordinary reasons to grant a further appeal.

An appeal must be submitted in writing within three weeks of the pronouncement of the judgment or from when the plaintiff received the judgment of the Patent and Market Court.

Judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court, subject to leave from the Patent and Market Court of Appeal, provided that the determination of the Supreme Court is of importance as a precedent. The Supreme Court's leave to appeal is required as well, which is typically only granted in exceptional cases.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activity or any other violation of the Swedish Competition Act (2008:579) (the Act).

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The elements of an agreement or practice that violate the Act are void and unenforceable. The Swedish Competition Authority (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 Patent and Market Court.

Furthermore, 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 SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine.

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.

Since 2013, the SCA has lodged about 15 court cases on competition fines concerning alleged abuses of a dominant position and anticompetitive agreements, including a few 'pure' cartel cases. The SCA has also used its authority to issue binding fines in non-contentious cases on a number of occasions.

The highest individual fine yet imposed in Sweden amounted to 200 million kronor as a result of a cross appeal in the *Asphalt* case. Following the 2007 judgment of the Stockholm District Court, 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 lower than the 1.2 billion kronor sought by the SCA. More recent fines have not been of that magnitude, with many cases being resolved in other ways.

The Act also contains the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, Section 1 or Article 101 Treaty on the Functioning of the European Union (TFEU), provided such injunction is necessitated by the public interest.

Guidelines for sanction levels

21 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?

Like the European Commission, the SCA has published a similar notice on its methodology for setting fines (the Fining Guidelines).

According to the Fining Guidelines, a fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous year. The SCA will not impose fines in minor cases. 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 loss suffered by other parties.

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 of the base amount. Regarding aggravating circumstances, particular attention is paid to any steps taken to coerce other undertakings to participate in the infringement, or if the undertaking held a ringleader role 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, participating in an infringement because of pressure from other companies, proving that no profits were made by the undertaking, or that it 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 the TFEU, evidence that shows that the infringement was terminated as soon as the SCA intervened and the financial situation of the undertaking.

The sentencing principles mentioned are binding on the adjudicator. The Fining Guidelines, however, are not binding on the adjudicator, but they are binding on the SCA when determining what fines to ask for and when imposing binding fines not disputed by the undertakings concerned.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There are no provisions in the Act or related guidance, and there are no references in case law, to compliance programmes being accepted as a mitigating factor. This may be something that is developed more in the future but there is no public precedent as yet.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Trading prohibitions can be imposed on individuals who are involved in particularly serious infringements of the ban on anticompetitive agreements (eg, cartels) provided such an injunction is necessitated by the public interest.

A trading prohibition bans the subject from initiating or participating in economic activity (eg, owning or setting up an undertaking) or occupying a managing position in an undertaking for a period of between three to 10 years. Injunctions can be imposed on all persons

involved in the management of a business. An injunction against trading may be issued against members or alternate members of a board of directors, managing directors and deputy managing directors provided the 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 also be imposed on individuals who, in another capacity, have conducted the management of a business, or who held themselves out to third parties as responsible for a business.

The infringement must therefore have been of a serious nature and of relatively long duration for an injunction to be imposed. Therefore, when assessing if an injunction against trading is necessitated by the public interest, it should be considered whether:

- the conduct was:
 - systematic;
 - intended to produce significant personal gain; or
 - caused or was intended to cause significant harm;
- the person in question has previously been convicted of criminal acts in respect of business activities; and
- the conduct was intended to prevent, restrict or distort competition.

A trading prohibition will not be considered necessary in the public interest, if the subject provided significant assistance in the investigation of the infringement to the SCA, the European Commission or a competition authority in another member state. This particularly applies in cases where a company takes part in a leniency programme.

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.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures may be available as a discretionary choice for the government authority that conducts a procurement. It is not a sanction that can be imposed during the competition infringement procedure, but is instead decided in the procurement procedure. Whether a tenderer can be debarred is assessed on a case-by-case basis. There is no specific duration for a debarment.

For debarment to be initiated it must be proportionate to the gravity of the professional misconduct and it must be sufficiently likely that the relevant undertaking is guilty of grave professional misconduct, proven by any means that the procuring authorities can demonstrate. An infringement of the prohibition against anticompetitive agreements, 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.

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 a procurement procedure. Although, despite there being no legislative provision stating a formal time limit for such a decision to be made in, as a general rule it should be made as early as possible.

A debarment decision can be appealed to the Administrative Court of the circuit where the procuring authority is located.

Parallel proceedings

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

Criminal penalties do not exist under Swedish competition law. 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. There is also a possibility for the SCA to apply for an injunction against trading.

PRIVATE RIGHTS OF ACTION

Private damage claims

- 26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 Swedish Competition Act (2008:579) (the Act), or articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act. There is a presumption of damage when a cartel infringement has been established. Both contractual liability and indemnity liability are included, and the liability covers pure economic loss without any link to personal or property damage. This means that the proven injury can be recovered. Hence, Swedish rules on damages are of a 'compensatory nature'. Passing-on defences and similar are permitted under Swedish law. The Act itself gives little guidance on the size of damages that can be awarded, and there are very few cases in Sweden.

The scope of persons entitled to damages is not defined in the Act, whereas purchasers that acquired the product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid. However, the scope of persons entitled to damages 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.

Regarding the judicial procedure, the Patent and Market Court holds the exclusive competence to hear antitrust damages actions. The procedural rules for such actions are the same as in other civil proceedings, with some exceptions. A case must be brought before the court within five years from when the infringing behaviour ended and the injured party gaining knowledge, or when they could have been expected to have gained knowledge, of the infringement, the injuries it caused and the identities of the concerned companies. The injured party is expected to have gained knowledge if the Swedish Competition Authority (SCA) has established an infringement.

Class actions

- 27 | Are class actions possible? If so, 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?

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, except for a few exceptions, the same as in civil proceedings.

COOPERATING PARTIES

Immunity

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

Chapter 3, Sections 12 to 15 of the Swedish Competition Act (2008:579) (the Act) provide for immunity or reduction from fines. These rules were amended in 2014 to introduce more predictability and to mirror the European Union's leniency system (eg, through the addition of a marker system). The Swedish Competition Authority (SCA) has also published guidelines on its leniency policy. Contrary to the EU leniency system, the Swedish leniency regime is available for all infringements captured by Chapter 2, Section 1 of the Act (ie, not only horizontal cooperation, such as cartels).

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if the information contained in the application is sufficiently material to enable action against the infringement if the undertaking:

- provides the SCA with all the information about the infringement that it has at its disposal;
- cooperates fully with the SCA throughout the investigation of the infringement;
- does not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and
- has ended its involvement in the infringement or ends it as soon as possible after informing the SCA.

If the SCA has already received sufficient information to commence an investigation into an infringement but no undertaking has applied for leniency in accordance with the above, immunity may still be granted if an undertaking, in addition to the criteria listed above, is the first to provide information that makes it possible to establish that an infringement has occurred or has otherwise facilitated the investigation of an infringement to a very significant extent.

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.

In the event that another company has already obtained a marker, 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 already fulfilled.

An undertaking that has forced others to participate may not obtain immunity.

Subsequent cooperating parties

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

The Swedish leniency programme also covers partial leniency for parties that cooperate after an immunity application has been made. Although only the first undertaking to cooperate with the SCA can qualify for

immunity, the undertaking that comes second may get a reduced fine if it fulfils the same kinds of conditions on cooperation applicable to immunity applicants. The SCA decides in its application to the court whether the information an undertaking has provided has added considerable value, and the related level of reduction to be awarded.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The reduction of the fine for the second cooperating party is between 30 and 50 per cent. The third cooperating party receives a reduction of 20 to 30 per cent. For other undertakings, the maximum reduction is 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.

There are no formalised amnesty plus or penalty plus systems available under the Swedish leniency regime. This means that there is no explicit scope to receive lenient treatment in one case as a result of providing information about an infringement in a separate case.

Approaching the authorities

31 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 to an anticompetitive arrangement 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 that submits an incomplete application may obtain a marker, provided that the application contains information on the market concerned by the infringement, the other companies involved in the infringement, and the object of the infringement. The time limit to perfect this market is set 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.

Cooperation

32 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 that are seeking partial leniency?

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA of a cartel infringement and provides information in its application that is sufficiently material to enable action against the infringement. However, the undertaking must:

- provide the SCA with all the information about the infringement that it has at its disposal;
- cooperate fully with the SCA throughout the investigation of the infringement;
- not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and

- end its involvement in the infringement or end it as soon as possible after informing the SCA.

All the information that the immunity 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 identities of the other participants, the affected market, and the type and duration of the infringement.

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 (eg, 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 already received sufficient information to commence an investigation into an infringement but no undertaking has applied for leniency in accordance with the above, immunity may still be granted if an undertaking, in addition to the criteria listed above, is the first to provide information that makes it possible to establish that an infringement has occurred; or facilitates the investigation of an infringement in some other way to a very significant extent. According to the SCA's guidelines, the latter criterion is interpreted strictly, as the availability of immunity under this rule is intended to be very limited.

Second or subsequent cooperating parties must add sufficient value to qualify for a fine reduction and fulfil somewhat similar conditions to an immunity applicant in terms of ongoing cooperation.

Confidentiality

33 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?

As a general rule in Sweden, everyone should have access to all public documents according to the principle of public access to official records. However, there are exceptions to this principle. The three most relevant categories of information for competition law are information relating to the investigation, the identity of the informant, and trade secrets.

Information related to an investigation by the SCA (not only planning and preparations) will be held confidential if, considering the object of the investigation, it is of exceptional importance that the information is not disclosed. The information is primarily confidential to the companies subject to the investigation, but it may also be confidential to third parties. The confidentiality lasts only as long as the SCA carries on its investigation. At the latest, when the SCA has finalised its draft statement of claim, the parties have a right to gain full knowledge of its content.

Information provided by immunity applicants or other cooperating parties may be treated as confidential. The provisions guarantee the confidentiality 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 another substantial detriment if the information is revealed. Confidentiality concerns both legal and natural persons. Both information that was given on an informant's own initiative and information provided on request from the SCA may be confidential under this rule. However, since the objective of the rule is to protect the informant, only the information that could somehow disclose the identity of the informant is treated as confidential here.

Information about commercial and operating conditions, inventions or research results may also be treated as confidential if it can be assumed that the undertaking would suffer damage if the information were to be revealed. This is typically the case for trade secrets provided to the SCA by certain third parties, such as competitors or customers.

Information in public records related to the SCA's investigations and other enforcement measures remains confidential for a maximum of 20 years, or otherwise as long as it can be assumed that the party concerned will suffer substantial damage or another 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.

There is a strong protection for party insight. This means that even though the information may be assessed as confidential, it can only be withheld from the parties if there is a public or individual interest of exceptional importance. In this case, the parties must be given enough information to be able to safeguard their rights of defence. 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, all documents submitted to the court (ie, evidence invoked against a party) must be disclosed to the party in question.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 cannot agree a plea bargain to resolve an investigation but there is a type of a settlement process. The Act gives the SCA the right to issue a 'fine order' – a form of binding settlement used where the facts are uncontested. The SCA controls this process, and only selects cases that it considers to be clear-cut infringements as being appropriate for settlements. If the company under investigation accepts the SCA's settlement terms, the fine order is binding and a simplified decision on liability is issued. Such settlements can be appealed to the Patent and Market Court within a year of written confirmation.

The settlement allows the SCA to impose a fine directly, without the usual requirement of proving its case in court. However, unlike the fixed 10 per cent reduction on offer at the EU level, there is no discount for agreeing to a settlement in Sweden. Advantages come in the form of a simplified and expedited process.

Corporate defendant and employees

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

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. However, in cases 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.

Dealing with the enforcement agency

36 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. 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 or orally.

DEFENDING A CASE

Disclosure

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

Access to the case file in its entirety is normally granted at the stage when the Swedish Competition Authority (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). Before the SCA files an application to issue fines with the court, the parties concerned will be granted an opportunity to review and comment on the draft application and the evidence disclosed.

However, there are some exceptions allowing the SCA to keep certain information confidential from the other concerned parties, even 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 (eg, legal and economic advisers).

When the SCA has submitted an application to the Patent and Market Court to ask 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.

Representing employees

38 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 or representation?

There is nothing definitively preventing an employee or other representative of a company under investigation from being represented by the same counsel during SCA interviews. Whether it is appropriate for an employee to seek separate counsel is assessed on a case-by-case basis (eg, taking account of whether and when the interests of the employee and employer are aligned).

Multiple corporate defendants

39 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, for members of the Swedish Bar and their employees, the guidelines on ethics of the Swedish Bar Association contain stringent

provisions relating to the representation of clients with conflicting interests. Subject to these limitations, defending multiple corporate clients is possible.

Payment of penalties and legal costs

40 | 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 not on the employees of those undertakings. Hence, individual employees cannot be ordered to pay fines or other monetary sanctions. However, undertakings may pay their employee's legal costs.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

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 are tax-deductible since they do qualify as an operating expense.

International double jeopardy

42 | 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 follows from the principle of *ne bis in idem* that companies and individuals already sanctioned in a proceeding outside Sweden cannot be fined in a Swedish national court for the same anticompetitive conduct. However, 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.

Swedish rules on damages are of a compensatory nature. This means that overlapping liability for damages can be taken into account when assessing damages. However, there is no clear legal ground for taking into account penalties imposed in other jurisdictions. The SCA does not mention it as a mitigating factor in its guidelines on how to determine fines, nor is it mentioned as a mitigating factor in the Act.

Getting the fine down

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

Companies can avail themselves of the SCA's leniency framework to reduce an anticipated fine. Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if the information contained in the application meets certain strict criteria. Reductions are also available for second and subsequently cooperating parties.

The existence or introduction of a compliance programme has not yet been shown to affect the level of the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In its annual report on enforcement, the Swedish Competition Authority (SCA) noted that many of its investigations, and subsequent litigations, are triggered by tip-offs or complaints. In 2019, the SCA received 682 tips, complaints and inquiries related to competition matters, an increase of

more than 100 over the previous year. However, this statistic does not cover leniency applications, in relation to which the SCA reported having 10 open matters as at Q1 2020.

The SCA can resolve a case in many ways, from simple case closure and case closure as a result of changed behaviour, to binding commitments and fines litigated in court. In 2019, five complaints were prioritised for in-depth investigation, one of which related to horizontal cooperation, and four investigations were closed in that same period. Some of this activity is summarised below, but it is worth noting that recent cases do not tend to fall into classic cartel territory but rather more broadly within that of anticompetitive agreements (including vertical matters).

One case drawing to a close in the past year is the investigation into whether an information exchange on production volumes between companies active in the asphalt industry had infringed competition law. The parties voluntarily submitted commitments with the effect that such information would not be shared between competitors. The SCA accepted the commitments and the case was closed in November 2019.

The SCA also resolved a case focusing on the wood cutting tools sector, in which agreements between a manufacturer and three retailers were investigated due to market-sharing concerns. The case was closed by the SCA in 2019 as the parties had ceased to apply the contractual provision which had been of concern.

The SCA also closed an investigation into alleged anticompetitive cooperation between companies active in the musical instruments sector. It was suspected that retailers, manufacturers and distributors had coordinated retail prices. The investigation did not support the suspicions as regards to the Swedish market, however, and the case was closed. Related cases have been ongoing throughout Europe.

In December 2019, the SCA also adopted an interim decision prohibiting a company selling training services to consumers via a mobile app from applying exclusive agreements with its fitness studio partners. The decision was unsuccessfully appealed by the party concerned and the case is ongoing. This is the first time since 2012 that the SCA has applied interim measures.

In July 2020, the SCA settled a case between two companies active in the interior design sector. The parties were found to have been coordinating their sales prices. Following the investigation, they agreed to pay fines of 75,000 kronor and 500,000 kronor respectively.

An in-depth investigation into anticompetitive cooperation between companies active in the professional hair care sector was also closed by the SCA in September 2020. The case centred on a press release issued by seven companies through a trade association and related contacts. The press release had given rise to a suspicion that the companies had coordinated their future competitive behaviour in collectively rejecting the alternative business concept of another competitor. After further investigation, no infringement was found.

Finally, in terms of public cases, there are ongoing investigations in the airline, brewery, insurance, lighting, transport and dairy sectors, not all of which relate to horizontal cooperation.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

In February 2020, the Swedish government published a proposal for the legislative amendments required to implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive).

The proposed changes include provisions to grant the SCA decision-making powers for issuing competition fines, as well as other

procedural fines levied for non-cooperation in the context of an investigation. The proposal is being consulted upon during 2020. Significantly, an opinion to the Swedish government from the Swedish Council on Legislation in October advised against extending the SCA's decision-making powers. The opinion is not binding but carries weight. The outcome of this remains to be seen.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The European Competition Network, of which the SCA is a member, released a joint statement in March 2020 on the application of competition law during the coronavirus crisis. The SCA then issued its own press release on that statement, as well as a subsequent press release in support of the Temporary Framework launched by the European Commission in April 2020.

The SCA has underscored its availability to provide informal advice on cooperation initiatives considered necessary as a result of the pandemic, but also emphasised that unjustified anticompetitive behaviour will not be tolerated.

No specific temporary regime, comfort letter or exceptions to the Swedish Competition Act (2008:579) have so far been issued or established by the SCA in this context.



**MANNHEIMER
SWARTLING**

Johan Carle

johan.carle@msa.se

Fredrik Sjövall

fredrik.sjovall@msa.se

Stefan Perván Lindeborg

stefan.pervan.lindeborg@msa.se

Norrlandsgatan 21

PO Box 1711

111 87 Stockholm

Sweden

Tel: +46 8 595 060 00

www.mannheimerswartling.se

Switzerland

Mario Strebel and Fabian Koch

CORE Attorneys Ltd

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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 Swiss Competition Commission.

Relevant institutions

2 | 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, which are based in Berne. They are independent of the federal government. The Commission consists of 11 to 15 members (currently 12) 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 allocated to one of these two chambers shall be made by the Commission as a whole. The Secretariat is organised into four operational divisions (services) responsible for the construction sector, the service sector, the infrastructure sector and product markets. Besides, the resources and logistics division is dealing with internal administrative matters only. Each division is headed by a vice-director. In addition to these divisions, there exist a number of cross-functional competence centres that support the work of the Secretariat. The Secretariat has around 75 employees (around 65 full-time equivalents), including a significant number of economists.

Changes

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

There have recently been several changes to the applicable regime. On 9 April 2018, the Commission amended the explanatory notes on the communication on vertical agreements 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. In August 2020, the Secretariat informed that the Commission allows the setting of paperless markers for leniency applications via online forms. Other than these electronic markers, leniency markers may only be submitted in writing, by email or in person. Furthermore, the Commission has decided to extend the applicability of the communication regarding the competition law treatment of vertical agreements in the motor vehicle sector for one year, from the end of 2022 to the end of 2023.

There are also some proposals for change to the regime. However, it is not clear whether, and if so in what form, they will be implemented.

Substantive law

4 | 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 the anti-competitive agreement does not only cover binding agreements in a strict legal sense but also non-binding agreements, '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 hardcore 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 involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, in the matter of the Elmex toothpaste cases of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, the Swiss Federal Supreme Court substantially tightened its practice with regard to hardcore restraints. The Swiss Federal Supreme Court decided those vertical and horizontal hardcore restraints listed above, in principle, significantly restrict competition. The significance of the competition restraints is assumed for hardcore restraints owing to their quality without the need to examine quantitative effects such as market shares. According to the Swiss Federal Supreme Court, already a small degree of a restriction of competition suffices to constitute significance. Horizontal and vertical hardcore restraints must therefore be justified on the grounds of economic efficiency to be permissible.

Economic efficiencies justifying otherwise unlawful anti-competitive 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.

In addition to these benefits, to successfully justify anti-competitive behaviour by claiming it creates economic efficiencies, the legal anti-competitive agreements must not, under any circumstances, enable the parties involved to eliminate effective competition.

The strict approach adopted with the Elmex toothpaste cases has been confirmed by the Swiss Federal Supreme Court in its Altimum decision (regarding mountaineering equipment) of 18 May 2018 (2C_101/2016). In this decision, the Swiss Federal Supreme Court also made clear that the barriers to justify otherwise unlawful anti-competitive agreements on the basis of economic efficiency are high, in particular for hardcore restraints.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

As any formal or informal agreement that restricts competition by object or effect, joint ventures and strategic alliances, such as marketing alliances and purchasing pools, are, in principle, subject to Swiss cartel regulation. Exceptions may be possible in a merger control context. In this context, anti-competitive and therefore otherwise inadmissible agreements that are directly related and necessary to concentrations (ancillary restraints) may be privileged (concentration privilege). Based on a formal request for legalisation, ancillary restraints can become officially legalised with the clearance of the concentration by the Commission in the respective merger control proceeding, which is of great benefit to the parties involved due to the legal certainty gained. Without such a formal request and legalisation, the parties themselves have to assess whether the ancillary restraints are permissible. This is also the case if a concentration is not notifiable since the turnover thresholds are not satisfied.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

According to article 2(1)-(1bis) of the Cartel Act, any undertaking, public or private, that is engaged in an economic process, ie, that offers or acquires goods or services, is an undertaking within the meaning of the Cartel Act and therefore subject thereto. As to the applicability of the law, a functional approach is taken and neither the organisation nor the legal form of an undertaking is relevant.

Undertakings can be individuals – that is, natural persons – or legal entities such as corporations or associations. 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 administrative sanctions, only the undertaking is. However, certain penal sanctions may apply. Further, undertakings that perform tasks in the public interest and that are vested by law with special rights (such as, for instance, Swiss Post for specific postal services) are also (partly) exempted.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Article 2(2) of the Cartel Act codifies the international law principle of the effects doctrine. According to the landmark cases involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), respectively, the Federal Supreme Court ruled that the Cartel Act applies to all agreements and concerted practices that may have an effect within Switzerland. Therefore, agreements concluded abroad or conduct that takes place outside Switzerland, but that might have effects in Switzerland may fall under Swiss jurisdiction.

More recently, the Commission has imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the European Economic Area. 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 Swiss Federal Supreme Court and the Swiss Federal Administrative Tribunal, respectively.

Export cartels

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

Article 2(2) of the Cartel Act codifies the international law principle of the effects doctrine. In light of this doctrine, 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 may nevertheless apply. Importantly, the Swiss Federal Supreme Court has widened the effects doctrine with its landmark decisions dated 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), respectively, with regard to Gaba and Gebro in the *Elmex Toothpaste* matter. Not only actual effects, but also potential

effects on the Swiss market are deemed sufficient to establish jurisdiction, giving the authorities considerable leeway when determining whether a specific conduct falls under Swiss jurisdiction.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Cartel Act does not provide for any industry-specific offences or defences or any anti-trust exemptions for government-sanctioned activities. 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 rules that establish a state market or price regulation, or that provide individual undertakings with special rights in order to fulfil public duties. However, according to the Swiss Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

The Cartel Act also empowers the Swiss Federal Council and the Commission to issue ordinances or general notices, respectively, on specific anti-competitive agreements that are, in principle, justified on economic efficiency grounds. Such anti-competitive 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 response to the Swiss Federal Supreme Court's landmark decisions in the Elmex toothpaste matter of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), and has additionally issued, for the first time, explanatory notes as an interpreting aid on 12 June 2017, as amended on 9 April 2018. 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 applicable in the European Union 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 do not contain hardcore restraints and only have 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 European Union and European Economic Area 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.

