Cartel Regulation 2020

Contributing editor
Neil Campbell

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

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

Dan White
dan.white@gettingthedealthrough.com

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Contributing editor
Neil Campbell
McMillan LLP

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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 a new chapter on Vietnam.

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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.

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For further information please contact editorial@gettingthedealthrough.com

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Editor's foreword

Neil Campbell
McMillan LLP

This 20th edition of *Cartel Regulation* is the most current and comprehensive source of information about anti-cartel laws and enforcement around the world.

The proliferation and modernisation of competition laws and institutions has invigorated cartel enforcement around the globe. The International Competition Network (ICN) has played an important role in this phenomenon through its Cartel Working Group.

Cartel laws are one of the core pillars of any effective competition regime. Two key areas of international consensus have fuelled the expansion of cartel regulation:

- There is virtually universal acceptance that certain types of competitor coordination are so unlikely to have pro-competitive or efficiency-enhancing benefits that they can safely be prohibited – and penalised severely – without the need for a case-specific assessment of anticompetitive effects.
- Leniency programmes that provide substantial 'carrots and sticks' for cooperating parties have been embraced by jurisdictions globally.

While these developments reflect an important 'soft convergence' in international cartel enforcement, there are numerous differences between regimes that have implications in cross-border cases. The presence of criminal liability for corporations and individuals in some but not all jurisdictions and the expanding civil damages exposures add further layers of complexity for cross-border cartel cases.

Cartel Regulation 2020 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 2020* also includes a new chapter on Vietnam.

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. Private actions by affected customers and collective or class actions are also a prominent part of the landscape in many jurisdictions, and the scope of these regimes and how they interface with agency proceedings are addressed as well.

The chapters in *Cartel Regulation 2020* have been prepared by 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 *Getting the Deal Through* team for all the work they do to produce this excellent annual volume.

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

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 direction, 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, in jurisdictions around the world there has been 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 antitrust 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 a 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 Ondulator, 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 aluminum 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 antitrust 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 antitrust 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 anticorruption enforcement. These schemes have been uncovered in a variety of industries, from railway infrastructure (Belgium), to asphalt paving (Brazil), to playground construction (Slovakia) and, more recently, to 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 §15a, which allows the government to recover treble civil damages when it is injured as the result of a violation of the antitrust 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 antitrust 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

Antitrust 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 antitrust policy and abuse of dominance cases than with the enforcement of cartel cases to the data. The new von der Leyen Commission recently 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 antitrust 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 anticompetitive. The regional court in Düsseldorf found that certain narrowly applied pricing clauses are not anticompetitive, 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 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 antitrust 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 have 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 antitrust 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 antitrust 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 antitrust 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.

MORRISON FOERSTER

Roxann E Henry
rhenry@mofo.com

Lisa M Phelan
lphelan@mofo.com

Megan E Gerking
mgerking@mofo.com

Robert W Manoso
rmanoso@mofo.com

2000 Pennsylvania Ave NW
Washington, DC 20006
United States
Tel: +1 202 887 1500
Fax: +1 202 887 0763/0764
www.mofo.com

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 an enforcement action be considered.

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

Brexit

Anna Lyle-Smythe Slaughter and May
Hans-Jörg Niemeyer Hengeler Mueller
Helen Gornall De Brauw Blackstone Westbroek

Introduction

On 23 June 2016, the UK electorate voted (by a 52 per cent to 48 per cent majority) to leave the EU. Since then, the leave vote, or Brexit, has caused much political, economic and legal uncertainty. On 29 March 2017, the then British Prime Minister, Theresa May, triggered article 50 of the Treaty on European Union, formally starting the two-year withdrawal process.

On 25 November 2018, the European Council endorsed a draft Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU. Following the rejection of the draft Withdrawal Agreement by the UK parliament, the date for the UK's withdrawal from the EU was extended to 31 October 2019. At the time of writing, it is unclear whether that date will be extended again or whether the UK will leave the EU on 31 October 2019 pursuant to a revised version of the draft Withdrawal Agreement or under a 'no deal' scenario.

The far-reaching impact of the Brexit vote will also be felt in EU and UK cartel regulation. At present, a cartel that relates to a market in the UK could be investigated by either the European Commission (the EC) or the UK Competition and Markets Authority (CMA), with the latter able to apply both EU and national competition laws, depending on the geographic scope of the alleged infringement. The EC and the CMA also closely cooperate with each other within the framework of the European Competition Network (ECN). The withdrawal of the UK from the EU may therefore have a significant impact on cartel regulation and enforcement in the UK (and also at the EU level).