The Commission has also 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 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, but 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 Swiss Federal Council may authorise otherwise unlawful anti-competitive 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Article 2(1)-(1bis) 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.

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, rules that establish a state market or price regulation or that provide individual undertakings with special rights in order to fulfil public duties. However, according to the Swiss Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Cartel proceedings under the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) are in principle two-staged, consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, Swiss Competition Commission may open an in-depth investigation even without going through a preliminary investigation.

The Commission's Secretariat can initiate preliminary investigations on its own initiative, at the request of involved undertakings (eg, competitors) or based on a complaint from third parties (eg, consumers). 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, it opens an investigation 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 Swiss Federal Department of Economic Affairs, Education and Research. During preliminary investigations, the parties concerned have no procedural rights (that is to say, no right to access 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 in-depth investigation is necessary. The decision to open an investigation does not qualify as a formal decision and hence cannot be appealed. The Commission decides which in-depth investigations are pursued.

The Secretariat must announce the opening of an in-depth investigation by means of an official publication. Such announcement states the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties may join the investigation as a party or as a third party without party status. As a third party without party status, they have limited procedural rights. While, in principle, a request to become involved as a party can be requested anytime, the involvement as a third party without party status must be requested within 30 days of the public announcement.

All parties to the investigation are vested with the usual procedural rights. They may access 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 are entitled to 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 takes, at a minimum, several months and a formal investigation at least one year and sometimes several years.

Investigative powers of the authorities

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

The Secretariat has broad investigative powers. Such investigative powers are checked by the Commission, in that a member of its presidium must authorise certain investigative instruments of the Secretariat for them to be applied legally. The Secretariat 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 anti-competitive agreements. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to access and 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 its investigation and to produce necessary documents (article 40 of the Cartel Act), in due consideration of the right against self-incrimination.

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, members of the Commission's presidium have the power to order inspections or dawn raids and seizures upon request of the Secretariat. The Swiss 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, in which 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, among other things, not wait for the arrival of external lawyers before starting to search a premise. 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, undertakings being 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 activities of independent attorneys admitted to the bar that are allowed to professionally represent parties in Swiss courts. Importantly, legal privilege is not granted to work product 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, the client or any other third party. Legal privilege may be invoked by the attorney, the client and also every third party having a protected document in custody.

The Commission published a note on the decisional process in cartel investigations under the Cartel Act in October 2019. The note aims to increase transparency by, among other things, outlining the practice of the Commission and the Secretariat in relation to their respective competencies, organisation and procedural conduct, in particular with regard to the oral hearings of the parties, and the parties' rights and obligations.

In February 2020, the Secretariat published two notes providing a simple overview of the procedure of both preliminary and in-depth investigations.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such 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 Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (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 Swiss Competition 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 Federal Cartel Office as well as with the US anti-trust authorities (ie, the US Department of Justice and Federal Trade Commission). In the absence of specific future cooperation agreements, such informal cooperation is not allowed to go beyond the exchange of non-confidential information.

Interplay between jurisdictions

14 | 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 anti-trust 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 Swiss Federal Supreme Court in its landmark decisions involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, 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

Decisions

15 | 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, among other things, also issue injunctions to terminate 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 case is decided or the proceeding is continued respectively for the other parties ((sequential) hybrid cartel cases). The Commission's Secretariat is responsible for conducting investigations and preparing cases and, together with one presidium member of the Commission, issuing necessary procedural rulings. 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. However, in its decision of August 2019 in the matter Construction Works in the Canton of Grisons, a bid-rigging case, the Commission considered compensation agreements with cartel victims (ie, awarding communities) as mitigating factors and reduced the fines for parties that entered into such agreements.

Burden of proof

16 | 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 appellate 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. 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. With regard to such issues, a prevailing probability shall suffice as the required level of proof, since full proof is, by the nature of these matters, impossible.

In the judgments of the Swiss Federal Administrative Tribunal in the bid-rigging case against building undertakings from the canton of Aargau of June 2018, the tribunal 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.

Circumstantial evidence

17 | 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 and the appellate courts accept the establishing of an infringement of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) 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. That is, as a general rule, certainty in the sense that no reasonable doubts shall continue to exist with regard to the relevant facts.

Appeal process

18 | What is the appeal process?

Decisions of the Commission and, to a limited extent, interim procedural decisions can be appealed to the Swiss Federal Administrative Tribunal within 30 days of 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 negatively affected by the decision of the Commission. In principle, only third parties that suffer a clearly perceptible economic disadvantage as a consequence of an anti-competitive 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 (this is rarely invoked in practice).

The appeal before the Swiss Federal Administrative Tribunal is a 'full merits' appeal on both the findings of facts and law. However, in practice, the Swiss Federal Administrative Tribunal grants the Commission a significant margin of technical discretion.

Judgments of the Swiss Federal Administrative Tribunal and, to a limited extent, interim procedural decisions, may be challenged before the Swiss Federal Supreme Court within 30 days of notification of the decision. In proceedings before the Swiss 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 European Convention of Human Rights 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 Swiss Federal Council to exceptionally authorise specific behaviour for compelling public interest reasons. To date, such authorisation has never been granted.

Judgments of the civil courts may ultimately be challenged before the Swiss Federal Supreme Court. If the legality of 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

Criminal sanctions

19 | 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 on-going 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.

Civil and administrative sanctions

20 | 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 from the outset.

From an administrative law point of view, under article 49a of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), direct sanctions (fines) are imposed on undertakings that:

- participate in a hardcore horizontal cartel, according to article 5(3) of the Cartel Act (ie, agreements on prices, quantities or territories between competitors);
- participate in hardcore vertical restraints pursuant to article 5(4) of the Cartel Act (ie, resale price maintenance or absolute territorial protection in distribution matters); 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.

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Swiss Competition 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 practices shall be taken into due consideration.

Furthermore, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an on-going investigation, can be fined up to 100,000 Swiss francs.

Since individuals acting as private undertakings fall under the Cartel Act, they can also be fined in cartel cases, as shown in the Upper Valais Driving Instructor Cartel case in which the Commission sanctioned also natural persons in its decision of March 2019.

Guidelines for sanction levels

21 | 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 severity 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, coercion of other cartel members, a particularly high profit as a result of 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 a settlement) influence the final amount of the fine. In its decision in the matter of Construction Works in the Canton of Grisons of August 2019, a bid-rigging case, the Commission reduced sanctions substantially for those undertakings that agreed with cartel victims on compensation for damages. Full immunity or a discount can also be obtained based on leniency cooperation.

Eventually, the Commission shall ensure that the penalty imposed is proportional and that the maximum fine amount of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative) is not exceeded. In particular, the sanction must also be in proportion to the financial capacity of the concerned undertaking and as a matter of principle must not lead to the bankruptcy of the concerned undertaking.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

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. In the absence of relevant case law, it is therefore disputed whether and to what extent compliance programmes may reduce sanctions under Swiss competition law.

In the landmark case involving GABA International SA, the manufacturer of Elmex toothpaste, of 28 June 2016 (2C_180/2014), the Swiss Federal Supreme Court reasoned that in this case, the compliance programme that has been in place at the time of the illegal conduct had no relevance with regard to the determination of the sanction. The Swiss Federal Supreme Court argued in that regard that from a competition law perspective, compliance programs aimed at preventing anti-competitive conduct in the first place through information and training of employees. Since in this case, the illegal conduct did not involve employees at lower levels of responsibility, but by senior management personnel that entered into an unlawful contract clause, the Swiss Federal Supreme Court concluded that the compliance programme could not be taken into account as a mitigating factor reducing the fine. This reasoning could be interpreted in such a way that depending on the merits of other cases, compliance programmes could indeed have a mitigating effect regarding sanctions. It remains to be seen, however, whether such argumentation will in fact be heard by the authorities. The requirements for a compliance programme in order to be taken into account as a sanction-mitigating factor will in any event be high, as has also been pointed out by the Swiss Federal Administrative Tribunal in its decision regarding Nikon in 2016. The mere existence of a compliance programme should not be enough in that regard.

A parliamentary motion by Rolf Schweizer (07.3856) that aimed at providing an express legal basis for compliance programmes to have a sanction-mitigating effect was written off in 2014. Also, a parliamentary initiative by Dominique de Buman (16.473) that, among other things, addressed the same matter was withdrawn in 2017.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

No. There is no legal basis for such disqualification under Swiss competition law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 on-going 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.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 on-going investigation, are subject to administrative or criminal fines, or both. 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

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 – and the passing-on defence is not excluded in Switzerland. However, a claimant may request the remittance of illicitly earned profits. Court and legal costs, as determined by the court, must usually be borne by the losing party in the proceedings.

Under Swiss law, the main difficulties are providing specific and sufficient proof of the damage incurred and establishing the required causal nexus between the anti-competitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims. In most instances, the claimant bears the burden of proof.

In its decision in the matter of Road Construction of August 2019, a bid-rigging case, the Swiss Competition Commission reduced sanctions substantially for those undertakings that agreed with cartel victims on compensation for damages. It remains to be seen, however, whether this will provide a sufficiently strong incentive for cartelists to offer compensation for damages during an administrative proceeding before the Commission or whether they hold back and potentially face civil proceedings.

Umbrella purchaser claims have so far not played a relevant role in Swiss case law. Also in legal literature, they have barely been discussed. While in theory such claims may not be excluded as such, providing sufficient proof of the damage incurred and establishing the required causal nexus would be very difficult in case of umbrella purchaser claims.

Class actions

27 | Are class actions possible? If so, 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.

Recent cases have shed some light into certain aspects of concepts for the collective enforcement of legal claims under Swiss law and shown that legal claims used in other legal systems (ie, class actions or model declaratory proceedings) are generally not provided for in the Swiss legal system.

In the aftermath of the 'Dieselgate' – the Volkswagen emissions scandal – the Swiss Foundation for Consumer Protection (SKS) filed multiple lawsuits with the Zurich Commercial Court against Volkswagen and its general importer for Switzerland. Finally, SKS acquired claims from approximately 6,000 consumers and non-consumers and accumulated these claims in a single lawsuit. However, the Commercial Court decided not to consider the merits of this case in the absence of the applicant's capacity to bring proceedings. In a recent judgment, the Swiss Federal Supreme Court confirmed the lower court's view that the legal action of SKS was not covered by the foundation's purpose.

COOPERATING PARTIES

Immunity

28 | Is there an immunity programme? If so, 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 Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), an undertaking that cooperates with the Swiss Competition 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) hardcore 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 in-depth investigation; or
 - submit evidence enabling the Commission to prove a hardcore 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 anti-competitive 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 Commission's Secretariat published a revised notice on leniency, which included a form for leniency applications. The notice was slightly revised in August 2015 and again in January 2019. In August 2020, the Swiss competition authorities introduced the possibility of setting paperless markers for leniency applications via an online form (electronic markers).

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 such a withdrawal or amendment of a final decision. 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 hardcore 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 within a period of five months following the notification and the undertakings continue to implement the notified restriction.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 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 hardcore 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 an indispensable requirement for receiving a 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).

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Being the second or third or subsequent cooperating party will not allow for full, but only partial, immunity of up to 50 per cent of the fine amount. 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 with a fine reduction of up to 80 per cent if an undertaking provides information to the Commission about other hardcore restraints that were unknown to the Commission at the time of their submission.

Approaching the authorities

- 31 | 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 a preliminary or in-depth investigation has already been opened and a dawn raid conducted. 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 email, orally by protocol declaration, or online by electronic marker – another form of paperless communication with the Commission that was introduced in August 2020). Importantly, it is not possible to submit a leniency marker via telephone or, since January 2019, by fax.

According to past investigations with several leniency applicants, the decision which undertaking may qualify for full immunity may be made in a matter of days or even hours.

Cooperation

- 32 | 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 that are seeking partial leniency?

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 proceeding 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 immunity or a partial reduction of the fine.

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 Swiss 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 Swiss Federal Administrative Tribunal again by the Swiss 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 fine.

Confidentiality

- 33 | 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, and data retention for later use is not permitted. Second, access is 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.

Settlements

- 34** Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 hardcore 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.

Corporate defendant and employees

- 35** 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 and, hence, the granting of immunity or partial leniency concerning a corporate defendant has, in principle, no effect on current and former employees. Employees might, however, 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). Further,

individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an on-going investigation can be fined up to 20,000 Swiss francs, and individuals acting for an undertaking violating a settlement decision, or other enforceable decisions or court judgments in cartel matters, may be fined up to 100,000 Swiss francs.

Dealing with the enforcement agency

- 36** 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.

DEFENDING A CASE

Disclosure

- 37** 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 in-depth 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 (eg, 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.

Representing employees

- 38** 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 or representation?

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 sanctions apply to individuals and undertakings, as a general rule, it is advisable to seek independent legal advice and representation. This seems all the more relevant since according to recent (and heavily criticised) practice of the Secretariat, with the exception of actual (formal or de facto) board members of an undertaking, current and past employees are treated as third parties (witnesses or informants), but not as party representing the concerned undertaking.

Multiple corporate defendants

- 39** 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 the investigation would be unduly complicated otherwise. 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. Besides, under Swiss law, counsel may represent multiple corporate defendants, provided that it discloses the fact to all undertakings and that there is no conflict of interest. Since affiliated companies are treated as one undertaking in the sense of the Cartel Act (the possibility to exercise decisive influence is the relevant test criterion), representation of such group of companies by the same counsel is the rule (ie, possible without restrictions).

Payment of penalties and legal costs

40 | 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.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

With a judgment of September 2016, the Swiss 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 Swiss 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 Swiss Federal Supreme Court handed down the judgment to the lower instance to assess this question in light of the facts of the case. 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 has passed the Swiss parliament. The date of entry into force of this federal law, however, has not yet been determined.

Private damages awards that take place in the ordinary course of business qualify in principle as business expenses and are deductible from profit taxes.

International double jeopardy

42 | 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.

Getting the fine down

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

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 if the undertaking according to its self-assessment has committed a hardcore infringement. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition may enjoy full or partial immunity of up to 50 per cent. Moreover, an amicable settlement with the authority may also result in an additional reduction of the potential fine of up to 20 per cent.

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 anti-trust 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 and there is no legal certainty as to the sanction-mitigating effect of a compliance programme.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The year 2020 has so far been marked by the coronavirus pandemic and the lockdown in Switzerland. As a result, since the autumn of 2019, the Swiss Competition Commission has only taken a few decisions or closed investigations respectively in the area of cartels. The following cases are the most relevant.

In September 2019, the Commission decided on the two last of overall 10 investigations in the Canton of Grison in the construction sector. These decisions concerned the Road Construction matter and the Engadin II matter, of which the Road Construction seems of wider interest. Eight of the 12 construction companies involved in the Road Construction matter submitted leniency applications or acknowledged the facts of the case. This led to a fine reduction of 14 million Swiss francs. Furthermore, nine of the concerned undertakings entered into settlement agreements with cartel victims regarding compensation for damages in the total amount of 6 million Swiss francs. Based thereon, the Commission reduced the fine for these nine undertakings by 3 million Swiss francs in total. The sanction reduction owing to settlement agreements with cartel victims in an on-going investigation is unprecedented in Swiss law. In the end, the Commission fined the 12 construction companies a total of 11 million Swiss francs for bid-rigging.

In December 2019, the Commission concluded its investigation against Brenntag Schweizerhall AG (Brenntag) and Bucher AG Langenthal (Bucher) with an amicable settlement. The Commission found that from 2014 to 2017, the two undertakings agreed on the allocation of their customers of the product AdBlue. AdBlue is an aqueous urea solution that reduces nitrogen oxide emissions from diesel engines. In the amicable settlement, the two companies committed to refrain from splitting up customers in the distribution of this product in the future. In its decision, the Commission took into account the fact that

Brenntag is both a supplier and a competitor of Bucher. As the vertical supply relationship between Brenntag and Bucher was the main issue in this case, the Commission refrained from imposing a fine.

It is now becoming apparent that the Commission has come more active again since late summer 2020. The following cases are of particular interest.

After having closed all 10 bid-rigging investigations in the Canton of Grisons in 2019, as mentioned above, in June 2020 the Commission has opened a new investigation with regard to possible bid-rigging in the construction sector in the Moesa region. The Commission had indications based on information received from the Canton of Grisons that several companies in the rather remote Moesa region in the south of the Canton of Grisons have entered into bid-rigging arrangements. The Commission carried out dawn raids.

In September 2020, the Commission opened an investigation against several wholesale and retail companies and their debt collection and services agency. The investigation focuses on alleged anti-competitive measures against various suppliers of daily consumer goods. In particular, the investigation will examine whether coordinated measures have been taken to encourage suppliers to use the debt collection platform, in particular through the threat of collective delisting of certain daily consumer goods. The opening of this investigation was accompanied by dawn raids at the premises of certain addressees of subjects of the investigation.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Consultation on revising the Cartel Act

In February 2020, the Federal Council instructed the Federal Department of Economics, Education and Research to prepare a consultation draft for a partial revision of the Cartel Act. An important element of the suggested technical revision of the law is the modernisation of the Swiss merger control regime. Studies show that this is expected to have positive effects on competition in Switzerland. The aim is to switch from the current qualified dominance test to the Significant Impediment to Effective Competition test. In accordance with the decision of the Swiss parliament of 5 March 2018, two requests of Motion Fournier 16.4094 'Improvement of the situation of SMEs in competition law proceedings' shall also be included in the envisaged partial revision. On the one hand, regulatory time limits shall be introduced for the Commission and the appellate courts in order to speed up the respective administrative procedures. On the other hand, compensation for parties at all stages of the administrative competition law procedure shall be granted (ie, also for the proceeding before the Commission).

Motion by François Olivier – The Elmex toothpaste matter

The motion by François Olivier of 13 December 2018 – 'The revision of the Cartel Act must take into account both qualitative and quantitative criteria to assess the inadmissibility of a competition agreement' – called on the Federal Council to amend article 5 of the Cartel Act in response to the landmark decisions involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively. The motion is pending in the Swiss parliament.

Fair price initiative and indirect counterproposal

The federal popular initiative 'Stop the high price island – for fair prices' (the 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

CORE Attorneys

Mario Strebel

mario.strebel@core-attorneys.com

Fabian Koch

fabian.koch@core-attorneys.com

Dufourstrasse 105
8008 Zurich
Switzerland
Tel: +41 43 555 70 00
www.core-attorneys.com

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 29 May 2019, the Federal Council submitted its message and the draft federal resolution in response to this initiative to the Swiss parliament. Therein, it recommends the rejection of the popular initiative together with an indirect counterproposal based on the concept of relative market power and only regulating import issues. The Swiss parliament has considered the proposal and prepared a parliamentary counterproposal. It is not yet known when the initiative will be put to a popular vote.

Motion by Pirmin Bischof – Online hotel booking systems

A 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 '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 '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 Department on Economic Affairs, Education and Research is currently elaborating a consultation draft in this matter.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

With regard to competition law, neither the Swiss Competition Commission, the Swiss parliament or the Swiss Federal Council have implemented any sort of emergency legislation, relief programmes or enforcement policies or other initiatives related to competitor conduct to address the pandemic.

In March 2020, the Commission issued a press release highlighting that it will not tolerate companies exploiting the coronavirus crisis to restrict competition. The Commission stressed that undertakings must nevertheless comply with anti-trust law, even if the crisis may lead to an increased need for cooperation and has thereby put specific emphasis on the fact that the overall economic situation must not be misused to form cartels and agree on prices. However, the Commission also stated that it is aware that special times require special measures and that it is available for information and stands ready for discussions with associations, companies and other authorities on the design of measures to combat the coronavirus crisis in conformity with Swiss competition law.

Turkey

Gönenç Gürkaynak and K Korhan Yıldırım

ELIG Gürkaynak Attorneys-at-Law

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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.

After rounds of revisions and failed attempts of enactment over a span of several years, a proposed amendment to the Competition Law (the Amendment Proposal) has been approved by the Grand National Assembly of Turkey (the Turkish parliament). On 16 June 2020, the amendments passed through the parliament and entered into force on 24 June 2020 (the Amendment Law), which was published in Official Gazette on 23 June 2020, No. 31165. According to the recital of the Amendment Proposal, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law.

Relevant institutions

2 | 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 enforcement of the Competition Law 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. As the competent body of the Competition Authority, the Board is responsible for, among other things, 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 be separately adjudicated and prosecuted by Turkish penal courts and public prosecutors.

Changes

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

One of the most important amendments in the Amendment Law is the introduction of a *de minimis* principle, bringing Turkish competition law closer to that of EU law. This amendment enables the Board to decide against launching full-fledged investigations into agreements, concerted practices and decisions of associations of undertakings that do not exceed thresholds determined by the Board (eg, a certain market share level or turnover). This principle does not apply to hardcore violations such as price-fixing, territory or customer sharing, or restriction of supply. With this new mechanism, the Turkish Competition Authority appears to be steering its direction, and public resources, towards investigating significant violations.

The introduction of the *de minimis* principle appears to be a more appropriate (and legally less controversial) measure for the Authority to prioritise cases, which has previously used article 9(3) of the Competition Law to terminate a pre-investigation on procedural efficiency grounds, such as when an infringement only affects a small market (eg, the *Izmir Container Transporters* decision, (20-01/3-2, 02.01.2020). Article 9(3), however, is an interim measure the Board may use to explain to companies how to terminate an infringement until its final decision is made. It still remains to be seen whether the introduction of the *de minimis* exception will end the excessive use of article 9(3) altogether, given that hardcore restrictions in small markets will still not benefit from the *de minimis* provision. The Amendment Law refers to 'turnover' and 'market share' thresholds for the *de minimis* exceptions but leaves the setting of thresholds to the Board. It is therefore not yet clear how the Board will define the limits of the safe harbour the new law has introduced. That said, given the goal of the Amendment Law is to bring the Competition Law closer to EU law, it would be fair to expect that the threshold will be based on the European Commission's Notice on agreements of minor importance that do not appreciably restrict competition under article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (the *De Minimis* Notice). The Commission also has another Notice on the Effect on Trade, (Commission Notice – Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty; OJ C 101, 27.4.2004, p. 81–96), which provides that even agreements including a restriction by object may fall outside the scope of article 101 TFEU if the parties' combined market share is 5 per cent or less and their aggregate annual turnover is €40 million or less. Given that the Amendment Law excludes hardcore restrictions from the safe harbour, however, the Authority may have been more heavily influenced by the *De Minimis* Notice in preparation of the Amendment Law rather than the Notice on the Effect on Trade. The *De Minimis* Notice could be a reference point for the Board to determine the *de minimis* threshold for Turkish law.

The Amendment Law brought about other significant changes, such as the introduction of settlement and commitment mechanisms.

There is also the amended Guidelines on Vertical Agreements, which was published on 30 March 2018, which includes provisions concerning internet sales and most favoured customer clauses.

Currently, an expected and significant development in Turkish competition law 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). 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. The draft regulation was sent to the Turkish parliament on 17 January 2014, but no enactment date has been announced as yet. However, its introduction demonstrates the Competition Authority's intention to bring secondary legislation in line with EU competition law during the harmonisation process.

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. 2019/1);
- 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.

Substantive law

4 | 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 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. Similar to the TFEU, the Amendment Law introduced

the *de minimis* principle, whereby the Board will be able to decide to not launch full-fledged investigations into agreements, concerted practices and decisions of association of undertakings that do not exceed the thresholds determined by the Board (eg, a certain market share level or turnover).

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 most recent of these block exemptions – 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'.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Under Turkish Competition Law, the competitive assessment of joint ventures falls between merger control and cartel regulation. Depending on the full-function character of a joint venture, it can be subject to either merger control or a general antitrust assessment.

If a joint venture is found to be a full-function joint venture, it will be subject to merger control regime under article 7 of the Competition Law, if the applicable turnover thresholds are met. However, if the joint venture is considered to be non-full-function, it would be subject to an article 4 test to see if it has an anticompetitive purpose or effect, and therefore would be subject to cartel regulation.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Law on Protection of Competition No. 4054 of 13 December 1994 (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, corporations and other entities alike acting as an undertaking.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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 (eg, 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 that lacks a 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 convincing 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.

Export cartels

8 | 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 the Competition Authority's jurisdiction, as per article 2 of the Competition Law. In Poultry Meat Producers (25 November 2009, 09-57/1393-362), the Authority launched an investigation into allegations that included, among other things, an export cartel. The Board decided that export cartels could not be sanctioned unless they affected the host country's markets. 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. There are sector-specific block exemption rules, but these do not define any industry-specific offences or defences that do not exist in the Competition Law but detail slightly different rules for the block exemption regulations. One such regulation exists in the motor vehicle sector (Block Exemption Communiqué No 2017/3 on Vertical Agreements in the Motor Vehicles Sector) (Communiqué No 2017/3). Accordingly, in cases that concern the motor vehicle sector's block exemption, both the defending undertaking and the Authority would consider the thresholds and rules specified within Communiqué No 2017/3.

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', oligopoly markets for the supply of homogeneous products (eg, cement, bread yeast and ready-mixed concrete) have constantly been under investigation for concerted practices. Nevertheless, whether this track record (more than 32 investigations in the cement and ready-mixed concrete markets in 21 years of enforcement history) leads to an industry-specific offence is debatable.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no defences or exemptions for state-approved or regulated actions.

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.

However, there are examples where the Board taken an undertaking's defence that it was acting in a state-approved or regulated manner into account (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).

INVESTIGATIONS

Steps in an investigation

11 | 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 conducts 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) 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 must be brought within 60 calendar days of the reasoned decision being officially served. It usually takes around three to eight months from the announcement of the final decision for the Board to serve a reasoned decision on an appeal.

Investigative powers of the authorities

12 | 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 31,903 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. 2020/1)). 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, make 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. 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.

In addition to the above, the Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in the companies' physical records and those in electronic storage and IT systems, which the Authority already does in practice. This is also confirmed in the Amendment Proposal's preamble as it indicates that the amendment serves 'further' clarification on the powers of the Authority that are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

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

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such 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's Directorate-General for 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, United Nations Conference on Trade and Development, World Trade Organization, the International Competition Network 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.

Interplay between jurisdictions

14 | 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

Decisions

15 | 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 rulings on that decision.

Burden of proof

16 | 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'.

Circumstantial evidence

17 | 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.

Appeal process

18 | 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 of both procedural and substantive reviews.

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 executing 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 12 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

Criminal sanctions

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

The sanctions that can be imposed under the Law on Protection of Competition No. 4054 of 13 December 1994 (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.

Civil and administrative sanctions

20 | 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 mitigating and aggravating factors into account (eg, 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, and the financial power of the undertakings or the compliance with their commitments) in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Competition Board of the Competition Authority (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.

In 2020, the Board fined a number of undertakings for hindering on-site inspections. In this respect, in its *Groupe SEB İstanbul* Decision (9 January; 20-03/31-14), Groupe SEB İstanbul was fined 0.05 per cent of its turnover generated in 2018 for hindering an on-site inspection. Similarly, the Board imposed a fine of 0.5 per cent upon Unilever for not granting access to Unilever's email system for a search by using 'eDiscovery' for approximately eight hours during the on-site inspection. (*Unilever* Decision, 7 November 2019, 19-38/584-250)

In 2019, the total amount of fines imposed on undertakings that obstructed on-site inspection was 38,116,076.71 Turkish lira.

In 2017, the Board has levied administrative monetary fines within an investigation launched against 13 financial institutions, including local and international banks, active in Turkey's corporate and commercial banking markets (28 November 2017, 17-39/636-276). The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturities) regarding loan agreements and other financial transactions. After an in-depth investigation lasting 19 months, the Board unanimously concluded that BTMU (which has since been renamed MUFG Bank), ING and Royal Bank of Scotland (which became a direct subsidiary of NatWest Holdings in 2019) violated article 4 of the Competition Law. The Board imposed administrative monetary fines on ING and RBS in the amount of 21.1 million Turkish liras and 664,000 Turkish liras, respectively, based on their annual turnovers in the 2016 financial year. However, the Board resolved that it would not impose an administrative monetary fine on BTMU, pursuant to the bank's leniency application that granted it full immunity, and relieved the remaining 10 undertakings from paying administrative monetary fines.

Another decision in 2017 concerned allegations that 10 undertakings that were active in producing ready-mix concrete in Turkey's İzmir region planned to artificially increase 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 economic evidence showed the relevant undertaking was not involved in an anticompetitive agreement or concerted practices, and it is understood that the Board took the defendants' view that it was implausible that they reached an arrangement within the alleged duration of the anticompetitive agreement, which was three months. The Board's decision constitutes a good example that the undertakings subject to an investigation based on allegations of anticompetitive agreements or concerted practice can defend themselves using economic and legal evidence, even when they are under the presumption of having engaged in a concerted practice of article 4 of the Competition Law, and so shows the importance of economic evidence.

Civil actions

Numbers of civil actions are still rare but are increasing. The majority of private lawsuits in Turkish antitrust enforcement are based on allegations of refusal to supply and price manipulation. Civil damage claims are usually settled among the involved parties prior to a court rendering judgment.

Similar to US antitrust enforcement, the most distinctive feature of Turkish competition law is that it provides for civil lawsuits for treble damages, and so supplements administrative enforcement with private lawsuits. Articles 57 et seq of the Competition Law entitle any legal or real person injured in their business or property by reason of anything

forbidden in the antitrust laws, to sue the violators for three times their damages, plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts do not usually engage in an analysis as to whether there is a condemnable anticompetitive agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question. As courts usually wait for the Board's decision, the court's decision can be obtained in a shorter period as compared to regular full judiciary processes in follow-on actions.

Guidelines for sanction levels

21 | 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 for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (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.

The Regulation on Fines states that fines are calculated by determining its base level. In the case of cartels, each undertaking's fine is set at between 2 per cent and 4 per cent of its 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 is used. Then aggravating and mitigating factors are factored in. Such factors are set forth in the Regulation on Fines.

Article 5/3, states that the amount of the fine may be increased by 50 per cent if a violation lasted between one and five years, and by 100 per cent if it lasted for more than five years, and article 6, allows for the base fine to be increased by 50 per cent to 100 per cent for each repetition of the violation and also further increased by one fold if the cartel is maintained after the notification of the investigation decision.

Aggravating factors are defined under article 6 in a non-exhaustive manner and accordingly, the base fine may also be increased by:

- 50 per cent to 100 per cent, if an undertaking's commitments made regarding the elimination of competition problems raised within the scope of article 4 of the Competition Law have not been met;
- up to 50 per cent, if an undertaking does not provide assistance with an investigation; and
- up to 25 per cent in cases such as coercing other undertakings into the violation.

The provisioned increase for not providing assistance with the investigation differs from the administrative monetary fine set forth in article 16 of the Competition Law for undertakings that obstruct the investigation process by way of providing misleading information or documents or not providing any information or documents at all, or preventing or obstructing an on-site inspection. In such cases, the Board would impose a separate administrative monetary fine, for each instance of obstruction, which is separate from the final administrative monetary fine that is imposed at the end of the investigation process.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner (ie, the Board has flexibility in deciding what constitutes mitigating factors in each specific case). In this regard, the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking, or association of undertakings:
 - provided assistance to the investigation beyond the fulfilment of their legal obligations;
 - provided evidence of public authorities encouraging, or other undertakings coercing, other undertakings to take part in the violation;
 - made voluntary payments of damages to those harmed;
 - voluntarily terminated other violations; or
- the violating practices formed a very small part of the undertakings' business, in relation to its annual gross revenue.

The Regulation on Fines also applies to managers or employees who held ringleader roles within the violation (eg, those participating in cartel meetings made decisions that would involve the company in cartel activity), and also provides for certain reductions in their favour when there are mitigating factors to the violation or the undertaking has provided assistance during the course of the investigation.

The Regulation on Fines is binding on the Competition Authority.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Article 7 of the Regulation on Fines follows that the Board may reduce the base fine 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 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 violations and occupation of a very small share by practices subject to the violation within annual gross revenues.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner, in such a way that the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking, or association of undertakings:
 - provided assistance to the investigation beyond the fulfilment of their legal obligations;
 - provided evidence of public authorities encouraging, or other undertakings coercing, other undertakings to take part in the violation;
 - made voluntary payments of damages to those harmed; or
 - voluntarily terminated other violations; or
- the violating practices formed a very small part of the undertakings' business, in relation to its annual gross revenue.

Regarding mitigating factors, there have been several 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 *Mey İçki* decision

(16 February 2017, 17-07/84-34) might be signalling a change in its perception of compliance programmes. The Board applied a 25 per cent reduction on the grounds that Mey İçki (a producer and distributors of spirits) ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board before the Board issued its final decision. Similarly, in its *Consumer Electronics* decision (7 November 2016, 16-37/628-279), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts, since the undertaking amended its contracts before the final decision of the Board.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The sanctions specified in terms of undertakings themselves may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as an infringing entity's employees or board or executive committee member if such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific for individuals. On that note, bid rigging activity may be criminally prosecutable under sections 235 et seq of the Turkish Criminal Code. Illegal price manipulation (ie, manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 a duty, not an option, for administrative authorities to apply blacklisting in cases 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.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 treble damages in lawsuits. Article 57 et seq of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) entitles 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, a debtor shall pay on the amount of their shares. However, in the event that the debtor makes a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust 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. However, there is no regulation that prevents potential umbrella purchaser claims as well since the article 58 of the Competition Law which focuses on the existence of a damage by stating that:

Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.

Class actions

27 Are class actions possible? If so, 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

Immunity

28 | Is there an immunity programme? If so, 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.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 per cent 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.

Approaching the authorities

31 | 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 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.

Cooperation

32 | 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 that are seeking partial leniency?

An applicant must submit:

- information on the products affected by the cartel;
- information on the duration of the cartel;
- names of the cartelists;
- dates, locations and participants of the cartel meetings; and
- other information or documents about the cartel activity.

The required information may be submitted verbally. Markers are 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.

In 2015, the Board slightly eased the tensions and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the Board's reasoned decision of an investigation of fresh yeast producers was released (14-42/783-346). The decision was the first of its kind, where the Board granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was granted to a submission made after the initiation of a preliminary investigation and dawn raids were executed. It served as a landmark case, in that it was the first example of the Board granting immunity after dawn raids. The Board justified this unprecedented action by claiming that substantive evidence and added value was brought in through the leniency application. In parallel, in the *Mechanical Engineering* decision (14 December 2017, 17-41/640-279), the Board accepted one undertakings' leniency application during the course of the preliminary investigation. The leniency applicant received full immunity from fines. Recently, in its decision regarding undertakings active in the Ro-Ro transportation sector (18 April 2019, 19-16/229-101), the Board decided that the administrative fine for an undertaking that applied for leniency during the investigation should be halved if the information it provides significantly contributed to the investigation. The Board further noted that relevant contributions included providing evidence that the violation's starting point was earlier than what was detected during the on-site inspection, and evidence illustrating that price information was exchanged by the violating undertakings and further details on how the price exchange was conducted. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

Confidentiality

33 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 (an undertaking or the employees or managers of an 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 the confidential nature of the information or documents that they are requesting 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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 Amendment Law introduces two new mechanisms that are inspired by the EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of articles 4 and 6 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law), prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide to not launch a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price-fixing between competitors, territory or customer sharing or the restriction of supply. The Board will provide the details of these new procedures through secondary legislation. Additionally, the Board may reopen an investigation in the following cases:

- there is a substantial change in any aspect of the basis of the decision;
- the relevant undertakings' non-compliance with the commitments; and
- there is a realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties.

Second, the amendment to the Competition Law published in Official Gazette on 23 June 2020, No. 31165 (the Amendment Law) also introduced a settlement procedure. As the relevant provision is added to article 43 concerning investigations of anticompetitive conduct in general, and that the Amendment Law does not limit the settlement option to only cartels, it appears that this new procedure will also be applicable to 'other infringements' under article 4 and abuse of dominance cases under article 6.

The new law will enable the Board, ex officio or upon a party's request, to initiate a settlement procedure. Unlike the commitment procedure, a settlement can only be offered in full-fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25 per cent. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation. That said, technically both commitments and settlement could be offered in the on-going proceedings as the Amendment Law is effective as of 24 June 2020.

Corporate defendant and employees

- 35 | 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 cartel 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 cartellists.

Dealing with the enforcement agency

- 36 | 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.

DEFENDING A CASE

Disclosure

- 37 | 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.

Representing employees

- 38 | 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 or representation?

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both a undertaking under investigation and its employees. That said, employees are hardly ever investigated separately, and there are no criminal sanctions against employees for antitrust infringements.

Multiple corporate defendants

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

If 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.

Payment of penalties and legal costs

- 40 | 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.

Taxes

- 41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

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.

International double jeopardy

- 42 | 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.

Overlapping liability for damages in other jurisdictions is not taken into account.

Getting the fine down

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

Aside from the recently introduced leniency programme, article 9 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law), which generally entitles Competition Board of the Competition Authority (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.

Following amendments in 2008, the new version of Competition Law makes reference to article 17 of the Law on Minor Offences to require the Competition Board, when determining the magnitude of a monetary fine, 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; and
- the financial power of the undertakings; and compliance with commitments.

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 the Board's *Industrial Gas* decision, 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 *Mey İçki* decision (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.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

During the course of the year in review, there has not been any significant cartel decision where the Competition Board of the Competition Authority (the Board) imposed significant administrative monetary fines. On the contrary, there is a decline in the number of cartel cases as well as the number of investigations with monetary fines. According to the annual report of the Turkish Competition Authority for 2019, the Board decided on 312 cases and 69 of them are related to competition law violations. Twenty-nine out of 69 are related to article 4 or 6 of the Competition Law. In a preliminary investigation initiated against *çiğ köfte* (a traditional version of steak tartar) producers operating in Gaziantep province of Turkey, the Board has noticed the price-fixing agreements regarding the sale price and conditions of *çiğ köfte* concluded between undertakings and acknowledged the presence of an agreement restricting competition in the relevant product market (10 January 2019, 19-03/13-5). Having said that, instead of imposing an administrative monetary fine, the Board addressed an opinion letter to the *çiğ köfte* producers pursuant to article 9/3 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) ordering them to cease any behaviour which may generate competition law infringements.



Gönenç Gürkaynak

gonenc.gurkaynak@elig.com

K Korhan Yıldırım

korhan.yildirim@elig.com

Çitlenbik Sokak No. 12
Yıldız Mahallesi Beşiktaş
34349 İstanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
www.elig.com

In a full-fledged investigation initiated against 16 freelance mechanical engineers on the allegation of forming a profit-sharing cartel, the Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel and thus violated article 4 of the Competition Law. Having said that, the leniency applicant received full immunity from fines, while also relieving one of the freelance mechanical engineers from an administrative monetary fine (14 December 2017, 17-41/640-279).

Finally, the Board has levied administrative monetary fines following an investigation launched against five undertakings and one association of the undertakings active in cabotage Ro-Ro transportation lines in Turkey (18 April 2019, 19-16/229-101). The Board concluded that Tramola Gemi İşletmeciliği ve Ticaret AŞ (Tramola), Kale Nakliyat Seyahat ve Turizm AŞ (Kale Nakliyat), İstanbullun Denizcilik Yatırım AŞ (İstanbullun), İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd Şti (İDN) and İstanbul Deniz Otobüsleri Sanayi ve Ticaret AŞ (İDO) violated article 4 of the Competition Law by way of collectively determining prices.

The Board imposed the following administrative monetary fines:

- 4 per cent of annual gross income on Tramola and İstanbullun;
- 0.1 per cent of annual gross income on İstanbullun, for submitting incomplete information to the Authority;
- 0.8 per cent of annual gross income on İDN and İDO; and
- 1.6 per cent of annual gross income on Kale Nakliyat, as the Board did not grant full immunity to the leniency applicant.

The total amount of the fines imposed to all of the undertakings was 7,404,850.77 Turkish liras.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 16 June 2020, the long-awaited and expected proposed amendments to the Competition Law passed through the parliament. They entered into force on 24 June 2020. According to the recital of the Amendment Proposal, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it

closer to European Union law. There are no further reviews or changes expected at this stage.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In order to fight the social and economic disruption of the covid-19 outbreak, on 17 April 2020, a new law entered into force, which amends the Law No. 6585 on Regulation of Retail Trade (Law No.6585). The amendment prohibits producers, suppliers and retailers from excessively increasing prices and engaging in any activity that will restrict consumers' access to products and distort competition, in particular conduct that obstructs consumers' access to products (regardless of the relevant company being dominant or not). An Unfair Price Assessment Board will be established to enforce these new prohibitions and impose administrative monetary fines in case of violations, which are also set by the new law. As the Law No.6585 concerns retailers, one can conclude that only excessive price increases and hoarding practices in relation to the retail market will be subject to Unfair Price Assessment Board's supervision. Therefore, all players in the retail market should follow the principles and procedures of the Unfair Price Assessment Board that will be announced with a secondary law.

Ukraine

Nataliia Isakhanova, Yuriy Prokopenko and Andrii Pylypenko

Sergii Koziakov & Partners

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The main domestic legislation regarding the protection of economic competition is as follows:

- the Constitution of Ukraine;
- the Economic Code of Ukraine;
- the Code of Ukraine of Administrative Offences;
- Law No. 3659-XII on the Antimonopoly Committee of Ukraine;
- Law No. 2210-III On Protection of Economic Competition;
- Law No. 236/96-BP On Protection Against Unfair Competition;
- Law No. 1197-VII On Public Procurements; and
- Law No. 1555-VII On State Aid to Undertakings.

A noteworthy detail is that Ukrainian competition law does not use the term 'cartels' but rather uses the 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, concerted actions imply concluding agreements in any form by undertakings, taking decisions in any form by associations and other concerted competitive behaviour (actions, inactivity) of undertakings.

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.

Relevant institutions

2 | 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 (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 the appropriate division of competences.

The main objectives, competencies, 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 to 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 the 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 any 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 on the relevant market.

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. These courts have the authority to review and scrutinise decisions of the AMCU in order to find breaches of the procedure or material law by the competition authority.

Changes

3 | 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 envisages a significant reduction of the amount of data and documents required under the simplified procedure and also that the list of documents and information to be submitted as part of an 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 of the Law On the Antimonopoly Committee of Ukraine came into force. These amendments deal with ensuring the rights of anti-cartel investigation participants to the 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 AMCU, which are recommended to its authorities in the process of determining the amount of 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 the case of illegal profit exceeding 10 per cent of the 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.

Substantive law

4 | 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 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 the 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).

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The law applies to any business entity that violates economic competition. Nevertheless, joint ventures and strategic alliances may not be considered as competitors if have specific contractual relations, purposes of creation that may fall within exemptions granted by the Antimonopoly Committee of Ukraine. 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 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.

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 the permission of the Cabinet of Ministers of Ukraine (CMU Regulation No. 219 as of 28 February 2002, last amended 17 July 2003).

In tenders carried out in Ukraine (including public procurements) a lot of companies join strategic partnerships or joint ventures by hiring each other with the purpose of participation at procurement where under qualification requirements allow such an option. In this case, it is obvious that such a cooperation alliance should be treated as one participant and not as the cartel distorting the procurement.

From another hand, joint ventures and strategic alliances may fall within the scope of cartels if their common activity and behaviour on the market have signs of distortion or restriction of competition that is subject of consideration by the Antimonopoly Committee of Ukraine.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The legislation on the 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, bodies of the Antimonopoly Committee of Ukraine may impose fines both on associations and economic entities: legal persons; natural persons; a group of economic entities being legal and (or) natural persons.

Hence, the legislation on competition shall apply to all undertakings in the meaning of article 1 of the Competition Law, including individuals. In addition, officials of undertakings may be subject to administrative responsibility under the Code of Administrative Offences of Ukraine.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

In conditions of internationalisation of economic links and restricting business practices, legislation on protection of economic competition in major countries of the world provides for an extraterritorial approach to the 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).

Export cartels

8 | 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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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 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 of 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).

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The Law of Ukraine 'On State Aid' says that state aid is forbidden as it distorts competition unless otherwise provided by this Law. The Law also defines the concept of 'state aid to economic entities' as support in any form provided to economic entities at the expense of state or local resources, which distorts or threatens to distort economic competition, creating advantages for the production of certain types of goods or the production of certain types of business activity.

State aid providers imply authorities, local governments, administrative and economic management and control bodies, as well as legal entities acting on their behalf, are authorised to dispose of state or local resources and initiate and provide state aid.

The Law specifies when the state aid is or may be declared eligible. Examples of such cases are:

- when the aid is of a social nature;
- the final beneficiaries are consumers;
- such aid is provided without discrimination as to the origin of the goods; and
- aid is provided to compensate for damage caused by emergencies of man-made or natural nature.

The state aid may be declared eligible in cases when:

- it promotes the socio-economic development of regions where living standards are low or unemployment is high;
- implements national development programs or solving social and economic problems of a national nature;
- promotes certain types of economic activity or certain economic spheres, or business entities in certain economic zones; and
- provides support for culture, creative industries, tourism and preservation of cultural heritage, if the impact of such state aid on competition is insignificant.

The Cabinet of Ministers of Ukraine determines the criteria for assessing the eligibility of certain categories of state aid.

INVESTIGATIONS

Steps in an investigation

11 | 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 Antimonopoly Committee of Ukraine (AMCU) of its decision; and
- execution of the decision.