Current cartel regulation and enforcement at the EU and domestic UK levels

The EC, specifically the Competition Directorate General, and the CMA are the principal competition enforcement agencies in the EU and UK, respectively.

Pursuant to Regulation 1/2003, national competition authorities (NCAs) throughout the EU are fully competent to apply EU competition law. However, the EC (rather than the CMA) is generally considered to be the most suitable authority to investigate a suspected cartel where:

- the relevant market covers more than three EU member states;
- issues raised by the case are closely linked to other EU rules that may be exclusively or more effectively applied by the EC;
- an EC decision is needed to develop EU competition policy; or
- it is more appropriate for the EC to act to ensure effective enforcement of competition rules.

Cooperation between the EC and NCAs with respect to cartel matters, among other things, is enhanced through membership of the ECN. The ECN facilitates the communication and coordination of the members of the ECN, to help ensure that EU competition laws are being applied consistently and effectively across the EU. In particular, within the ECN framework, the EC and NCAs cooperate in relation to competition law enforcement, including cartels, and NCAs are entitled to consult the EC on the domestic application of EU competition rules. Further, the EC and NCAs are entitled to exchange and use as evidence information – including confidential information – for the purposes of applying articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The ECN also established a model leniency programme, which, although not binding, sets out the key substantive and procedural requirements that every EU member state's leniency programme should have.

For further information regarding EU or UK cartel regulation, see the EU and UK chapters of this book.

Post-Brexit cartel regulation under the draft Withdrawal Agreement and Political Declaration

The draft Withdrawal Agreement covers the terms under which the UK will leave the EU, while the Political Declaration sets out the framework for the future EU–UK relationship. The texts envisage that the EU and UK will develop an 'ambitious, wide-ranging and balanced economic partnership', which will encompass 'a free trade area as well as wider sectoral cooperation'. The texts also envisage that the final agreement should include provisions to ensure open and fair competition between the parties.

The draft Withdrawal Agreement provides for a transition period until 31 December 2020, which may be extended by mutual agreement. During the transition period, there will be no change to the status quo. EU law will continue to be directly applicable in the UK and the European Court of Justice (ECJ) and European institutions, including the EC, will continue to have jurisdiction over the UK.

The draft Agreement does not deal with competition law post-Brexit in any detail except in the context of a draft Protocol on Ireland/Northern Ireland. This protocol envisages the establishment of a single EU–UK customs territory, which would come into effect if an agreement on the future EU–UK relationship is not reached by the end of the transition period. To prevent undue distortions of trade and competition in this scenario, the draft protocol introduces a new category of substantive provisions, which can be enforced by both the CMA and the EC in their respective territories. The new substantive provisions mirror the current EU competition rules except that, instead of applying to the extent that trade between member states is affected, they apply to the extent that trade between the UK and the EU is affected.

With regard to transitional arrangements, the draft Withdrawal Agreement envisages that the EC will retain jurisdiction over cartel cases where proceedings are initiated in accordance with article 2(1) of Commission Regulation (EC) No. 773/2004 before the end of the transition period. Where cartel conduct begins after the transition period, the CMA will hold jurisdiction in respect of the effects in the UK, while the EC will have jurisdiction over UK businesses to the extent that their conduct has effects in the EU.

At present, the UK competition rules largely mirror EU competition rules. In the short term at least, it seems unlikely that UK competition law would significantly shift from this position. However, in the longer term, UK competition law could diverge from EU competition law. The UK government has published a draft statutory instrument which envisages that section 60 of the Competition Act 1998, which requires UK competition law to be interpreted in line with EU rules, would be repealed. It would be replaced by section 60A, which provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with the pre-exit EU competition case law when interpreting UK competition law, but that they may depart from such pre-exit EU case law where it is considered appropriate in the light of particular circumstances.

Post-transition, a significant shift in enforcement may be expected as businesses would be unlikely to benefit from a 'one-stop shop' for cross-border cases involving the UK and other EU member states. Accordingly, businesses that are active in the EU and UK could face parallel investigations by the EC and CMA, with the CMA having jurisdiction over a case insofar as the conduct has effects in the UK, and the EC having jurisdiction insofar as the conduct affects trade between EU and EEA member states. The risk of parallel investigations is particularly important for potential leniency applicants. Any potential leniency applicant that is subject to both the UK and EU regimes would need to consider lodging applications in both jurisdictions. Parallel investigations may also lead to the CMA and the EC arriving at different, and potentially inconsistent, outcomes in relation to cartel cases arising from the same set of conduct. This could result in compliance becoming more complicated and difficult for multinational businesses.