Grounds for the commencement of an investigation

The AMCU may start 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 or bodies of administrative management and control, concerning violations of the legislation on the protection of economic competition; and
- under the AMCU's own initiative.

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 its information in the case to be held in confidence 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 forms 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

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.

Investigative powers of the authorities

12 | 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 the 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 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 the knowledge necessary for giving an expert opinion;
- to examine the office premises and transport of undertakings and legal entities, and remove or arrest articles, documents or other information media, which may be used as evidence or sources of evidence in the case;
- in cases of AMCU employees being prevented from exercising their powers, to engage police authorities for the 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 the 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

Inter-agency cooperation

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

Bilateral cooperation by the Antimonopoly Committee of Ukraine (AMCU) in the area of competition policy is based on principles of mutual confidence, a 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 include:

- the Memorandum on Cooperation in the sphere of competition policy between the AMCU and Competition Authority of Turkey as of 9 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 cases that go beyond the jurisdiction of domestic competition law.

Interplay between jurisdictions

14 | 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

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Upon receipt of parties' commentaries and objections, the Antimonopoly Committee of Ukraine (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.

Burden of proof

16 | 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 as relevant evidence when they find an infringement or lack thereof. These data may be obtained from different sources (eg, 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 exposes a link between cartel participants and proves the 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).

Circumstantial evidence

17 | 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 showing a 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.

To recognise collective actions as coordinated and violating anti-monopoly 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. The criteria for attributing collective actions to concerted actions and the delineation of agreements and concerted actions are quite vague in the Competition Law.

Appeal process

18 | 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 an 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 may uphold the decision, modify the decision, reverse the decision or make a new decision.

The decisions made by the AMCU may be modified, reversed or rendered invalid if:

- the AMCU fails to fully assess the facts that are relevant to the case;
- the AMCU fails to prove the facts relevant to the case and that it deems established;
- the findings of the AMCU's decision do not correspond to the facts of the case; or
- the findings of the AMCU's decision do not duly comply with or apply substantial or procedural legal provisions.

The plaintiff, defendant or third party may appeal a decision of the AMCU 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's actions in the administrative court.

SANCTIONS

Criminal sanctions

19 | 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 we expect to see the incorporation of relevant provisions into Ukrainian legislation soon.

Civil and administrative sanctions

20 | 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.

Guidelines for sanction levels

21 | 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. This 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 another enterprise, on which the defendant is economically dependent.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Legislation on the protection of economic competition does not envisage such an option.

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 another enterprise, on which the defendant is economically dependent.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Legislation on protection of economic competition does not envisage such an option, and this is usually to be decided by the business itself, especially now when it has internal compliance programmes. There is no criminal responsibility of individuals involved in cartel activity. Officials of undertakings may be subject to administrative responsibility under the Code of Administrative Offences of Ukraine, but this administrative responsibility does not envisage prohibiting them from serving as corporate directors or officers.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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.

Parallel proceedings

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

There is no criminal responsibility provided in Ukrainian legislation for anticompetitive concerted actions. Sanctions for violation of competition legislation 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 the said persons of the Code of Ukraine on administrative offences, but it does not refer to cartel regulation.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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. That means that 'umbrella purchaser claims' are generally allowed. Nevertheless, such an approach is comparatively new and is yet subject to consideration by the economic courts of Ukraine.

Class actions

27 | Are class actions possible? If so, 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

Immunity

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

Leniency programmes are allowed in Ukraine. A 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.

Subsequent cooperating parties

29 | Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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.

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.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

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 cooperate with the AMCU in the process of considering 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.

Approaching the authorities

31 | 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.

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.

Cooperation

32 | 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 that are seeking partial leniency?

The applicant is entitled to immunity (full release of liability) if, at the same time, it satisfies the two following conditions.

First, it voluntarily reports its participation in the anticompetitive concerted actions before other participants of anticompetitive concerted actions.

Second, it provides information essential to the decision in the case. Its amount and content have to prove 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, while 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.

Confidentiality

33 | 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.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 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.

Corporate defendant and employees

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

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.

Dealing with the enforcement agency

36 | 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 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.

DEFENDING A CASE

Disclosure

37 | 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.

Representing employees

38 | 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 or representation?

Ukrainian antitrust law does not provide for employee liability – the AMCU imposes fines directly on undertakings – therefore, there is no need for counsel to represent an undertaking and its employees as defendants.

Multiple corporate defendants

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

If counsel plans to represent multiple undertakings as defendants, there is a need to check for the presence of a conflict of interest between the clients.

Payment of penalties and legal costs

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

It is possible, but Ukrainian competition law does not provide for employee liability – the AMCU imposes fines directly on undertakings.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

The fine shall be paid from the undertaking's income that is subject to taxation. The fine is tax-deductible.

International double jeopardy

42 | 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.

Getting the fine down

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

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 another enterprise on which the defendant is economically dependent.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The Antimonopoly Committee has exposed a cartel conspiracy in a tender to select a contractor for the construction of facilities at the Chernobyl nuclear power plant and the Centralized Spent Fuel Storage Facility. Not for the first time, the violator of the competition legislation is the company from the orbit of the corporation UKRBUD LLC BC Ukrbudmontazh. Another participant in the conspiracy is PJSC Ukrenergomontazh.

When these anticompetitive concerted actions at construction works in Chernobyl were revealed the Antimonopoly Committee of Ukraine (AMCU) assessed the fine for participants in the amount of 117 million Ukrainian hryvnias. During 2017-2018, these companies participated in four procurement procedures totalling more than 1 billion hryvnias and won the three largest ones. The customers of the construction were the Chernobyl NPP and Energoatom. BC Ukrbudmontazh was fined 55 million hryvnias and PJSC Ukrenergomontazh was fined 62 million hryvnias. Both companies were also barred from participating in public procurement for three years.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Antimonopoly Committee of Ukraine has approved a new version of the amendments to the Law of Ukraine 'On State Aid to Business Entities'. The document is designed to implement the government's priority action plan, as well as within the priorities of the Committee's activities for 2020.

The Antimonopoly Committee of Ukraine has completed work on proposals for the draft law 'On Amendments to Certain Laws of Ukraine on Competition and Antitrust Reform' (No. 2730 of 14 January 2020), which was submitted to Ukraine's parliament by a number of deputies. The document should reform Ukrainian competition law in order to increase the efficiency of the Committee's work, bring it in line with rules in force in the European Union, and implement best practices from the EU and the United States.

Proposals for the draft law were developed with the participation of experts from the Twinning Project 'Support to the Antimonopoly Committee of Ukraine and agreed with US experts of the Competitive Markets project', funded by United States Agency for International Development.

At the first stage, changes to the legislation on protection of economic competition are proposed the following:

- definition of terms (business entity, control);
- concentration control;
- conducting inspections;
- establishing priority in the consideration of applications;
- release from liability, settlement in cases (leniency and settlement), compensation for damages;
- joint and several liability for the payment of fines; and
- financial independence, etc.

In the second stage of the reform, which is expected to occur during 2021 or 2022, changes will be proposed regarding:

- domination and abuse of monopoly position;
- institutional independence; and
- other issues.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In 2020, Ukraine imposed bans on the exports of personal protective equipment (PPE) and buckwheat.

From the 11 March 2020, the Cabinet of Ministers of Ukraine adopted a number of resolutions temporarily restricting the export of some anti-epidemic goods, namely:

- waterproof laboratory suits;
- gloves made of other polymeric materials;
- medical non-sterile non-nitrile nitrile gloves;
- nitrile gloves;
- disposable medical gowns;
- medical masks (surgical);
- goggles;
- protective face shields; and
- respirators of protection class not lower than FFP2.

These restrictions were caused solely by security measures to prevent the spread of covid-19 in Ukraine.

SERGII KOZIAKOV & PARTNERS

ATTORNEYS & COUNSELLORS AT LAW

Nataliia Isakhanova

n.isakhanova@kievbarrister.com

Yuriy Prokopenko

y.prokopenko@kievbarrister.com

Andrii Pylypenko

a.pylypenko@kievbarrister.com

Office 93
5/24 Irynynska Street
Kiev 01001
Ukraine
Tel: +380 44 590 4828
Fax: +380 44 590 4830
www.kievbarrister.com

This decision was undertaken to enable healthcare facilities and Ukrainian pharmaceutical manufacturers to undertake the necessary measures to prevent the introduction and spread of the acute respiratory disease covid-19 in Ukraine.

On 1 August 2020, the ban on the export of PPE expired and was not extended.

Thus, the government has moved from a reasonable ban on the export of certain goods in response to the covid-19 pandemic to monitoring international events caused by the pandemic.

It should be noted that on 27 May 2020, a government meeting approved a programme to stimulate the economy to overcome the effects of the covid-19 epidemic. The measures the programme proposes to implement include:

- promoting exports and facilitating access for enterprises to key raw materials;
- stimulating industrial production by increasing domestic demand through public procurement and protecting local producers; and
- ensuring uninterrupted sales of agricultural products and access of producers to markets.

It also proposes to effectively use the following trade defence measures:

- protection of national producers from acts of unfair and growing imports through the use of trade defence instruments;
- protection of national producers in the trade and economic sphere, including from protectionist policy measures of other states by prevention;
- liberalisation and elimination of trade barriers on Ukrainian goods in foreign markets; and
- protection of the rights and interests of Ukraine using World Trade Organization mechanisms and international agreements.

It is important to note that the implementation of some short-term initiatives in response to covid-19 to protect domestic producers through the use of trade defence instruments should also keep in mind the interests of other market participants and Ukraine's international economic interests.

Since the introduction of quarantine measures in Ukraine, the Antimonopoly Committee of Ukraine has paid special attention to compliance with competition law by manufacturers of medicines, antiseptics etc.

Thus, during the rapid spread of the coronavirus SARS-CoV-2, antiseptics, disinfectants and sanitisers have become a necessary commodity among the population. Unfortunately, some manufacturers resorted to unfair competition, exaggerating the properties of their products or attributing to them properties that are not confirmed in accordance with applicable law.

On 22 October, the AMCU recommended seven antiseptic manufacturers stop disseminating information that may be misleading, due to the way of presenting inaccurate, incomplete information in product labelling and inform consumers about the consumer properties of their own products in a way that will not be misleading.

These business entities were required to notify the Antimonopoly Committee of Ukraine of the results of their considerations of these recommendations within 10 days of receiving the notices.

United Kingdom

Elizabeth Morony, Samantha Ward, Ben Jasper and Alexandra Buckley

Clifford Chance

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartel conduct can lead to both civil and criminal enforcement in the United Kingdom. The civil offence is set out in Chapter I of the Competition Act 1998 (CA 1998) and article 101 of the Treaty on the Functioning of the European Union (TFEU) and prohibits certain conduct by undertakings. The Competition and Markets Authority (CMA) is required to enforce article 101 of the TFEU in UK competition matters under Council Regulation (EC) No. 1/2003.

The criminal offence, which applies to individuals, not undertakings, is set out in section 188 of the Enterprise Act 2002.

Relevant institutions

2 | 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 CMA investigates and enforces breaches of Chapter I of CA 1998 and article 101 of the TFEU. There are also certain sectoral regulators such as Ofgem (gas and electricity), the Financial Conduct Authority and the Payment Systems Regulator that have equivalent powers to the CMA to apply and enforce Chapter I of CA 1998 and article 101 of the TFEU for conduct that takes place in their respective sectors. The Competition Appeal Tribunal (CAT) hears appeals against cartel decisions taken by the CMA or sectoral regulators.

In England, Wales and Northern Ireland, the CMA and the Serious Fraud Office (SFO) prosecute the criminal offence under section 190(2) of the Enterprise Act 2002. The CMA can refer criminal cartel cases to the SFO, but will only do so if a case involves serious or complex fraud. To date, criminal prosecutions have only been pursued by the CMA. The criminal cartel offence is tried either before a jury in a Crown Court or before a magistrate.

In Scotland, the CMA and the Crown Office and Procurator Fiscal Service (COPFS) cooperate to enforce the criminal offence, with the COPFS bringing prosecutions.

Changes

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

Brexit

The United Kingdom formally left the European Union on 31 January 2020 and is currently in a transition period in which EU law continues to apply, until 31 December 2020.

Before its departure, the United Kingdom issued a series of statutory instruments that will bring an end to the direct jurisdiction of the EU's institutions in the United Kingdom at the end of the transition period. As a result, the European Commission will no longer enforce breaches of EU competition law in the United Kingdom unless they formally commence their investigation (issue a statement of objections) before 31 December 2020. Likewise, the CMA can only investigate breaches of article 101 of the TFEU until 31 December 2020 unless the relevant conduct occurred before that date. Investigations into conduct, which takes place from 1 January 2021, will be restricted to breaches of Chapter I of the Competition Act 1998.

Another change is that section 60 of the CA 1998, which requires UK competition law to be interpreted consistently with EU law, will be repealed. This will be replaced with a new section 60A of the CA 1998 from the end of the transition period, which requires UK competition authorities and courts or tribunals to ensure that UK competition law is interpreted consistently with EU law as at 31 December 2020, but allows the departure from EU case law and principles that predate the end of the transition period where it is considered appropriate in light of certain specified circumstances. Section 60A of the CA 1998 will apply from 1 January 2021 to all UK competition authority investigations. In October 2020, the draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 was updated to provide that both the UK Supreme Court and the Court of Appeal will be able to overturn established EU case law after the end of the transition period.

The EU Damages Directive

The EU Damages Directive was implemented in the United Kingdom on 9 March 2017 through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the Regulations). Schedule 1 of the Regulations introduces certain changes, which include:

- the granting of protection over leniency materials, settlement submissions and competition authorities' investigation materials (schedule 1, sections 28 and 29 of the Regulations);
- confirmation of the rebuttable presumption that cartels cause harm (schedule 1, section 13 of the Regulations); and
- benefits to immunity applicants in subsequent damages claims through exemption from the general rule that cartelists will be jointly and severally liable for harm caused by the cartel (schedule 1, section 15 of the Regulations) for conduct that has taken place wholly on or after 9 March 2017.

CMA guidance

Following a consultation process in August to September 2020, the CMA released updated guidance note Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (Investigation Procedures Guidance) regarding:

- investigation procedure: the Investigation Procedures Guidance provides further detail on commitments and the CMA's streamlined access to file approach;
- director disqualification orders: for example, the guidance clarifies that directors' written representations that relate to an investigation under the Company Directors Disqualification Act 1986 will only be disclosed to addressees of a statement of objections in exceptional circumstances;
- penalties: the draft penalty statement will now be sent at the same time as the statement of objections; and
- leniency: the CMA will not mention publicly whether any undertaking involved in a suspected cartel has applied for leniency at the opening of its investigation.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices, which:

- 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 (the Chapter I prohibition).

The Chapter I prohibition is based on article 101 of the TFEU. Currently, and until at least 31 December 2020, the Competition Act must be interpreted in line with EU law, meaning that the Chapter I prohibition and its exemptions closely follow EU law.

Chapter I provides a non-exhaustive list of prohibited conduct. This includes agreements to fix prices, limit or control production, markets, technical development or investment, and share markets or sources of supply. The Office of Fair Trading's applications for leniency and no-action in cartel cases guidance (which has been adopted by the CMA) states that by definition, cartel activities have as their object the prevention, restriction or distortion of competition and, therefore, there is no need to assess the effects of the cartel activity. The guidance also makes clear that cartel activity includes direct or indirect communication of specific, not publicly available, information regarding future pricing intentions between two or more competitors in a market.

An agreement may be exempt from the Chapter I prohibition if an undertaking can prove that the agreement improves production or distribution, promotes technical or economic progress and offers consumers a fair share of the resulting benefit (section 9 of the CA 1998). However, this is highly unlikely to be the case in relation to cartel activity.

The criminal cartel offence is a separate offence to the Chapter I prohibition that applies to individuals and not undertakings, and is set out in section 188 of the EA 2002. Section 188 of the EA 2002 relates only to horizontal agreements and provides that an individual is guilty of an offence if he or she 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 that involve direct and indirect price fixing, limitation of supply or production, market sharing and bid-rigging. This offence will be committed regardless of whether the agreement was implemented.

When considering whether to bring a prosecution under section 188 of the EA 2002, the CMA will follow the Code for Crown Prosecutors, which requires the CMA to consider whether a case has sufficient evidence for a realistic prospect of success. The CMA must then consider whether a prosecution is required in the public interest, taking into account factors such as the seriousness of the offence and whether prosecution is a proportionate response.

In April 2014, the scope of the criminal cartel offence was broadened with the removal of the requirement that an individual must

have acted dishonestly in agreeing to engage in cartel activity. Since April 2014, the CMA is only required to demonstrate that an individual intended to enter into, or operate, an agreement.

Section 188A of the EA 2002 states that an individual does not commit an offence in various circumstances including:

- if customers are provided with relevant information about the arrangements before they enter into an agreement for the supply of the affected product or service;
- in bid-rigging cases, if the person requesting bids is given relevant information about the arrangements at or before the time a bid is made; and
- if relevant information is published in a specified manner before the arrangements are implemented.

Section 188B of the EA 2002 provides three defences to the criminal cartel offence:

- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from customers at all times before they entered into agreements for the supply to them of the product or service;
- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from the CMA; or
- before the making of the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers to obtain advice about them before making or implementing them.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Section 22 of the EA 2002 provides that if a joint venture or strategic alliance constitutes a relevant merger situation under section 23 of the EA 2002, it must be notified to the CMA. The parties to a joint venture or a strategic alliance will need to determine whether they are in a relevant merger situation, and if so, notify the CMA on a voluntary basis. The CMA's Mergers: Guidance on the CMA's jurisdiction and procedure states that until a merger (or in this case, a joint venture) is completed, parties will still be subject to the Chapter I prohibition, and should ensure that they continue to operate as separate undertakings while the CMA considers approval of the arrangement.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Chapter I of the Competition Act 1998 (CA 1998) and article 101 of the Treaty on the Functioning of the European Union (TFEU) apply to undertakings that are broadly defined as any natural or legal person engaged in economic activity, regardless of its legal form or how it is financed. The Competition and Markets Authority (CMA) guidance as to the appropriate amount of a penalty confirms that this includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings, non-profit making organisations and in certain circumstances, public entities that offer goods or services on a given market.

The criminal cartel offence under the Enterprise Act 2002 (EA 2002) only applies to individuals.

Extraterritoriality

- 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Section 2(3) of the CA 1998 states that the prohibition in Chapter I of the CA 1998 (the Chapter I prohibition) governs agreements that are implemented or are intended to be implemented, in the United Kingdom. If an agreement is entered into outside of the United Kingdom, but implemented, or intended to be implemented in the United Kingdom, the Chapter I prohibition will apply. The qualified effects doctrine set out by the European Court of Justice in *Intel v Commission* [2017] Case C-413/14P provides that article 101 of the TFEU will apply not only to agreements implemented in the European Union but also to agreements that have immediate, substantial and foreseeable economic effects within the internal market.

Section 190(3) of the EA 2002 also states that the criminal offence will apply to agreements entered into outside the United Kingdom if the agreement, or part of the agreement, is implemented, or intended to be implemented, in the United Kingdom.

Export cartels

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

Under section 2(1)(a) of the CA 1998, Chapter I prohibition only applies to agreements if they affect trade within the United Kingdom. Section 190(3) of the EA 2002 requires that agreements must also be implemented, or intended to be implemented, in the United Kingdom.

Industry-specific provisions

- 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Agreements that are subject to exemptions under the Financial Services and Markets Act 2000 (schedule 2 of the CA 1998), the Broadcasting Act 1990 or the Communications Act 2003 (schedule 2 of the CA 1998) are excluded from the scope of the Chapter I prohibition. Agreements relating to the production or trade in an agricultural product are also excluded from the Chapter I prohibition (schedule 3 of the CA 1998).

There are no industry-specific defences or exemptions for the criminal cartel offence.

Government-approved conduct

- 10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no general defence or exemption, but if there are exceptional and compelling public policy reasons (schedule 1, section 7(1) of the CA 1998), a conflict with laws or international obligations (schedule 1, section 6(1) of the CA 1998), the Secretary of State can exclude a particular agreement from the scope of Chapter I. In May 2020, the Secretary of State issued five statutory instruments that grant exemptions to the Chapter I prohibition in response to the covid-19 pandemic. These exemptions were granted to address issues such as excess demand for groceries supplies, logistics services and healthcare, and excess supply in dairy farming and production and ferry services. There are limits to these exemptions. For example, the dairy exemption allows farmers and producers to share information on surpluses, stock and capacity (among other things) but does not permit them to share information on prices and costs.

INVESTIGATIONS

Steps in an investigation

- 11 | What are the typical steps in an investigation?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act Guidance.

Sources of the CMA's investigations

The CMA's Competition Act 1998 (CA 1998) guidance explains that the CMA obtains information from several sources that may result in it opening an investigation. These include:

- businesses that have been involved in a cartel (and want to take advantage of leniency);
- individuals with information about a cartel who apply for leniency;
- complaints from individuals or businesses;
- the CMA's own research; and
- evidence gathered through other CMA work (eg, mergers or market investigations).

Initial assessment phase

To open a formal investigation, section 25 of the CA 1998 requires that the CMA has reasonable grounds for suspecting that competition law has been breached. Generally, before the CMA forwards a case to its Enforcement Directorate, it is likely to request further information from parties on a voluntary basis. However, this is less likely in a suspected cartel case owing to concerns that this may prejudice the investigation.

Opening a formal investigation

If a complaint is likely to progress to a formal investigation, the case is allocated a designated case team responsible for the daily running of the case and a senior responsible officer who authorises the opening of a formal investigation and, where the senior responsible officer considers there is sufficient evidence, authorises a statement of objections.

After 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 investigating, the relevant legislation, the case-specific timetable, and contact details for the case team. The CMA will also generally publish a notice of investigation on its website at this point. However, in cartel investigations, the CMA is unlikely to include details of the investigation at this stage to avoid any impact on its ongoing investigation.

Investigative powers

The CMA has a range of powers under the CA 1998 to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach, criminal offences also apply where an individual interferes with the CMA's investigatory powers.

Investigation outcomes

CMA investigations can be resolved in several ways.

If the CMA considers that the case gives rise to competition concerns, instead of continuing its investigation, the CMA may accept commitments from businesses on future conduct. The CMA must be satisfied that the commitments offered to address its competition concerns.

The CMA can 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 businesses under

investigation an opportunity to make written and oral representations on the statement of objections, if the CMA still considers that there has been an infringement, the CMA can issue an infringement decision and impose fines or directions, or both, to end any ongoing anti-competitive conduct.

A case decision group will be appointed by the Case and Policy Committee if the CMA decides to issue a statement of objections. The General Counsel and Chief Economic Adviser will ensure that there has been a thorough review of the legal and economic analysis (and the supporting evidence) and will inform the case decision group of any significant legal risks or risks on the economic analysis. The case decision group will then decide whether, based on the facts and available evidence, the CMA can establish that the legal test under the Chapter I prohibition has been met. If a draft penalty statement has been issued, the case decision group will also decide whether a financial penalty should be imposed and the appropriate amount of that penalty.

The CMA can decide to close an investigation on grounds of administrative priorities. The CMA can also publish a reasoned no-grounds-for-action decision if it has not found sufficient evidence of an infringement of competition law.

Investigative powers of the authorities

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

The CMA has a range of powers under the CA 1998 to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach, criminal offences also apply where an individual interferes with the CMA's investigatory powers.

These powers include the following.

Written information requests

Under section 26(1) of the CA 1998, the CMA has the power to require any person to produce a specified document or to provide specified information, which the CMA considers relates to any matter relevant to the investigation. The CMA will send formal information requests in writing (a section 26 notice). This will indicate the subject matter and purpose of the CMA's investigation, specify or describe the documents or information, or both, that the CMA requires, and set out the offences or sanctions, or both, that may apply if the recipient does not comply.

The CMA may ask for documents such as internal business reports, copies of emails and other internal data. The definition of a document under section 59(1) of the CA 1998 also allows the CMA to ask for information that is not in written form (eg, market-share estimates based on knowledge or experience).

Power to require individuals to answer questions

Under section 26A(1) of the CA 1998, the CMA can require any individual who has a connection with a business that is a party to the investigation to answer questions on any matter relevant to the investigation after giving formal written notice. Section 26A(6)(a) of the CA 1998 provides that an individual is considered to have a connection with a business if he or she is or was:

- concerned in the management or control of the undertaking; or
- employed by, or otherwise working for, the undertaking.

This may be a current connection or a former connection, for example where the individual used to work for the undertaking under investigation (section 26A(6)(a) of the CA 1998).

The CMA's Competition Act Guidance states that it will give formal notice to anyone it wishes to interview, informing them that it intends to ask questions under formal powers. Where an individual has a current connection with the relevant undertaking at the time the formal notice is given, the CMA must also give a copy of the notice to that undertaking. The Guidance states that it will be generally inappropriate for a legal adviser who only represents the undertaking to attend this interview.

Power to enter premises (dawn raids with or without a warrant)

In some cases, the CMA will visit premises to obtain information. The CMA has separate powers under CA 1998 that allow it to enter premises with or without a warrant. The power that the CMA uses will depend on whether it intends to inspect business premises (eg, offices) or domestic premises (eg, employees' homes). The CMA can enter a business premise without a warrant but cannot enter domestic premises without one.

Power to enter premises without a warrant

Under section 27(1) of the CA 1998, any CMA officer who is authorised in writing by the CMA to do so has the power to enter business premises without a warrant. Section 27(2) of the CA 1998 requires that the investigating officer give the occupier of the premises written notice indicating the subject matter and purpose of the CMA's investigation, setting out the offences or sanctions, or both, that may apply if the recipient does not comply.

In certain circumstances, as set out in section 27(3) of the CA 1998, the CMA need not give advance notice of entry. For example, the CMA need not give advance notice if it has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that the CMA is investigating or a business whose conduct the CMA is investigating, or if a CMA-authorized officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to do so.

When an inspection without a warrant is being conducted, section 27(5) of the CA 1998 permits CMA officers to require any person to:

- produce any document that may be relevant to the CMA's investigation: CMA officers can take copies of, or extracts from, any document produced;
- explain any document produced; and
- tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

Power to enter premises with a warrant

The CMA can apply to the court for a warrant to enter and search business premises (section 28(1) of the CA 1998) or domestic premises (section 28A(1) of the CA 1998).

The CMA generally seeks warrants if it has concerns that information relevant to the investigation may be destroyed or otherwise interfered with if requested through a written request (sections 28(1)(b) and 28A(1)(b) of the CA 1998).

Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary but only if they are prevented from entering the premises (sections 28(2) and 28A(2) of the CA 1998). The CMA's Competition Act Guidance states that CMA officers cannot use force against any person.

The warrant also authorises CMA officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies or extracts from them (sections 28(2)(b) and 28A(2)(b) of the CA 1998). The CMA's Competition Act Guidance states that at the end of the inspection, the CMA officer will provide, where practicable, a list of documents and extracts that have been taken.

Criminal Cartel Offence

Under section 190(2) of the Enterprise Act 2002 (EA 2002), proceedings relating to the criminal cartel offence may only be instituted by

the Director of the Serious Fraud Office (SFO) (section 190(2)(a) of the EA 2002) or by, or with, the consent of the CMA (section 190(2)(b) of the EA 2002).

The CMA and SFO both have investigation powers relating to the criminal cartel offence. The CMA's powers are set out in sections 193 and 194 of the EA 2002, whereas the SFO's powers are set out in section 2 of the Criminal Justice Act 1987 (CJA 1987). The recent 2020 memorandum of understanding between the CMA and SFO sets out the presumption that if the SFO accepts a criminal cartel investigation, the powers under CJA 1987 will be used rather than those under EA 2002. In joint investigations, the SFO and CMA will consider which powers to use on a case-by-case basis.

Under section 193(1) of the EA 2002 and section 2(2) of the CJA 1987, the CMA and Director of the SFO respectively may require a person under investigation, and any other person whom they have reason to believe has relevant information to answer questions or provide information relevant to the investigation. Notice of this will be sent to the person under investigation in writing.

Under section 193(2) of the EA 2002 and section 2(3) of the CJA 1987, the CMA and the Director of the SFO respectively may require the person under investigation, or any other person, to produce specified documents that relate to the investigation. The CMA and Director of the SFO are permitted to take copies of documents, or require the person producing them to explain them (section 193(3)(a) of the EA 2002 and section 2(3)(a) of the CJA 1987). Under section 193(4) of the EA 2002 and section 2(3)(b) of the CJA 1987, if documents are not produced, the CMA or Director of the SFO can require the person who was ordered to produce them to state, to the best of their knowledge and belief, where the documents are.

Under section 194(1) of the EA 2002 and section 2(4) of the CJA 1987, the CMA and the Director of the SFO respectively have the power to request the grant of a warrant. This warrant is exercisable by any officer of the CMA (section 194(2) of the EA 2002) or any constable (section 2(5) of the CJA 1987) and enables them to enter premises using reasonable force, and to take possession of, or take steps to preserve, documents. Section 2(6) of the CJA 1987 states that a constable exercising a warrant under section 2(5) of the CJA will be accompanied by a member of the SFO or a person whom the Director has authorised.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Competition and Markets Authority (CMA) is currently a member of the European Competition Network (ECN), through which it cooperates with other member states' national competition authorities (NCAs). In particular, ECN guidance states that members:

- inform each other of new cases and envisaged infringement decisions;
- coordinate and assist with investigations; and
- exchange evidence and other information.

Absent any specific provisions in a future UK-EU trade agreement, the current cooperation with the ECN will cease when the transition period ends on 31 December 2020. Cooperation between the United Kingdom and other ECN members is expected to continue and could be documented in informally negotiated mutual assistance agreements.

The CMA also cooperates with non-ECN members and is permitted, under section 243(1) of the EA 2002, to disclose information to overseas authorities for certain purposes that include supporting overseas authorities with their cartel investigation (section 243(2) of the EA

2002). The CMA has stated that as part of its expanded role post-Brexit, it plans to enhance its relationships with other NCAs both closer to home and further afield. In September 2020, the CMA became a signatory to the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities that aims to improve inter-agency cooperation between five countries: Australia, Canada, New Zealand, the United Kingdom and the United States.

Interplay between jurisdictions

14 | 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?

Cartel conduct can infringe both the prohibition in Chapter I of the CA 1998 and article 101 of the Treaty on the Functioning of the European Union (TFEU) if it has an effect on trade within the United Kingdom, and an effect on trade between EU member states (under Regulation (EC) No. 1/2003). This requires that the CMA applies Chapter I of the CA 1998 and article 101 of the TFEU concurrently and meant that the CMA and the European Commission have historically referred cases to each other. Under the Brexit withdrawal agreement, the European Commission will continue to be competent for UK cartel cases involving other EU member states that it initiates before 31 December 2020 (ie, where a statement of objections was issued before that date). The CMA's guidance on the functions of the CMA after the end of the Transition Period states at paragraph 2.7 that after 31 December 2020, Regulation (EC) No. 1/2003 ceases to apply to the United Kingdom, at which point the European Commission will cease to be competent for any cases initiated after this date.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act Guidance.

In relation to the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 2002). The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's Cartel Offence Prosecution Guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Burden of proof

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

Regarding the prohibition in Chapter I of the Competition Act 1998 (CA 1998), in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (2002) CAT 1*, the Competition Appeal Tribunal (CAT) confirmed that the Office of Fair Trading (OFT) had the burden of proof in civil cartel cases. The standard of proof is the civil standard, so the Competition and Markets Authority (CMA) must prove its case on the balance of probabilities. In *Napp*, the CAT held that the OFT Director must satisfy the CAT that based on strong and compelling evidence, taking account of the seriousness of what is alleged, the infringement is duly proved. This approach was confirmed in *JJB Sports plc and Allsports Ltd v OFT [2004] CAT 17*. However, the CAT

held that 'strong and compelling' evidence should not be interpreted as meaning that something akin to the criminal standard applies to cartel proceedings.

Concerning the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 2002). The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's Cartel Offence Prosecution Guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Circumstantial evidence

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

In *Napp*, the CAT confirmed that the OFT was able to rely on inferences and presumptions about a certain set of facts (absent the existence of any contradictory facts) to discharge the burden of proof. In *JJB Sports plc and Allsports Ltd*, the CAT further confirmed that wholly circumstantial evidence could be sufficient to meet the required standard in certain circumstances.

Appeal process

18 | What is the appeal process?

The CAT hears appeals against decisions of the CMA and sectoral regulators. Appeals in the CAT are on the merits and heard before a tribunal consisting of three members: either the president or a chairman and two ordinary members. The chairmen are generally judges of the High Court of England and Wales (and the equivalent courts in Scotland and Northern Ireland), and other senior lawyers. The two ordinary members will likely be senior lawyers or economists, or those with expertise in business, accountancy or related fields.

To appeal a CMA or sectoral regulator's decision, an appellant must file a notice of appeal that must satisfy certain format requirements. The CAT registrar will send an acknowledgement of receipt to the appellant and a copy of the notice to the respondent. The registrar will then schedule a case management conference to discuss such items as timing, procedural issues, and whether and when the parties should file a disclosure report.

The notice of appeal must be filed by the appellant with the registrar within two months of being notified of the regulator's decision, under Rule 9 of the Competition Appeal Tribunal Rules 2015. These two months are counted from the day after the undertaking is notified of the regulator's decision. Rules 15(1) and 15(6) provide that a respondent must file the defence and its annexes within six weeks after the date it receives the notice of appeal. The CAT will only grant extensions to any of these deadlines in exceptional circumstances (see *Vodafone v Ofcom* [2008] CAT 4). Hearing dates will be fixed at a case management conference.

Appellants and the CMA also have a right to appeal CAT judgments either on a point of law or, in penalty cases, the amount of any penalty, with the permission of the CAT or the Court of Appeal.

SANCTIONS

Criminal sanctions

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

Criminal sanctions for individuals are set out under section 190 of the Enterprise Act (EA 2002) and include custodial sentences (including a term of up to five years) and fines.

The Competition and Markets Authority (CMA) has pursued only a handful of criminal convictions, with the most recent prosecution in 2017. All successful CMA criminal prosecutions detailed below related to conduct before April 2014, when the CMA was required to demonstrate that an individual acted dishonestly in agreeing to engage in cartel activity. The CMA is now only required to demonstrate that an individual intended to enter into or operate an agreement, making the requirements of section 188 of the EA 2002 easier for the CMA to satisfy.

There have been several successful criminal prosecutions. An individual was sentenced to two years (suspended), made the subject of a six-month curfew order and disqualified from acting as a company director in relation to the supply of precast concrete drainage products (2017). In relation to the supply of galvanised steel tanks (2015), three individuals were charged with one pleading guilty (receiving a suspended sentence of six months and 120 hours of community service) and two others being acquitted following a jury trial. In relation to the marine hose cartel (2008), three defendants were sentenced to terms of between two-and-a-half and three years in prison, disqualified from acting as directors for between five and seven years and, in some cases, ordered to pay costs.

The CMA has also pursued unsuccessful prosecutions. In 2010, four individuals involved in the airline passenger fuel surcharge cartel were charged under section 188 of the EA 2002, but proceedings were withdrawn one month into the criminal trial.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Civil sanctions for cartel activity include fines of up to a maximum of 10 per cent of the worldwide turnover of the undertaking. Following the CMA's 2019 concrete drainage products investigation, it issued total fines of £36 million to three undertakings, one of which received a £25.4 million fine. The CMA may also impose directions or a declaration that the agreements in question are void. Also, the CMA can apply to the High Court for a Competition Disqualification Order that can result in a director being disqualified for up to 15 years.

If an undertaking fails to comply with a CMA investigation order, the CMA can issue directions to ensure an undertaking's compliance with the relevant order.

Guidelines for sanction levels

21 | 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 CMA sets out its approach to penalties in its Penalty Guidance, which details its six-step approach to calculating financial penalties, namely:

- calculation of the starting point (of up to 30 per cent of the turnover in the relevant product market and the relevant geographic market in the last financial year preceding the date when the infringement ended) having regard to the seriousness of the infringement and for general deterrence;
- the starting point may be increased or, in certain circumstances, decreased to reflect the duration of the infringement. Typically, the starting point will be multiplied by the number of years (or part years) of an infringement;
- the penalty may then be adjusted based on aggravating or mitigating factors. Aggravating factors include continuing the infringing behaviour after the commencement of the CMA's investigation, whereas a mitigating factor may be an undertaking partaking in the infringement under severe duress or pressure;

- the penalty may next be adjusted for specific deterrence and proportionality (eg, the amount may be increased to discourage the undertaking from engaging in future breaches of competition law);
- the penalty will then be adjusted downwards if it exceeds the maximum penalty of 10 per cent of the worldwide turnover of the undertaking, and to avoid double jeopardy; and
- there may be discounts for leniency, settlement or the CMA's approval of a voluntary redress scheme or both.

Compliance programmes

- 22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CMA can issue discounts of up to 10 per cent (in the mitigating factors stage set out above) if an undertaking can demonstrate that it has taken adequate steps appropriate to the size of its business concerned to achieve a clear and unambiguous commitment to competition law compliance. In its penalty guidance, the CMA states that it will not issue discounts unless the undertaking can demonstrate that it has reviewed its compliance activities, and changed them to reflect the failings that led to the specific breach of competition law. Any compliance programme will also need to address competition law risk identification, risk assessment, risk mitigation and review activities. This might require an undertaking to make a public statement on its commitment to compliance, and submit enhanced reporting on its compliance activities to the CMA.

Director disqualification

- 23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

If a company has infringed Chapter I of the Competition Act 1998 (CA 1998), its directors can be disqualified for up to 15 years if they knew of, or ought to have known about, the arrangements. The CMA, and sectoral regulators, can either seek a competition disqualification order from the High Court (or Court of Session in Scotland or Northern Ireland High Court) or accept a competition disqualification undertaking from the director that has the same effect as a competition disqualification order. To date, the CMA has disqualified 19 directors primarily by way of competition disqualification undertakings.

Debarment

- 24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedure is not automatic; however, sections 57(8)(d) and 57(12) of the Public Contracts Regulations 2015 set out that a contracting authority has the discretion to exclude economic operators from procurement procedure for three years, from the date of the relevant event, if it has sufficiently plausible indications to conclude that the economic operator has entered into agreements aimed at distorting competition.

Parallel proceedings

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

Sanctions for criminal and civil activity can both be pursued for the same conduct; however, only undertakings can be pursued for breach of the prohibition in Chapter I of the CA 1998, and only individuals can be pursued under section 188 of the EA 2002.

PRIVATE RIGHTS OF ACTION

Private damage claims

- 26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of the prohibition under Chapter I of the Competition Act 1998 (CA 1998) or article 101 of the Treaty on the Functioning of the European Union (TFEU) has the standing to bring a claim in the High Court or the Competition Appeal Tribunal (CAT) (section 47A of the CA 1998), whether a direct or indirect purchaser. Claims can be brought on a follow-on basis after an infringement decision under Chapter I of the CA 1998 or article 101 of the TFEU has been issued, or on a stand-alone basis where no infringement decision has been issued.

Follow-on actions are based on the tort of breach of statutory duty, and damages are awarded on the tortious basis of the amount of the loss, plus interest. Defendants can use the passing-on defence, which allows damages suffered by the purchaser of a cartelised product to be reduced if the defendant can prove that the purchaser passed on the overcharge to his or her customers. For claims where the loss or damage suffered was wholly on or after 9 March 2017, under section 36 Competition Act 1998 and Other Enactments (Amendment) Regulations 2017, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was suffered before, there are circumstances in which exemplary damages may be awarded.

Costs generally follow the event, with the unsuccessful party paying the costs of the successful party (Part 44.2 of the Civil Procedure Rules). However, the CAT has a broader discretion in awarding costs and will consider a range of factors. Generally, a successful party is only likely to recover around two-thirds of its costs. The English courts have a wide discretion to order simple interest and have also awarded compound interest.

Class actions

- 27 | Are class actions possible? If so, 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 High Court

In the High Court, there is no equivalent in England and Wales of the US-style (opt-out) class-action procedure, nor is there a similar certification process. While it is possible to bring representative actions in the High Court, this is difficult to do. In *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch), the claimants attempted to bring a quasi-class action in the High Court. They alleged that they had paid inflated air-freight prices as a result of a price-fixing cartel to which

British Airways and other airlines were a party and claimed damages for themselves and other importers of cut flowers who they purported to represent. The claim was rejected at first instance, on the basis that the class of direct and indirect purchasers was too ill-defined, and the direct and indirect purchasers would not all benefit from the relief sought by the claimant because of the need for direct purchasers to pass on the overcharge to indirect purchasers for the latter to benefit from damages awarded. This decision was upheld by the Court of Appeal.

The Competition Appeal Tribunal

The Consumer Rights Act 2015 (CRA 2015) introduced collective actions in the CAT for both follow-on and stand-alone claims on an opt-in or an opt-out basis.

There is a certification process in the CAT. Under section 47B of the CA 1998 (as amended by the CRA 2015), any collective proceedings will only be continued if the CAT makes a collective proceedings order. It is possible to bring either opt-in or opt-out collective proceedings; that is, brought on behalf of each class member without specific consent unless a class member elects to opt-out by notifying the representative that his or her claim should not be included in the proceedings.

The CAT will make this order if the person bringing the proceedings is someone it could authorise to act as the representative and it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. The collective proceedings must:

- authorise the person who brought the proceedings to act as the representative;
- describe the class of persons whose claims are eligible for inclusion; and
- specify whether the proceedings are on an opt-in or an opt-out basis.

To date, no collective proceeding has been authorised by the CAT and there is an ongoing appeal before the Supreme Court in *Merricks v Mastercard* that is likely to resolve current uncertainty about the standard that claimants must meet to obtain a collective proceedings order.

COOPERATING PARTIES

Immunity

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

The Competition and Markets Authority (CMA) offers three types of leniency, based on the time at which an undertaking applies.

To be offered Type A or B leniency, an applicant must:

- accept that it participated in cartel activity in breach of the 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.

To be offered Type C leniency, an applicant must satisfy all the above conditions, except for the coercion requirement. Further detail on type A, B and C leniency are set out below.

Type A

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Subsequent cooperating parties

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

Type B and Type C leniency are available for parties that cooperate after an immunity application has been made.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or a penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Going in second

- 30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Parties that cooperate with the CMA after a leniency application has already been made may be eligible for Type C leniency. Type C applicants will be eligible for discretionary reductions in corporate penalties of between 25 to 50 per cent, discretionary criminal immunity to specific individuals and protection from director disqualification proceedings. The Leniency Guidance provides that once an applicant becomes eligible only for Type C leniency, their position in relation to other Type C applicants will not be decisive as to the level of discount they are awarded. However, it is likely that the further ahead in the queue an applicant is, the easier it will be to provide greater value to the CMA and receive a greater discount.

The CMA also offers leniency plus if an undertaking is cooperating with the CMA in relation to its cartel activity in one market, and chooses to cooperate with the CMA in relation to cartel activity in a second market, it can receive a larger reduction in financial penalties for its cartel activities in the first market.

Approaching the authorities

- 31 | 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 initiating or completing a leniency application; however, the CMA will not accept leniency applications from undertakings once it has issued a statement of objections in relation to the reported cartel activity. Also, if applicants would like to receive Type A leniency, they will need to approach the CMA before the CMA launches a Chapter I of the Competition Act 1998 (CA 1998) or article 101 of the Treaty on the Functioning of the European Union (TFEU) investigation, and before other members of the cartel approach the CMA.

Cooperation

- 32 | 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 that are seeking partial leniency?

The Leniency Guidance set out that applicants must first confirm their acceptance that their activity amounts to an infringement of Chapter I of the Competition Act 1998 and article 101 of the TFEU.

Once applicants have confirmed this, the Leniency Guidance emphasise that applicants must maintain continuous and complete cooperation with the CMA throughout the CMA's investigation and any subsequent proceedings brought by the CMA. If an applicant fails to cooperate with the CMA continuously, they could lose the protections offered to them. The CMA expects applicants to genuinely assist them in effectively investigating and taking enforcement action against the cartel conduct. This requires that applicants take such steps as providing the CMA with documents, and other evidence when they submit leniency applications.

Confidentiality

- 33 | 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 not generally disclose that an undertaking has made a leniency application until it issues its statement of objections.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 CMA has the discretion to offer an undertaking an opportunity to enter into a settlement process, on the condition that the undertaking admits that it breached the Chapter I of the Competition Act 1998 prohibition, ceases the infringing behaviour immediately from the date that it enters into settlement discussions with the CMA (where it has not already done so), and confirms it will pay a penalty set at a maximum amount. The undertaking must also confirm that, among other things, it accepts that there will be an infringement decision made against it and that the streamlined administrative procedure will govern the remainder of the CMA's investigation. An undertaking will still be able to appeal the CMA's infringement decision but if it does so, it will lose its settlement discount.

The amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

The CMA may, at its discretion, choose to accept commitments from an undertaking on its future conduct instead of proceeding with an investigation. These could be structural or behavioural, or a combination of both, but an undertaking's compliance with them must not be too difficult for the CMA to monitor. If commitments address all of the CMA's concerns, the CMA cannot proceed with the investigation. If the commitments only partially address the CMA's concerns, it can continue its investigation into the elements that have not been addressed.

Corporate defendant and employees

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

The CMA offers three types of leniency, based on the time at which an undertaking applies.

Type A

An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

The grant of any form of leniency or reductions in penalties to Type B applicants is always discretionary, but current and former employees who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Type C

The grant of any form of leniency or reductions in penalties to Type C applicants is always discretionary, but specific individuals who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Dealing with the enforcement agency

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

Before making a leniency application, an applicant or its legal adviser can phone the CMA's leniency enquiry line on a confidential basis to ascertain whether the CMA has an ongoing investigation or whether Type A immunity is, in principle, available. The legal adviser will need to provide certain details such as the relevant sector and dates to allow the CMA to check availability of Type A immunity.

Once the CMA officer has made the relevant internal enquiries, they will revert on the availability of Type A immunity. If Type A immunity is available, and the applicant wishes to proceed with its applications, the legal adviser will need to provide the applicant's identity to the CMA. At this point, the CMA will give the applicant a preliminary marker, while the applicant prepares its full leniency package. If Type A immunity is not available, the applicant should discuss with the CMA whether Type B leniency is available.

DEFENDING A CASE

Disclosure

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

The Competition and Markets Authority (CMA) offers addressees of the statement of objections and any draft penalty statement a reasonable opportunity to inspect the CMA's file. The CMA will generally provide addressees with copies of the documents referred to in the statement of objections and any draft penalty statement, and a schedule of documents that sets out all other documents in the CMA's file.

The CMA has made changes to its disclosure process, as reflected in its updated Investigation Procedures Guidance, including a new streamlined access-to-file approach whereby parties are provided with the key documents referred to in the statement of objections and a schedule of other, non-key documents on the file. Addressees can request to inspect the additional documents set out in this schedule, and the CMA will deal with these requests on a case-by-case basis. Where the CMA agrees to disclose these documents, it will likely use a confidentiality ring or data room to facilitate disclosure.

The CMA generally provides addressees with the same time to review the file as to submit its written representations in response to the statement of objections and any draft penalty statement (which will be up to a maximum of 12 weeks).

Representing employees

38 | 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 or representation?

There are no restrictions on counsel representing employees under investigation in addition to the corporation that employs them unless there is a conflict of interest. However, in the Investigations Procedure Guidance, the CMA states that its starting position is that it will be generally inappropriate for an undertaking's legal adviser to attend

interviews that it conducts under its powers under section 26 of the Competition Act 1998.

Multiple corporate defendants

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

While there are no restrictions on lawyers representing multiple corporate defendants, there is a risk that conflicts of interest may arise and corporate defendants will usually each have their own, independent representatives.

Payment of penalties and legal costs

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

There are no blanket restrictions prohibiting a company from paying a civil penalty, or any associated legal costs imposed on an employee.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or penalties imposed by the CMA are not tax-deductible on the basis that they are incurred as a result of an undertaking's breach of the law (see *CIR v Alexander von Glehn Ltd* [1920]).

A private damages settlement payment may be tax-deductible if an allegation is neither admitted nor proved. Tax deductions for private damages are not permitted where a payment is punitive but may be permitted where a payment is restitutionary.

International double jeopardy

42 | 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?

If a penalty or fine has been imposed by the European Commission, or by a court or other body in another EU member state in respect of an agreement or conduct, the CMA's Penalty Guidance states that the CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.

Getting the fine down

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

The CMA can issue discounts of up to 10 per cent if an undertaking can demonstrate that it has taken adequate steps appropriate to the size of its business concerned to achieve a clear and unambiguous commitment to competition law compliance. In its penalty guidance, the CMA states that it will not issue discounts unless the undertaking can demonstrate that it has reviewed its compliance activities, and changed them to reflect the failings that led to the specific breach of competition law. Any compliance programme will also need to address competition law risk identification, risk assessment, risk mitigation and review activities. This might require an undertaking to make a public statement on its commitment to compliance, and submit enhanced reporting on its compliance activities to the CMA.

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties

and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Regarding settlements, the amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Nortriptyline

The Competition and Markets Authority (CMA) made its first application to the High Court for a competition disqualification order in the *Competition and Markets Authority v Michael Christopher Martin*, in which it was successful. Martin was not directly involved in meetings with the other undertakings but was aware of the cartel agreement and took no steps to stop the conduct. The High Court described this as a middle bracket serious case and disqualified Martin for seven years.

Fludrocortisone acetate tablets

In July 2020, the CMA issued a decision imposing fines on suppliers of fludrocortisone acetate tablets for breaching the prohibition in Chapter I of the Competition Act 1998. All three companies admitted breaching competition law and were fined £2.3 million in total. In June 2020, the CMA successfully secured a binding disqualification undertaking from one of the directors involved in the cartel.

Online resale price maintenance in the music industry

In 2020, the CMA issued four separate decisions regarding online retail price maintenance within the music industry (regarding guitars, synthesisers, electronic drums, digital pianos and keyboards). The CMA found that in the four separate cases, the companies had entered into or participated in a concerted practice whereby they instructed resellers not to sell their products below a minimum price point. The fines issued by the CMA totalled more than £10 million.

Residential estate agency services

In December 2019, the CMA issued a decision finding that estate agents in the Berkshire area had agreed to fix and maintain a minimum level of

CLIFFORD CHANCE

Elizabeth Morony

elizabeth.morony@cliffordchance.com

Samantha Ward

samantha.ward@cliffordchance.com

Ben Jasper

ben.jasper@cliffordchance.com

Alex Buckley

alex.buckley@cliffordchance.com

10 Upper Bank Street
London
E14 5JJ
United Kingdom
Tel: +44 207 006 1000
Fax: +44 207 006 5555
www.cliffordchance.com

commission fees. Fines totalling £605,519 were imposed on the participating companies. One company (the Romans Group) was not fined because it was the first company to come forward under the CMA's leniency programme.

Precast concrete drainage

In October 2019, the CMA issued a decision finding that 3 suppliers of pre-cast concrete drainage products had infringed Chapter I of the Competition Act (and EU competition law) by agreeing to fix or coordinate their prices, share the market by allocating customers and regularly exchanging competitively sensitive information. The firms were fined more than £36 million.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Brexit

The United Kingdom formally left the European Union on 31 January 2020 and is currently in a transition period, during which EU law continues to apply, until 31 December 2020.

The EU Damages Directive

The EU Damages Directive was implemented in the United Kingdom on 9 March 2017 through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

CMA guidance

Following a consultation process in August to September 2020, the CMA released updated guidance note Guidance on the CMA's investigation procedures in Competition Act 1998 cases.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

In March 2020, the CMA launched its COVID-19 Taskforce to identify, monitor and respond to competition and consumer problems arising from the covid-19 pandemic and the measures taken by the government to contain it. The CMA's Guidance: CMA COVID-19 taskforce makes clear that the COVID-19 Taskforce was intended to:

- scrutinise market developments to identify harmful sales and pricing practices as they emerged;
- warn firms suspected of exploiting these exceptional circumstances through unjustifiable prices or misleading claims;
- take enforcement action if there is evidence that firms may have breached competition or consumer protection law and they fail to respond to warnings;
- equip the CMA to advise the government on emergency legislation if there is a negative impact on people that cannot be addressed through existing powers; and
- enable the CMA to advise the government on how to ensure competition law does not stand in the way of legitimate measures that protect public health and support the supply of essential goods and services. It will also advise on further policy and legislative measures to ensure markets function as well as possible in the coming months.

United States

Steven E Bizar and Julia Chapman

Dechert LLP

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | 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. Also, 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 substantially prohibit the same conduct as their federal counterparts and, depending on the state, may provide for criminal and civil enforcement.

Relevant institutions

2 | 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 (DOJ), Antitrust Division has the power to investigate and to civilly and criminally prosecute cartel activity in the federal courts. The FTC enforces the FTC Act but only has civil enforcement powers in FTC administrative proceedings or federal court. Private plaintiffs may also sue in a 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.

Changes

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

Not applicable.

Substantive law

4 | 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:

- an agreement;
- between two or more competitors;
- that restrains trade; and
- that affects either domestic (interstate) commerce or import commerce.

In the absence of an agreement, unilateral conduct does not violate section 1 of the Sherman Act (although 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 a 'conscious commitment' (*In re Chocolate Confectionary Antitrust Litigation*, 801 F3d 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 F3d 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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and other competitor collaborations may be subject to scrutiny under the antitrust laws just like any agreement among otherwise independent firms. To avoid per se treatment, courts have held that the economic resources of the parties must be integrated so that, effectively, the joint venture amounts to a single entity. It is not enough simply to characterise an agreement among competitors as a joint venture; courts have held joint venture agreements to be per se unlawful where the agreement was nothing more than a price-fixing device. By contrast, a joint venture agreement is not per se unlawful under section 1 if it 'holds the promise of increasing a firm's efficiency and enabling it to compete more effectively' (*Copperweld Corp v Independence Tube Corp*, 467 US 752, 768 (1984)). Importantly, not every joint venture agreement raises competitive issues (eg, if the participants are not competitors), and a legitimate collaboration can violate the antitrust laws.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Both individuals and corporations (as well as partnerships and other business entities) are subject to the antitrust laws. Criminal enforcement actions may be brought against corporations and individuals. Civil enforcement actions (both government and private) typically are brought against corporations but may also be brought against individuals. Likewise, non-profit entities are subject to the antitrust laws.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into 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-prong 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. The 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 F3d 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 F3d 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)).

The 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 F3d 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 Department of Justice have interpreted directness more broadly, applying a 'proximate cause' standard. See *Minn-Chem, Inc v Agrium, Inc*, 683 F3d 845, 859-61 (7th Cir 2012) (en banc); *Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816, 817-20 (7th Cir 2015); and *Lotes Co v Hon Hai Precision Indus Co*, 753 F3d 395, 410 (2d Cir 2014). While these standards are different, these differences may be of little practical distinction in most cases.

The 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 F3d 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 F3d 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.

Export cartels

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

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.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

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 1011 et seq) is one example of such legislation, exempting state law-regulated insurance business that does not involve any agreement to 'boycott, coerce, or intimidate'. The 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

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 under state policy and is subject to state supervision.

Other exemptions and immunities 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.

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.

INVESTIGATIONS

Steps in an investigation

11 | 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. 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 under the Hart-Scott-Rodino Act.

In a criminal investigation, the Department of Justice (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 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. 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.

Before the 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, although 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 Federal Trade Commission (FTC)) or an FTC administrative proceeding before an administrative law judge.

Cartel investigations, either civil or criminal, follow no set timeline and may linger for several years before proceeding to any enforcement action or termination.

Investigative powers of the authorities

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

The antitrust enforcement agencies have far-reaching, although not unlimited, investigative powers. 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 United States. Also, upon a finding of probable cause by a federal judge, the DOJ may obtain warrants permitting it, through the Federal Bureau of Investigation, 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 United States, the agency may initiate a border watch. If an individual on a border-watch list were to voluntarily enter the United States, 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 United States and is not detained, the DOJ's practise 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 are often unaware of their rights making resisting the pressure exerted by the authorities in these situations 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, therefore, should carefully consider the circumstances under which executives may travel to the United States.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

US antitrust agencies routinely cooperate with their counterparts in the European Commission and elsewhere around the world. 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, under bilateral mutual legal assistance treaties (MLATs), US agencies share information with foreign counterparts. The United States 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. Under these MLATs, investigators may exchange evidence, where possible under law, and theories of the case.

In addition to MLATs, the United States 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 United States has entered into ACAs with, among others, Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The Department of Justice (DOJ) and the Federal Trade Commission have bilateral MOUs with corresponding agencies in China, India and Russia, which serve a similar function to the ACAs.

The United States and the individual agencies participate in several 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.

Interplay between jurisdictions

14 | 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 United States has entered into MLATS, ACAs or MOUs.

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 United States 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 those 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

Decisions

15 | 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 Federal Trade Commission 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 before trial by way of a plea agreement. In the civil context, nearly all litigations are resolved by way of a dispositive motion or by way of settlement.

Burden of proof

16 | 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.

Circumstantial evidence

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

In the criminal context, the Department of Justice'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.

Appeal process

18 | 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, a 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 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

Criminal sanctions

19 | 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, imprisonment. 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 imprisonment. 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 above 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.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Department of Justice (DOJ) may seek equitable injunctive remedies for cartel activity via civil actions (15 USC section 4) but has no power to seek civil fines. The DOJ may, however, seek civil damages in cases in which the US government is a victim of the conduct under section 4A of the Clayton Act. The DOJ's 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 Federal Trade Commission is similarly limited to equitable remedies, including injunctive relief and disgorgement.

Guidelines for sanction levels

21 | 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)), although '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 online from the US Sentencing Commission's website.

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 and 3C1). Concerning 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 cannot 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 the firm tolerated the activity, 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-bargaining process.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

In July 2019, the DOJ updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations to credit companies with effective compliance programmes. Specifically, the DOJ states that having an effective compliance programme can result in the DOJ recommending a fine reduction to the sentencing judge. The recommended fine may be within the range provided by the Guidelines or may be a downward departure from the Guidelines. The DOJ does not have a formula for determining what reduction if any, it will recommend.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The US antitrust laws do not subject individuals charged with or convicted of antitrust violations to orders prohibiting them from serving as corporate directors or officers. The Securities and Exchange Commission's regulations, however, do provide for disqualification of, among others, corporate directors or officers upon conviction of any felony or misdemeanour in connection with the purchase or sale of any security, which may be read to include antitrust violations tied to the purchase or sale of securities (Rule 262(a)(1), Rule 503(a)(1) of Regulation CF and Rule 506(d)(1)(i)). Equally significantly, in selecting directors and senior-level officers, corporations generally look for candidates with a strength of character, inquiring minds and a reputation for good judgement and wisdom. It is difficult to conceive of how a corporation could continue to rely on a director or officer who is subject to an order in a cartel case – that is, someone who had participated in cartel activities and either been convicted or is a cooperating witness – without exposing the corporation to liability or increased criticism from activist investors or corporate gadflies.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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 before 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 18 months (*ibid*).

Unless they have previously been convicted, contractors must receive notice and an opportunity to be heard before being debarred. Suspension requires notice but may be imposed before 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).

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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. That decision can be made before or during an investigation. 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

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 under 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 the standing; namely:

- the directness of the 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.

Purchasers that acquired the affected product from competitors of the cartel members who are not themselves members of the cartel do not have the standing to seek damages from cartel members on the theory that it was the cartel members conduct that allowed the non-cartel competitors to take advantage of the increased prices (an 'umbrella damages' theory).

As a practical matter, state-law claims brought as class actions will be consolidated into the federal multi-district litigation under 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 compensate 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.

Class actions

27 | Are class actions possible? If so, 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?

Most private civil antitrust lawsuits are brought as class actions under 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 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).

Also, 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 anti-trust 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 and factual evidence gleaned from discovery, often resulting in multi-day evidentiary hearings. See *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 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 corporations or individuals 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

Immunity

- 28 | **Is there an immunity programme? If so, 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 Department of Justice's (DOJ) 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 a 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. In October 2020, ACPERA's sunset provision was repealed and the act was reauthorised and signed into law.

To obtain leniency, an applicant must ordinarily be the first to report illegal activity to the government, before 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 on the DOJ's website.

Subsequent cooperating parties

- 29 | **Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, 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 Federal Sentencing Guidelines (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-bargaining 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 DPAs as a reward for their efforts in cooperating with the DOJ's investigation. NPAs remain a disfavoured approach for all but the 'first in' applicant; however, the DOJ recently updated their policies to allow prosecutors to grant DPAs (although not NPAs) to cooperating companies with effective compliance programmes (consistent with the DOJ's guidance on compliance programmes) in place. A compliance programme in and of itself does not guarantee a DPA, but an effective compliance programme will be taken into account when choosing whether to grant a DPA. NPAs and DPAs are more commonly granted to individuals who cooperate with the government's investigation, rather than corporations.

Going in second

- 30 | **How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?**

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.

There is no significance to being 'second in', although, generally, 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 concerning 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 antitrust violations but chose not to report them.

Approaching the authorities

- 31 | **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?**

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 time (often 30 days, although 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 of 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 (eg, jurisdictional or statute of limitations defences) 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.

Cooperation

32 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 that are seeking partial leniency?

Leniency recipients must cooperate fully and transparently with the DOJ's investigation in exchange for complete immunity. Also, 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 outlined in the plea agreement.

Confidentiality

33 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, the confidentiality of these materials will be determined on a document-by-document basis, although 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.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 the discretion to approve or modify such proposed agreements but usually defer to the DOJ's recommendation.

Corporate defendant and employees

35 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 the discretion to include 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 several targets of the investigation who may be indicted for wrongful conduct associated with the violations outlined in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, although 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.

Dealing with the enforcement agency

36 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 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.

DEFENDING A CASE

Disclosure

37 | 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)). Generally, the Department of Justice (DOJ) provides defendants with 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).

Representing employees

38 | 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 or representation?

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 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 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.

Multiple corporate defendants

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

It is generally inadvisable for the same 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 single litigation, because generally, these entities share a unity of interest, such unity is far murkier or non-existent in the case of unaffiliated cartel participants. In practice, these joint representations rarely occur. In the criminal context, joint representations may not satisfy the defendant's Sixth Amendment right to effective assistance of counsel. Different lawyers or teams of lawyers within a firm may sometimes represent different defendants in the same matter with appropriate disclosure and waivers.

Payment of penalties and legal costs

40 | 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.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

International double jeopardy

42 | 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 United States against a defendant against whom it obtained a judgment on the same facts in a foreign jurisdiction.

Getting the fine down**43 | What is the optimal way in which to get the fine down?**

Approaches for reducing fines vary from case to case and party to party. Until recently, the DOJ did not typically consider the presence of a pre-existing compliance programme to be a strong mitigating factor that would merit a significantly reduced fine. However, in July of 2019, the DOJ updated their 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations' to credit companies with effective compliance programmes. In addition to allowing for reduced sentencing, an effective compliance programme can lead to 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, although that decision may not always be advisable for all defendants. 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.

Generally, 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.

UPDATE AND TRENDS**Recent cases****44 | What were the key cases, judgments and other developments of the past year?**

In *Federal Trade Commission v Abbvie* (3d Cir. 2020), the Third Circuit Court of Appeals held that the Federal Trade Commission (FTC) lacked the authority to secure disgorgement of profits as a remedy in antitrust cases. Specifically, the Court found that section 13(d) of the Federal Trade Commission Act, which allows courts to 'enjoin' antitrust violations, does not create the authority to secure disgorgement.

Regime reviews and modifications**45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?**

Not applicable.

Coronavirus**46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?**

Efforts to respond to supply shocks or other consequences stemming from the covid-19 pandemic may give companies reason to collaborate with competitors in a way that benefits the public, but that simultaneously involves antitrust risk. To facilitate procompetitive collaborations that may be helpful to expand capacity, develop new products, or bring goods and services to individuals and communities, the Antitrust Division of the Department of Justice (DOJ) and the FTC jointly announced an

Dechert LLP

Steven E Bizar

steven.bizar@dechert.com

Julia Chapman

julia.chapman@dechert.com

Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
United States
Tel: +1 215 994 4000
Fax: +1 215 994 2222
www.dechert.com

expedited review process for proposed competitor collaborations related to covid-19. Examples of collaborative efforts that may not violate the antitrust laws, depending on the details of the proposal, include temporary combined production and distribution, shared equipment, medical supplies, raw materials, collaborative research and development and participation in joint purchasing arrangements. In their joint statement, the FTC and DOJ announced a new voluntary guidance review process for proposed collaborative efforts, and committed to respond within seven calendar days after receiving all necessary information for collaborations related to 'public health and safety'. Both the FTC and DOJ also committed to responding 'expeditiously' to all other covid-19 requests. Interested parties are required to explain how the collaboration is related to covid-19 and provide a detailed written proposal, which can be drafted with the assistance of antitrust counsel.

Despite this expedited review process, both the DOJ and FTC noted in their statement that they will pursue civil and criminal violations of the antitrust laws against individuals and businesses that are using the covid-19 pandemic as an opportunity to harm competition. For this reason, it is critical to obtain antitrust advice before attempting to collaborate with competitors.

Vietnam

Nguyen Anh Tuan, Tran Hai Think and Tran Hoang My

LNT & Partners

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Competition Law 2018, which came into force on 1 July 2019, is the primary legislation regulating cartel activities in Vietnam. Competition-related provisions and industry-specific infringements and exemptions can also be found in specialised instruments such as Insurance Business Law 2000, Telecommunications Law 2009, and the Law on Credit Institutions 2010.

The Penal Code 2015 (as amended) is the sole legislation governing criminal cartel offences.

Relevant institutions

2 | 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 Competition Commission (NCC) is Vietnam's principal competition watchdog. Under the purview of the Ministry of Industry and Trade, the NCC amalgamates the investigative and adjudicative functions formerly discharged by the Vietnam Competition and Consumer Authority (VCCA) and Vietnam Competition Council respectively. The NCC is in charge of administrative competition violations.

Criminal competition violations are investigated by the police, prosecuted by the procuracy (ie, public prosecutors) and adjudicated by the courts. There is no separate investigative body, tribunal or court dealing with criminal competition violations.

Changes

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

The most significant change is the Competition Law 2018, which introduces, among other things, a shift in regulatory approach from form-based to effect-based (ie, cartel violation is now assessed on the basis of its impact on competition rather than whether it falls within a statutorily prescribed list of prohibited conducts), a leniency policy, the NCC, and a new merger control regime.

The government recently unveiled Decree 35/2020/ND-CP, which provides for, among other matters, guidance on the substantial lessening of competition test (including safe harbours) and the competition proceedings (the Guiding Decree).

Another decree providing for the formal establishment of the NCC is expected to promulgate later this year, although the exact date is not publicly disclosed.

The Penal Code 2015 (as amended), which effectuated on 1 January 2018, is another noteworthy development because for the first time it criminalises certain cartels and imposes criminal liabilities on commercial entities.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The Competition Law 2018 provides for a non-exhaustive list of restrictive agreements, some of which are illegal per se and some subject to the substantial lessening of competition test (articles 11 and 12 respectively).

Accordingly, the following behaviour is strictly prohibited among horizontal and vertical cartels:

- bid rigging;
- restriction of non-cartel participants' market access or business development; and
- removal of non-cartel participants from the market.

The following behaviour is strictly prohibited among horizontal cartels and conditionally prohibited (ie, are only prohibited if they actually or potentially restrict competition) among vertical cartels:

- price-fixing;
- allocating market share or customers; and
- restricting output.

The following behaviour is conditionally prohibited among horizontal and vertical cartels:

- restrictions on research and development;
- agreements to impose certain contractual conditions on other businesses or forcing other businesses to accept obligations not directly related to the subject matter of the contract;
- agreements on refusal to deal;
- agreements to limit the upstream or downstream markets; and
- other restrictive agreements.

'Restrictive agreement' is defined as an agreement in any form which has or is capable of having a competition-restraining effect. As such, informal exchanges such as instant messages or verbal conversations can also be considered an agreement. Furthermore, information exchange is also forbidden if it enables undertakings to engage in anticompetitive conducts. The NCC may in practice rely on such form of agreement and other circumstantial evidence to ascertain a cartel violation.

As for conditionally prohibited cartels, the NCC will assess whether they cause or are capable of causing a significant competition-restraining impact on the basis of the factors stipulated in article 13.1 of the Competition Law 2018 and elaborated in article 11.2 of the Guiding Decree, namely:

- the individual and combined market share of the cartel participants;
- market barriers;
- restrictive impact on R&D or technological advance;
- impact on access to essential infrastructure;
- any increases in purchase prices or switching costs; and
- any control over sector-specific essentials.

Article 11.3 of the Guiding Decree provides for safe harbours on the basis of the market share of the involved undertakings. Accordingly, conditionally prohibited horizontal cartels will not be considered to have an actual or potential competition-restraining impact if the combined market share of the participants is less than 5 per cent. For vertical cartels, the threshold is if the individual market share of each cartel participant is less than 15 per cent.

The Competition Law 2018 also provides for exemptions in certain cases. In particular, except for bid rigging and the restrictive agreements on the removal of non-participants from the market or on the restriction of non-participants' market access or business development, illegal cartels are eligible for an exemption for a maximum of five years if they are beneficial to consumers and satisfy one of the conditions provided in article 14.1 of the Competition Law 2018.

Furthermore, as from 1 January 2018, under article 217 of the Penal Code 2015, the following cartels are criminally prosecutable if they generate an illegal gain of at least 500 million Vietnamese dong or cause another undertaking a loss of at least 1 billion dong:

- restriction of non-participants' market access or business development;
- removal of non-participants from the market; and
- the following horizontal cartels where the parties' combined market share totals at least 30 per cent:
 - price-fixing;
 - allocation of market or customers;
 - output restriction;
 - R&D restriction;
 - agreements to impose certain contractual conditions on other businesses; or
 - forcing other businesses to accept obligations not directly related to the subject matter of the contract.

Bid rigging is prosecutable under a separate provision (article 222 of Penal Code 2015) and only individuals can be held criminally liable.

Joint ventures and strategic alliances

- 5** | **To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?**

Restrictive agreements are broadly defined and include agreements of any kind that have (actual or potential) substantial competition-lessening impact. As such, joint ventures and strategic alliances may be caught by the Vietnamese cartel regime.

However, it is noteworthy that under Vietnamese competition law a joint venture which resulted in the creation of a new independent legal entity is deemed an economic concentration and thus will not be subject to cartel laws.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

- 6** | **Does the law apply to individuals, corporations and other entities?**

The Competition Law 2018 applies to 'undertakings', which is defined as organisations and sole proprietorships conducting business activities,

and include, among other things, public service companies and foreign businesses operating in Vietnam. When a person designated or approved by or otherwise acting on behalf or at the direction of a corporate entity commits an offence, only the corporate is held liable for administrative sanctions. For criminal sanctions, both individuals and corporates are independently criminally prosecutable.

Extraterritoriality

- 7** | **Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?**

Article 1 of the Competition Law 2018 widens the scope of governance. Accordingly, anticompetitive conduct outside of Vietnam will be caught if such conduct has an actual or potential competition-restraining impact on the domestic market. This is so irrespective of whether the foreign entity has a presence in Vietnam.

Export cartels

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

Export cartels which only affect the foreign markets are not subject to the Competition Law 2018 because the legislation only applies to cartels which cause or are capable of causing a restrictive impact on the Vietnamese market.

Industry-specific provisions

- 9** | **Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?**

Several pieces of industry-specific legislation, mainly in the banking and insurance sectors, do provide for industry-specific infringements and exemptions. article 14.2 of the Competition Law 2018 also recognises that industry-specific agreements are to be conducted in accordance with the relevant industry-specific legislation.

In particular, article 9.2 of the Law on Credit Institutions 2010 (as amended) prohibits anticompetitive conducts that are actually or potentially harmful to national monetary policies, the safety of the credit institution system, national interests or the lawful rights and interests of others. Horizontal and vertical cartels on market division and foreclosure are illegal per se under article 10.4 of the Insurance Business Law 2000 (as amended). Article 10.1 of the same however provides for exemptions for insurers and insurance brokers with respect to, among other things, reinsurance, co-insurance, loss assessment and information exchange for risk management.

Government-approved conduct

- 10** | **Is there a defence or exemption for state actions, government-approved activity or regulated conduct?**

According to article 8.1(a) of the Competition Law 2018, government-sanctioned or government-mandated actions are exempted from cartel regulation in declared states of emergency. It follows that during a declared emergency crisis cartels are permitted if approved by or formed at the request of the competent authority.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

A National Competition Commission (NCC) investigation can be initiated by whistle-blowers (via leniency programme), formal complaints from aggrieved parties, or information from third parties on the potential existence of a restrictive agreement.

In the event a party lodges a formal complaint, the NCC has seven working days from receipt of the complaint to assess its validity and completeness before notifying the complainant and defendant. Then within 15 calendar days of such notification, the NCC will assess the substantive content of the complaint to either formally launch an investigation or request the complainant to supplement further information.

Alternatively, the NCC can at its own initiative commence a competition probe within three years of the date on which the alleged cartel activity started if there are probable grounds to believe a cartel violation has been committed.

The time-limit for investigation is nine months for a typical cartel and one year for a complex case. During the course of the investigation, if there are indications of a criminal offence then the NCC shall transfer the file to the competent authority (or authorities).

Investigative powers of the authorities

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

The NCC is empowered to request information on the violation from relevant parties, collect information and conduct 'investigative measures' via its subordinate the Competition Investigation Agency, and request other competent authorities to temporarily seize evidence, facilities used to commit the violation, licences or practising certificates, search vehicles, objects or premises.

Neither the Competition Law 2018 nor the Guiding Decree elaborates on the meaning of 'investigative measures'. It is also understood that the Competition Investigation Agency may also cooperate with other competent authorities to conduct a dawn raid on suspected undertakings, although in practice the agency has never done so. Of note, court orders are not required to invoke these investigative actions and interim measures.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Vietnam Competition and Consumer Authority (VCCA) has engaged in various multilateral and bilateral cooperation programmes with international organisations and national competition watchdogs, ranging from International Competition Network, UNCTAD, to OECD and Japan Fair Trade Commission. For the time being, these programmes mainly focus on competition policymaking and enforcement experience.

Given the widened scope of the Competition Law 2018 to cover extraterritorial conduct, the National Competition Commission (NCC) is expected to continue and reinforce cooperation on areas such as consultation and information exchange with its overseas counterparts to detect, investigate and prosecute any potential cross-border infringements.

Most recently, VCCA officials participated in the 23rd and 24th ASEAN Experts Group on Competition and hosted the 20th meeting of the ASEAN Committee on Consumer Protection and Related Meetings in 2019.

Interplay between jurisdictions

14 | 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 authors have not observed any significant interplay with other jurisdiction in cross-border cases to date. Whether and to what extent interplay between jurisdictions affects the investigation remain to be seen.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Once the investigation is concluded, the National Competition Commission (NCC) chairperson must establish a council comprising of NCC members to decide on the case. The council may request the investigating body (ie, the Competition Investigation Agency) to conduct additional investigation for a maximum of 60 calendar days if the evidence is found insufficient to ascertain a cartel violation, or hold an investigative hearing if there is sufficient evidence; the hearing must be conducted in public unless the case involves sensitive matters such as state secret or trade secret. Within 60 calendar days of its establishment or receipt of the investigative report and conclusions on additional investigation, the council must decide whether to impose sanctions on and, where necessary, apply remedies to the parties concerned. This decision will be published on the NCC's website for 90 consecutive days from its effective date.

Burden of proof

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

The burden of proof lies with the NCC in administrative cases, or public prosecutors if the case is criminally prosecuted. If the offence is established, the onus will shift to the defendant to form a defence. The burden also falls on the undertaking seeking exemption under article 14 of the Competition Law 2018 to satisfy the provision.

Where the NCC has issued a decision on a competition case, the aggrieved party seeking to claim damages must establish that they in fact incurred a loss or damage and such loss or damage was caused by the illegal cartel activity. In the absence of such decision by the NCC, in addition to proving losses and causation, the claimant must also prove that the defendant engaged in an illegal cartel activity.

In respect of civil enforcement, the standard of proof is essentially balance of probabilities. In a criminal case, the standard of proof is more onerous, and the evidence must satisfy the definition provided in article 86 of the Criminal Code Procedure 2015. Vietnam's criminal justice system however does not have any equivalence to the 'beyond reasonable doubt' standard.

Circumstantial evidence

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

Given that direct evidence is not always available, especially when it comes to cartel activities, circumstantial evidence is usually acceptable to initiate an investigation into complaints by aggrieved parties or whistle-blowers. However, circumstantial evidence alone may not be sufficient to establish an offence in a criminal proceeding or to conclude that there exists an anticompetitive agreement prohibited by laws.

Appeal process

18 | What is the appeal process?

A party may appeal against a decision by the NCC following a two-phased process.

Administrative complaint

The first phase, the administrative complaint, unfolds as follows.

Within 30 calendar days from the date of receipt of a decision on the alleged infringement, any party dissatisfied with such decision, either in part or in whole, may lodge a complaint to the NCC's chairperson (complainant).

Within 10 calendar days of the date of receipt of such complaint, the NCC's chairperson must notify the complainant and concerned parties in writing of their decision whether to accept or refuse jurisdiction; in the event of refusal, a reason must be clearly stated.

Within five working days from the date of accepting jurisdiction, the NCC chairperson shall establish a complaint resolution council, which comprises of himself or herself and the remaining NCC members who did not sit in the council adjudicating the infringement.

Within 30 calendar days for normal cases or 45 calendar days for complex cases from the date of its establishment, the council must issue a decision resolving the complaint.

Administrative litigation

The second phase, the administrative litigation, commences when the appellant is still unsatisfied with the decision on resolution of the complaint and unfolds as follows:

Within 30 calendar days of receiving the complaint resolution decision, an unsatisfied undertaking shall file a lawsuit against a part or the whole of such decision at a competent administrative court.

Within three months (in normal cases) or four months (in complex cases) of acceptance, the court must issue the first instance judgment. The time-limit may be prolonged if the first instance stage is temporarily suspended, adjourned or otherwise delayed.

Any appeal must be made within 15 calendar days of pronouncement of the first instance decision.

Within three months (in normal cases) or five months (in complex cases) of acceptance, the court must issue the appellate judgment. Similarly, the time-limit may also be prolonged due to any suspension, adjournment or delay.

SANCTIONS

Criminal sanctions

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

With respect to criminally prosecutable cartels (except bid rigging), primary penalties vary depending on the severity of the behaviour and whether the violator is an individual (eg, executives of the undertaking participating in the illegal cartel) or corporate. Accordingly, if the cartel generates an illegal gain between 500 million and under 3 billion dong, or causes loss to a third party in the range of 1 billion to under 5 billion dong:

- individuals will be fined from 200 million to 1 billion dong, or subject to a non-custodial sentence of up to two years, or a prison sentence from three months to two years; and
- corporates will be fined from 1 billion to 3 billion dong.

If the illegal gain generated from, or loss caused by, the cartel exceeds the above thresholds, or if the cartel crosses either of the above thresholds and involves an exacerbating factor (ie, recidivism, implementing the cartel with sophisticated and elaborate means, or implementing the cartel in abuse of dominant or monopolistic position):

- individuals will be fined from 1 billion to 3 billion dong, or subject to a prison sentence from one year to five years; and
- corporates will be fined from 3 billion to 5 billion dong, or subject to suspension from six months to two years.

As a secondary sanction in combination with any of the above primary sanctions, individuals may also be fined from 50 million to 200 million dong or prohibited from holding a position or practising for one to five years. Corporates may be fined from 100 million to 500 million dong or prohibited from conducting certain business(es), or mobilising capital for one to three years.

With regard to bid rigging, an individual may be sentenced for up to 20 years and forbidden from holding a position or practising for up to five years or confiscated of part or all of their assets.

It is noteworthy that the leniency policy does not apply in case of criminal prosecution. Instead, a separate amnesty regime shall apply.

As of this writing, the authors are not aware of any criminally prosecuted cartels.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The main administrative sanction is monetary fine (except where the violator is a state agency, in which case the National Competition Commission (NCC) shall request the agency in question to cease the violation, take remedial actions and recompense).

The maximum fine is 10 per cent of the violator's total turnover in the previous year for prohibited horizontal cartels, and 5 per cent for unlawful vertical cartels. In any event, the imposed administrative fine cannot exceed the lowest level of criminal monetary fine.

In addition to fines, the NCC may impose supplementary penalties (eg, confiscation of illegal gains) on and/or take remedial measures (eg, removal of unlawful terms and conditions in agreements or commercial transactions) against the violators depending on the nature and severity of the breach.

The minimum fine for all types of prohibited cartels is 1 per cent the violator's total turnover.

Given that the current cartel regulation regime is in its early stage (Decree No. 75/2019/ND-CP on dealing with competition law violations only took effect from 1 December 2019), the authors have not observed any instance where a violator was fined under new regulations. As for the expired Competition Law 2004, there were only two cases in which several undertakings were found to have engaged in prohibited cartels. The first case, a pupil insurance cartel, resulted in no fine because all participants had prematurely terminated the price-fixing agreement while the other, a 19-participant car insurance cartel, was fined a total (including procedural fees) of 1.8 billion dong.

Guidelines for sanction levels

21 | 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?

Decree No. 75/2019/ND-CP provides for, among other things, general principles for the calculation of administrative fine as well as comprehensive lists of aggravating and mitigating factors.

For each of the aggravating or mitigating factors, the violator shall respectively be given a fine increase or reduction of no more than 15 per cent of the average of the fine range. The fine range for illegal horizontal cartels is 1 per cent to 10 per cent turnover, and 1 per cent to 5 per cent

for prohibited vertical cartels. The fine reduction or increase must not exceed the minimum or maximum level of fine.

Accordingly, a cartel participant may receive a fine reduction if they:

- prevent, mitigate or remedy inflicted damage;
- come forward, arduously assist with the investigation;
- are a first-time offender; or
- commit the offence under duress.

Factors already taken into account when applying the leniency policy are not considered mitigating factors for administrative sanction purposes.

By contrast, a cartel participant may receive a heavier administrative fine if they:

- are not a first-time offender;
- take advantage of situations of hardship (eg, war, natural disasters, pandemic) to commit the offence;
- continue the cartel despite cessation request from the authority; or
- commit the offence on a large scale (eg, in terms of volume or value of goods).

In respect of criminally prosecutable cartels, the Penal Code 2015 (as amended) also provides for sentencing principles. As a general rule, when deciding the sentence, the court shall consider the nature and severity of the offence as well as any mitigating or aggravating factors. For individuals, the court also considers the violator's personal background and character.

Accordingly, a cartel participant may receive a more lenient criminal sanction if they:

- prevent, mitigate or remedy inflicted damage;
- did not inflict considerable damage; or
- arduously assist with the detection and investigation of the crime.

In addition to the above factors, others may be taken into consideration depending on whether the violator is an individual or a corporate. In the former case, other relevant mitigating factors include the violator committed the offence under duress, turns themselves in, expresses a co-operative attitude or contrition, or makes atonement for their violation. On the other hand, a corporate violator may receive a lighter sanction if it has made considerable contributions to social welfare.

The list of mitigating factors applicable to criminal sanctions is not exhaustive. The court has considerable leeway to decide whether to accept other factors when deciding on a sentence.

As for aggravating factors, second-time offenders or dangerous recidivists will be subject to heavier sanctions. In addition, for individuals, abusing one's power or position to carry out the prohibited cartel is also an aggravating factor.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The mere existence of a compliance programme will not help reduce administrative fines because it is not a factor in the exhaustive list of mitigating factors. On the other hand, with regard to criminal sanctions, the court may take such programme into account when deciding the sentence. Considering that there has not been any instance where a competition violation is criminally prosecuted, this matter remains untested. In any case, an effective compliance policy may prove crucial for early detection of cartel activity, thereby putting an undertaking in a favourable position in the leniency application process or strengthening the undertaking's defensive strategy should a criminal prosecution be pursued.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Yes. Individuals found guilty of a criminally prosecutable cartel may, in addition to a pecuniary fine or prison sentence, also be prohibited from holding a position or practising for up to five years.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is available as a discretionary sanction in response to cartel infringements and depends on the nature and severity of the infringement. As such, the relevant decision-making authority varies.

The primary authority is the organisation or individual entitled to issue debarment decisions with respect to projects within their scope of management. The ministries, heads of ministerial-level agencies and chairpersons of provincial people's committees have the authority to, upon recommendation by such organisations or individuals, debar violators within their respective scope of management, or, in the case of the Ministry of Planning and Investment, nationwide.

The length of debarment ranges from six months to five years depending on the severity of the infringement.

Parallel proceedings

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

If the violation is criminally prosecutable, criminal penalties shall be pursued to the exclusion of administrative sanctions. Otherwise, if the violation does not meet the threshold for criminal prosecution, administrative sanctions shall apply.

In either case, a violator may in addition to criminal or administrative sanctions be held liable for damages pursued in a civil action.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The applicable laws, specifically the Competition Law 2018 and the Law on Protection of Consumer Rights 2010 (as amended), do not differentiate between direct and indirect purchasers. Likewise, the laws are also silent on passing on and double recovery issues. At this time, the authors are not aware of any private cartel damage claims in Vietnam. Therefore, it remains to be seen whether the courts would accept a passing on defence, whereby the defendants seek to prove that the claimants incurred no actual loss because they have passed it on to parties further down the supply chain (eg, end consumers) in the form of, for instance, price increases or reduction in discount rate.

The laws do not provide for double, treble, or any other forms of punitive or exemplary damages for that matter. On the other hand, cost

awards, which include attorney's fees and other reasonable expenses for preventing and alleviating damages (eg, interim measure charges, examining service fees, etc), can be recovered. In practice, it is usually subject to the court to determine whether expenses used to prevent and alleviate damage or loss are reasonable.

Class actions

27 | Are class actions possible? If so, 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 civil or commercial disputes are generally not available and often only allowed in certain limited cases such as labour or consumer protection issues.

In a consumer protection dispute, for instance, the Law on Protection of Consumer Rights 2010 (as amended) mandates that the Provincial Consumer Associations shall be in charge of filing the lawsuit either on behalf of the consumers to protect the latter's rights and interests or in their own name to protect public interests.

The Civil Procedure Code 2015 (as amended) also provides for a mechanism which arguably bears some resemblance to class action regimes. In particular, under article 42, the court may consolidate or merge similar cases (usually if they have the same defendant(s) or the same or similar legal relations) which it has already accepted into a single case for resolution provided that the merger and resolution of such cases adhere to the laws. How this mechanism works in practice, especially when there is a significant number of individual disputes, remains to be seen.

To the authors' knowledge, there has not been any competition law class action so far in Vietnam.

COOPERATING PARTIES

Immunity

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

The Competition Law 2018 provides for a leniency programme, under which co-conspirators participating in a cartel may turn themselves in and assist with a National Competition Commission (NCC) investigation in exchange for either full immunity from, or a reduction of, fines for breach of competition law which the NCC would have otherwise imposed on them. This is the first time the leniency programme is introduced.

As the Competition Law 2018 regulates individuals and corporates alike, either may apply for leniency and the policy applies to all leniency seekers in the same manner.

To qualify for leniency an applicant must:

- have partaken or is currently partaking in a cartel;
- voluntarily come forward before an investigation is launched;
- declare honestly and provide all evidence of the infringement which is significantly valuable to dismantle the cartel;
- cooperate fully with the competition authority during the investigation; and
- not be a ringleader or a coercer.

Furthermore, only three whistle-blowers are eligible for leniency, with the first entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine reduction respectively.

The leniency policy is only applicable to administrative sanctions and does not extend to criminal penalties. Instead, a separate amnesty mechanism under the Penal Code 2015 (as amended) is applied (the

word 'amnesty' is used when referring to the Penal Code leniency policy to avoid confusion).

Accordingly, amnesty may be available to individuals if they turn themselves in, cooperate with the investigation, inform on accomplices, make reparation or compensation for damage inflicted; and to corporates if they actively cooperate in the uncovering or investigation of the crime, make reparation or compensation for damage inflicted, proactively prevent or mitigate consequences.

A corporate may be exempt from criminal sanctions if it has fully remedied and compensated for all damage or loss inflicted. This exemption is however entirely at the court's discretion.

There is currently no official guideline on how the NCC shall implement the leniency policy. As such, many areas related to the leniency policy and the implementation thereof remain largely untested.

Subsequent cooperating parties

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

After the first whistle-blower came forward, only two subsequent cartel participants are eligible for a partial fine reduction. They are subject to similar eligibility requirements as the first whistle-blower, although the NCC may apply a higher threshold in assessing the overall value to the investigation of the evidence they provide.

Given the lack of official leniency guidelines, the NCC would have significant discretion in determining whether an undertaking qualifies for leniency.

Cartel participants not eligible for leniency policy can attempt to reduce the fine level by taking advantage of the mitigating factors stipulated in Decree 75/2019/ND-CP.

Going in second

30 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The first whistle-blower will be entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine reduction respectively. Other than the policies mentioned above, there is no 'immunity plus' or 'amnesty plus' option, nor a 'penalty plus' regime.

Approaching the authorities

31 | 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?

Given the limited scope of the leniency policy, applications should be filed as soon as possible before the NCC commences a cartel investigation, even if there is currently no formal marker system.

In practice, for various reasons applying for leniency is not always a viable option for undertakings. Deciding the best possible course of action would therefore require a pros-and-cons analysis and risk assessment. Factors to be considered include without limitation:

- the possibility of another member abandoning the cartel and coming forward first (ie, the 'race to the courthouse' effect); game theory is usually applied in this case;
- the risk of the competition watchdog already pursuing the conspiracy;
- the exposure of participants to antitrust probes in other jurisdictions (especially in case of a cross-border cartel); and

- the possibility and severity of the sanctions and remedies imposed, including criminal sanctions; for this particular factor, as the leniency policy does not extend to criminal sanctions, an undertaking should consider carefully if the cartel is criminally prosecutable.

Cooperation

- 32 | 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 that are seeking partial leniency?

The Competition Law 2018 is silent on the nature, level and timing of cooperation that is required of or expected from a leniency applicant. Although all applicants are subject to the same leniency conditions, the 'significant value' required of the provided evidence may arguably differ between the first whistle-blower and subsequent applicants. In particular, emphasis will be placed on the quality of evidence provided, that is, whether and the extent to which it can help discover, investigate, penalise and remedy the violation. Examples of evidence which may prove useful to the investigators include, for instance, a signed agreement or memorandum, an implicating email or instant message exchange between the cartel participants, or a voice recording or minutes of a discussion on competitively sensitive topics (eg, pricing scheme) between them.

Confidentiality

- 33 | 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 Law 2018 does not have any explicit provision on the confidentiality obligation in respect of leniency procedure. The Law however mandates that if requested the NCC must keep confidential the identity of and the information provided by the informant, be it an organisation or individual. The provision may be construed to encompass all leniency applicants.

Under article 25 of the Guiding Decree, all evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will be kept confidential if legitimately requested by the participant(s) in the competition legal proceedings. In addition, if necessary and at any stage facilitative to the cartel investigation, the NCC has the discretion to publicly disclose in whole or in part the evidence.

In light of the above, to ensure the confidentiality of commercially sensitive information, all leniency applicants should attach a written request for confidential treatment to their application and specify therein which information they wish to be kept confidential.

Settlements

- 34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 laws of Vietnam are silent on this issue. Article 86.2 of the Competition Law 2018, however, allows the investigating authority to stay an investigation if the complainant withdraws the file, and the respondent undertakes to cease the alleged violation and take remedial measures, and receives approval from the investigating authority. It is

unclear to whom should the respondent's undertakings be made, and what must be approved by the investigating authority.

Corporate defendant and employees

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

Current and former employees of a corporate entity which is granted leniency are often not subject to any administrative sanction unless such individuals attempted to hinder or misled the investigation. Criminal amnesty will be subject to criminal provisions.

Dealing with the enforcement agency

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

There is currently no provision on how a leniency application should be filed with the NCC. It would follow that an application filed by a legal representative of the undertaking or an authorised person (either an external counsel or employee) is acceptable.

It is unclear if a leniency application must be made formally in writing or can be otherwise (eg, orally or anonymously). However, given the local bureaucratic practice, the authors take the view that leniency application should be made formally in writing.

DEFENDING A CASE

Disclosure

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

All evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will only be kept confidential if legitimately requested by the relevant parties.

Representing employees

- 38 | 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 or representation?

A counsel may concurrently represent a corporate and its employees as long as no actual or potential conflict of interest arises.

Whether and when a present or former employee should seek an independent counsel is a matter between this individual and the lawyer; the NCC would not intervene in this regard.

Multiple corporate defendants

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

Multiple corporate defendants may be represented by the same counsel irrespective of their affiliation, if any, provided there is no actual or potential conflict of interest.

Payment of penalties and legal costs

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

As a general principle, any undertaking found to have committed a violation shall bear the legal consequences.

In practice, corporates might reimburse employees but such amount would not be treated as tax-deductible expenses.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties are not tax-deductible.

On the other hand, private damages awards, which are not considered non-deductible expenses under tax regulations, may be eligible for deduction if there is valid and accurate documentation.

For tax implications, seeking consultation from a tax specialist is advised.

International double jeopardy

42 | 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 Competition Law 2018 nor Decree No. 75/2019/ND-CP specifies rules on international double jeopardy for administrative sanctions or private damages awards.

Likewise, the Penal Code 2015 (as amended) is also silent on international double jeopardy in respect of criminal sanctions.

Getting the fine down

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

The best way to mitigate legal repercussions, in general, is through early cooperation with the authority in discovering or investigating the offence and through remedies and compensation. These actions will be considered by the authority when assessing either leniency application or mitigating factors under both administrative and criminal sanction regimes. Thus, even if leniency is not an option, a violator may nevertheless have their fine reduced by mitigating factors.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Since the National Competition Commission (NCC) has not been established, there is arguably lack of legal standing for the Vietnam Competition and Consumer Authority (VCCA) (ie, the competition authority under the former regime which is currently acting as a quasi-competition watchdog under the new regime) to investigate or handle cartel claims. Therefore, for the time being, the VCCA generally does not proactively enforce cartel cases. However, enforcement practice is expected to be more robust once the NCC is formally established.

The latest publicly known case handled by the competition regulator concerns a group of companies in the medical equipment sector. Specifically, the complainant, An Phu Trading and Medical JSC, lodged a complaint against Central Pharmaceutical 1 JSC (CPC 1) and Bbraun Vietnam Limited (Bbraun Vietnam) for refusing to provide them with the documentation necessary for their participation in a medical equipment tender solicited by a local health department. Given that the complainant was bidding with Bbraun-manufactured products, the health department required the complainant to submit a sale authorisation from Bbraun Vietnam and proof of collaboration between Bbraun Vietnam and CPC1. Bbraun Vietnam refused to provide the complainant with the former on the ground that it had issued one to the complainant's competitor,



Nguyen Anh Tuan

tuan.nguyen@lntpartners.com

Tran Hai Thinh

thinh.tran@lntpartners.com

Tran Hoang My

my.tran@lntpartners.com

Levels 18 and 21, Bitexco Financial Tower
2 Hai Trieu Street, District 1
Ho Chi Minh City
Vietnam
Tel: +84 28 3821 2357

Level 12, Pacific Place Building
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi
Vietnam
Tel: +84 24 3824 8522

Level 40, Ocean Financial Centre
10 Collyer Quay
Singapore 049315
Tel: +65 924 02947

www.lntpartners.com

while CPC 1 refused to provide the latter citing lack of Bbraun Vietnam's consent. Under these circumstances, the competition regulator initially took the view that the respondents' behaviour indicated a violation of the Competition Law 2018. However, when the regulator requested the parties to provide further information for the investigation, they all committed to 'permit [the complainant] to perform the awarded contract as per the bidding package', thereby effectively closing the case without any final decision or imposition of penalties.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The most anticipated development at the moment is the formal establishment of the new competition regulator, the NCC. With the new law effective recently and the new regulator to be established, the competition landscape in Vietnam is expected to see drastic changes in the coming years. In the past years, cartels were one of the most common violations detected and sanctioned by the competition authority. In the near future, with the removal of market share threshold for initiating a cartel probe and introduction of a leniency programme, the authors anticipate that cartel investigations and enforcement will be more vigorous.

Coronavirus

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

The initial government relief package does not cover competitor conduct but only provides for, among other things, financial aids in the forms of a 10 per cent cut in retail electricity tariff, capital support, deferment of payments of taxes and land rent. According to media reports, the proposed second aid package will focus more on financial support designed to stimulate aggregate demands. There is no indication that the government will encourage the formation of crisis cartels or similar conduct to dampen the socio-economic impact of the coronavirus pandemic.

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 chapter.

Argentina

Is the regime criminal, civil or administrative?	Administrative.
What is the maximum sanction?	200 million adjustable units (equivalent to 8.122 million Argentine pesos).
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	Yes, if they have effects in Argentina.

Australia

Is the regime criminal, civil or administrative?	The Australian competition law regime prohibits cartels under civil law and makes it a criminal offence for corporations and individuals to participate in a cartel (or attempt to do so).
What is the maximum sanction?	<p>For corporations:</p> <ul style="list-style-type: none"> • A\$10 million; • three times the total benefits that have been obtained and which are reasonably attributable to the conduct; or • where the benefits cannot be determined, 10 per cent of the corporate group's annual turnover in the preceding 12 months. <p>For individuals:</p> <ul style="list-style-type: none"> • up to 10 years in jail or fines of up to \$420 000 per criminal cartel offence or both; or • a pecuniary penalty of up to \$500 000 per civil contravention.
Are there immunity or leniency programmes?	Yes. The ACCC Immunity and Cooperation Policy sets out the policies of the Australian Competition and Consumer Commission (ACCC) in relation to applications for both civil and criminal immunity from ACCC-initiated civil proceedings and criminal prosecution.
Does the regime extend to conduct outside the jurisdiction?	<p>Where the cartel conduct occurs outside of Australia, the conduct only falls within the CCA if:</p> <ul style="list-style-type: none"> • it is carried on by: <ul style="list-style-type: none"> • companies carrying on business within Australia; • Australian citizens; or • persons ordinarily resident in Australia; and • the parties are in competition with each other in trade or commerce within Australia or between Australia and places outside Australia.

Austria

Is the regime criminal, civil or administrative?	Fines of the Cartel Court for cartel activities are usually considered sanctions within the meaning of criminal law due to the severe nature of the sanction (see also article 6 of the European Convention on Human Rights).
What is the maximum sanction?	The maximum fine that may be imposed for cartel activity based on the Austrian Cartel Act 2005 is 10 per cent of the undertaking's or association's previous financial year's aggregated turnover.
Are there immunity or leniency programmes?	Yes. Immunity or a reduction of fines imposed based on the Cartel Act is available, based on the provisions of the Austrian Competition Act 2002.
Does the regime extend to conduct outside the jurisdiction?	The Austrian cartel law regime extends to conduct outside Austria's jurisdiction if the conduct affects Austria.

Belgium	
Is the regime criminal, civil or administrative?	The regime is of administrative nature with civil liability. Individuals can be administratively prosecuted and sanctioned.
What is the maximum sanction?	Fines imposed on a company cannot exceed 10 per cent of the worldwide turnover. Fines imposed on individuals cannot exceed €10,000.
Are there immunity or leniency programmes?	Both immunity and leniency regimes are available for companies and individuals under Belgian law.
Does the regime extend to conduct outside the jurisdiction?	No, the immunity and leniency regimes are limited to the cartel's activities performed by the investigated undertaking in Belgium (cooperation with neighbouring countries is very advanced).
Brazil	
Is the regime criminal, civil or administrative?	A cartel is administratively (for companies, individuals and associations) and criminally (for individuals) prosecuted in Brazil. Companies and individuals are also liable for civil damages.
What is the maximum sanction?	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, a maximum administrative fine of 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, a maximum administrative fine of 2 billion reais. For individuals, the maximum criminal penalty is imprisonment of five years.
Are there immunity or leniency programmes?	Yes. The leniency agreement and TCC.
Does the regime extend to conduct outside the jurisdiction?	Yes. If the misconduct has direct or indirect effects in Brazil, even if potentially.
Canada	
Is the regime criminal, civil or administrative?	The regime has both criminal and civil/administrative provisions
What is the maximum sanction?	A price-fixing, customer/market allocation, or output restriction 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.
Are there immunity or leniency programmes?	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.
Does the regime extend to conduct outside the jurisdiction?	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.
Remarks	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?	The regime is civil and administrative.
What is the maximum sanction?	10 per cent of worldwide turnover plus confiscate the illegal income.
Are there immunity or leniency programmes?	Yes. There are leniency programmes.
Does the regime extend to conduct outside the jurisdiction?	Yes. The regime has extraterritorial jurisdiction.
Denmark	
Is the regime criminal, civil or administrative?	The regime is criminal. Private damage claims are possible through the criminal regime.
What is the maximum sanction?	Imprisonment may be imposed on individuals. The maximum term of imprisonment is one and a half years but may be increased up to six years in case of aggravating circumstances. Fines should not exceed 10 per cent of the legal undertaking's worldwide turnover.
Are there immunity or leniency programmes?	The Act provides for a leniency programme, which is comparable to the leniency programme set out under EU law.
Does the regime extend to conduct outside the jurisdiction?	The Act contains no extraterritoriality, except for section 29, which provides that the Act does not apply to the Faroe Islands and Greenland.

European Union

Is the regime criminal, civil or administrative?	The procedure before the EC is administrative. The EC enjoys wide powers of investigation (eg, to request information, take statements and conduct on-site inspections). If it establishes an infringement to competition law, it has the power to impose significant fines on undertakings. EC decisions may be appealed before EU courts.
What is the maximum sanction?	Pursuant to article 23(2) of Regulation No. 1/2003, the EC may impose fines of up to 10 per cent of an undertaking's total turnover in the business year preceding the decision.
Are there immunity or leniency programmes?	The EC's leniency programme is detailed in its 2006 guidelines. The first company that denounces the cartel and actively cooperates with the EC can be granted full immunity from a fine. Provided that they bring sufficient added value to the EC, other companies can then benefit from reductions of fines that range from 30 per cent to 50 per cent for the second company that denounces the infringement, 20 per cent to 30 per cent for the third company, and up to 20 per cent for subsequent ones.
Does the regime extend to conduct outside the jurisdiction?	The Commission's jurisdiction extends to conduct outside of the EU, provided that such conduct has an effect in the EU. In the context of a cartel with a global scope, the EC may decide to include in its calculation of the value of sales, sales made outside the EEA, if sales made within the EEA alone do not adequately reflect the weight of each participant in the infringement.
Remarks	The EC does not impose fine or criminal sanctions on individuals, but such penalties exist at the national level in several member states.

Finland

Is the regime criminal, civil or administrative?	The regime is administrative.
What is the maximum sanction?	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.
Are there immunity or leniency programmes?	Yes, there is immunity and leniency programmes largely harmonised with that of the Commission and the ECN.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct has effects in Finland.

France

Is the regime criminal, civil or administrative?	The regime is administrative and criminal.
What is the maximum sanction?	The FCA may impose fines of up to 10 per cent of an undertaking's total annual worldwide turnover.
Are there immunity or leniency programmes?	French law offers leniency programmes before the FCA. Total or partial immunity can be granted, but this does not prevent the applicant for leniency from facing payment of damages to the victims of the competition law breach.
Does the regime extend to conduct outside the jurisdiction?	French competition law applies to concerted actions, agreements, or alliances that have the objective to affect the French market or have an effect on the French market, regardless of the place where the companies involved have their headquarters and the conduct took place.

Germany

Is the regime criminal, civil or administrative?	Administrative.
What is the maximum sanction?	Fines imposed against natural persons are limited to €1 million. An undertaking can be fined up to 10 per cent of its total turnover in the business year preceding the competition authority's decision. The competition authority can also impose a fine on an association of undertakings of up to 10 per cent of the aggregate turnover of its members operating in the market affected by the infringement.
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	The GWB applies to all restraints of competition affecting the German market, even if they were caused outside the country by foreign undertakings.

Hong Kong

Is the regime criminal, civil or administrative?	Civil and prosecutorial regime. However, the criminal standard of proof (beyond a reasonable doubt) applies due to quasi-criminal nature of the proceedings.
What is the maximum sanction?	The pecuniary penalty is capped at 10 per cent of the group turnover in Hong Kong for each year of contravention, up to a maximum of three years.
Are there immunity or leniency programmes?	The Commission has leniency programmes for undertakings and individuals engaged in cartel conduct. Undertakings that do not qualify for leniency can cooperate with the Commission, which may recommend a cooperation discount of up to 50 per cent on the pecuniary penalty.
Does the regime extend to conduct outside the jurisdiction?	The regime applies to conduct outside Hong Kong so long as it has an impact in Hong Kong.
Remarks	Cartel conduct has been the focus of the Commission's enforcement. To date, all cases brought by the Commission to the Tribunal are against cartel conduct.

India	
Is the regime criminal, civil or administrative?	The regime is civil in nature.
What is the maximum sanction?	A penalty of up to three times the profit of the participating firm for each year of the continuance of the cartel or 10 per cent of its relevant turnover for each year of the continuance of the cartel, whichever is higher, can be imposed.
Are there immunity or leniency programmes?	A leniency programme is available in terms of the Competition Commission of India (Lesser Penalty) Regulations 2009, read with section 46 of the Competition Act 2002.
Does the regime extend to conduct outside the jurisdiction?	The regime extends to conduct outside India if such conduct has an appreciable adverse effect on competition in India.
Remarks	The development of competition law jurisprudence in India is still in its infancy. Several cases that are likely to have bearing on important aspects of the procedural law as well as the substantive law as interpreted by the CCI are still pending before the first appellate forum (ie, the NCLAT) or the Supreme Court (ie, the second and the final appellate forum) for adjudication.
Japan	
Is the regime criminal, civil or administrative?	Administrative, criminal and includes civil (private action).
What is the maximum sanction?	Criminal: servitude 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 goods/services over the cartel period up to the previous three years. Civil: the amount of damage; no triple damage.
Are there immunity or leniency programmes?	Yes, effective 4 January 2006. Amended as of 1 January 2010. A further amendment is expected upon the amendment of the Antimonopoly Law effective sometime in 2019 or 2020.
Does the regime extend to conduct outside the jurisdiction?	Yes, the Japan Fair Trade Commission may challenge conduct affecting the Japanese market.
Remarks	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.
Korea	
Is the regime criminal, civil or administrative?	Administrative and criminal, with civil damages actions available.
What is the maximum sanction?	Ten per cent of relevant 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 of three years for individuals.
Are there immunity or leniency programmes?	Yes, the programme is fairly effective.
Does the regime extend to conduct outside the jurisdiction?	Yes, if the conduct has an effect on the Korean market.
Remarks	Strengthening enforcement with high administrative fines and increasingly frequent criminal prosecutions.
Malaysia	
Is the regime criminal, civil or administrative?	Civil, however, obstructing MyCC's investigation may lead to criminal sanctions.
What is the maximum sanction?	10 per cent of the worldwide turnover of the enterprise over the period of the infringement.
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	Yes.

Mexico

Is the regime criminal, civil or administrative?	The regime is administrative, criminal and civil. Administrative sanctions are imposed by the Federal Economic Competition Commission (COFECE). Criminal sanctions are imposed by criminal courts. Compensation for damages is awarded by federal specialised courts in competition, broadcasting and telecommunications.
What is the maximum sanction?	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, respectively, fines of approximately 18 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. In cases of recidivism, the COFECE 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.
Are there immunity or leniency programmes?	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 reach civil liability for monetary damages.
Does the regime extend to conduct outside the jurisdiction?	Cartel conduct performed abroad will be sanctioned by the COFECE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by the COFECE as indicia of the extensive effects of the practice in Mexico's national territory.
Remarks	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 Federal Telecommunications Institute issued new regulations of the LFCE, regarding broadcasting and telecommunications industries. In June 2015, the COFECE 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 September 2016, the IFT published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to a public inquiry. In January 2017, the IFT published the Guidelines on the Immunity and Reduction of Sanctions Programme.

Portugal

Is the regime criminal, civil or administrative?	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 (Law No. 23/18 of 5 June) and the general principles of civil liability.
What is the maximum sanction?	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.
Are there immunity or leniency programmes?	Yes. The programme provides for full immunity or reduction of the fines that would apply to the infringement.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct produces effects within Portugal.
Remarks	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.

Singapore

Is the regime criminal, civil or administrative?	The competition law regime in Singapore is administrative in nature.
What is the maximum sanction?	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.
Are there immunity or leniency programmes?	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.
Does the regime extend to conduct outside the jurisdiction?	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.
Remarks	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?	The regime is a mix of administrative and criminal.
What is the maximum sanction?	<p>Administrative</p> <ul style="list-style-type: none"> • For undertakings: up to 10 per cent of the annual turnover of the undertaking in the preceding business year. • For individuals: up to €30,000. <p>Criminal</p> <ul style="list-style-type: none"> • For undertakings: up to 200 times the amount of damages caused or illegal benefit obtained through the criminal offence. • For individuals: up to five years' imprisonment.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes, if the conduct has the object or effect of restricting competition in the Slovenian market or the internal market of the EU.

Spain	
Is the regime criminal, civil or administrative?	<p>Enforcement is administrative.</p> <p>Stand-alone or follow-on damage claims are heard before the civil courts.</p> <p>No criminal enforcement, but some criminal offences can overlap with cartels.</p>
What is the maximum sanction?	<p>Up to 10 per cent of the infringing undertaking's annual turnover per infringement.</p> <p>For legal representatives or members of management bodies with direct participation, up to €60,000 per infringement (this may be increased to €400,000).</p>
Are there immunity or leniency programmes?	Yes, there is a leniency programme that provides full exemption of the fine to the first applicant that reveals the existence of a cartel, and reductions to applicants that cooperate after the CNMC is aware of the cartel.
Does the regime extend to conduct outside the jurisdiction?	Any conduct taking place outside Spain which affects or may affect competition in all or part of the Spanish market has the potential to be covered by the cartel prohibition.
Remarks	The Spanish Law for the Defence of Competition is currently under review. Among the modifications is the possible introduction of settling cartel cases (with a discount on the fine up to 15 per cent), similar to the EU procedure. This was previously not available under Spanish legislation.

Sweden	
Is the regime criminal, civil or administrative?	The regime is civil and administrative. There are no criminal sanctions for cartel activity.
What is the maximum sanction?	The fine may not exceed 10 per cent of the concerned undertaking's turnover of the previous financial year.
Are there immunity or leniency programmes?	Yes, a system for immunity and leniency, largely similar to the EU's system, is in force.
Does the regime extend to conduct outside the jurisdiction?	An agreement between undertakings situated outside Sweden may be prohibited if the agreement has actual or potential effects in Sweden.

Switzerland	
Is the regime criminal, civil or administrative?	<p>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.</p> <p>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 partially complying with the obligation to provide information, may be fined.</p>
What is the maximum sanction?	<p>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).</p> <p>The competition authorities may impose administrative sanctions on undertakings if they violate an amicable settlement, decision or judgment to their own advantage.</p> <p>The maximum criminal sanction for individuals is 100,000 Swiss francs.</p>
Are there immunity or leniency programmes?	Yes, as of 1 May 2004.
Does the regime extend to conduct outside the jurisdiction?	Yes, as long as the conduct may have effects within Switzerland.

Turkey

Is the regime criminal, civil or administrative?	The Turkish cartel regime is administrative and civil in nature, not criminal. That being said, certain antitrust violations, such as bid rigging in public tenders and illegal price manipulation, may also be criminally prosecutable, depending on the circumstances.
What is the maximum sanction?	In the case of proven cartel activity, the companies concerned shall 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 turnover generated in the financial year nearest to the date of the fining decision will be taken into account).
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Turkey is one of the 'effect theory' jurisdictions, where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of: <ul style="list-style-type: none"> • the nationality of the cartel members; • where the cartel activity took place; or • whether the members have a subsidiary in Turkey.

Ukraine

Is the regime criminal, civil or administrative?	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.
What is the maximum sanction?	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.
Are there immunity or leniency programmes?	Leniency programmes are allowed in Ukraine. A 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.
Does the regime extend to conduct outside the jurisdiction?	No, the regime does not extend outside the jurisdiction. To date, there are no examples of cooperation between other jurisdictions and Ukraine.
Remarks	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?	Criminal and civil.
What is the maximum sanction?	Civil – 10 per cent of the undertaking's worldwide turnover for the previous business year. Criminal – imprisonment for a maximum of five years.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes, if an agreement is implemented in the United Kingdom.

United States

Is the regime criminal, civil or administrative?	The US regime has criminal, civil and administrative elements. Criminal actions are, by Department of Justice (DOJ) policy, reserved for per se violations of the antitrust laws, which generally include price-fixing agreements, bid rigging, and market allocation agreements.
What is the maximum sanction?	For corporations, the maximum criminal fine is the greater of US\$100 million, twice the gross gain from the offence, or 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.
Are there immunity or leniency programmes?	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 the Antitrust Criminal Penalties Enhancement Reform Act of 2004, the leniency recipient may be eligible for reduced civil damages (single, not treble) and avoid joint and several liability in civil litigation.
Does the regime extend to conduct outside the jurisdiction?	The Sherman Act applies to extraterritorial conduct to the extent it involves either import commerce or 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.

Vietnam	
Is the regime criminal, civil or administrative?	All three.
What is the maximum sanction?	For corporates: a fine of up to 5 billion dong or suspension of up to two years. For individuals: a fine of up to 3 billion dong or imprisonment up to five years.
Are there immunity or leniency programmes?	There is a leniency policy applicable to administrative sanctions and an amnesty regime for criminal sanctions.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct has an actual or potential adverse impact on the domestic market.
Remarks	No official leniency policy guideline is available. There has been no prosecution under the new regime. The new competition watchdog has not been formally established. The new competition watchdog has not been formally established as yet.

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 U.S. Attorneys 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

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)