Post-transition, the CMA would no longer be subject to Regulation 1/2003 and is unlikely to be a member of the ECN. Without a new cooperation agreement in place, the CMA and the EC would not automatically be able to coordinate their cartel investigations and share with each other information relevant to those investigations. They would also encounter increased difficulties in obtaining information pursuant to compulsory information requests, where the specific business does not have premises located in the jurisdiction of the relevant authority (eg, the EC may have difficulties in enforcing compliance with an information request in respect of a business in the UK only without premises in the EU). The EC would also be unable to carry out dawn raids of premises located in the UK, nor would it be formally entitled to request that the CMA does so, irrespective of whether documents are available at those premises that are relevant to an EC investigation. The UK government recognises these risks and has indicated in a White Paper that it wants to work with the EU to continue its cooperative arrangements, including provisions on sharing confidential information and coordinating on cases.

Alternative models for post-Brexit cartel regulation

The UK government and the EU have both acknowledged that they must prepare for all eventualities, including a 'no deal' scenario in which the UK leaves the EU without a Withdrawal Agreement and framework for its future relationship with the EU in place. To prepare for this possibility, the UK government and the EC have published a series of technical notices with the intention of helping businesses and citizens prepare for such a 'no deal' scenario.

In a 'no deal' scenario, the UK could choose to trade with the EU market pursuant to World Trade Organisation (WTO) rules. The position for cartel regulation would be much the same as discussed above, with the main difference being that there would be no transition period and therefore the UK's competition regime would apply in parallel to the EU regime from 31 October 2019. In those circumstances, the proposal that the EC would retain jurisdiction for ongoing competition cases initiated pre-Brexit could not be taken for granted. A 'no deal' scenario would also likely have an impact on the ability of the regulators to cooperate and gather information for the purposes of cartel investigations. The UK government's 'no deal' notice is silent on whether and how the CMA and the EC would cooperate on any resulting parallel cases. In the absence of any agreement, such cooperation would have no formal basis.

As an alternative to the WTO route, some stakeholders have called for the UK government to drop the proposals set out in the draft Political Declaration and negotiate for the UK to become a member of the European Economic Area (EEA) and of the European Free Trade Association (EFTA) – the Norwegian model. The EEA currently consists of the 28 EU member states, as well as Iceland, Liechtenstein and Norway (Switzerland is a member of EFTA but not of the EEA). Under the EEA agreement, all EEA countries adopt all EU legislation in agreed policy areas, namely the free movement of goods, services, capital and people. Joining the EEA would mean that the UK would remain subject to the majority of EU legislation, including EU competition law.

Under the Norwegian model, UK competition law and cartel regulation would largely remain as it is now. From a legislative perspective, section 60 of the Competition Act 1998 would probably be amended to require the UK courts to interpret UK competition law in accordance with EEA (rather than EU) law. In practice, this would be unlikely to have a significant impact on the way in which UK courts interpret UK competition law, given that the key competition provisions of the EEA Agreement – namely articles 53 and 54 – mirror articles 101 and 102 TFEU. The EFTA states are, however, subject to the jurisdiction of the EFTA Court, which is required, under the agreement establishing the EFTA Court, to pay due account to the principles laid down by the relevant rulings of the ECJ. Practice has shown that the EFTA Court often refers to ECJ precedents in its judgments.

In terms of enforcement, the CMA would – as is currently the case – continue to deal with antitrust cases that only have effects in the UK. Where a specific case has effects across EU member states and EFTA states, jurisdiction could be assumed by either the EC, the EFTA or the CMA, depending on the specific circumstances of the case.

The EFTA Surveillance Authority (ESA) currently enforces the provisions of the EEA Agreement in Iceland, Liechtenstein and Norway. Article 56 of the EEA Agreement provides for a one-stop shop whereby either the EC or the ESA will assume jurisdiction in a specific case (although there are various cooperation provisions by which the other authority can still assist with the investigation) as follows.

The EC assumes jurisdiction where trade between EU member states is appreciably affected (regardless of the effect on trade between EFTA states). As a result, the EC typically deals with the majority of cases with an EEA-wide impact.

The ESA assumes jurisdiction where only trade between:

- the EFTA states is affected (for example, only trade between Norway and Iceland); or
- an EFTA state and an EU member state (but not between EU member states) is affected (eg, trade between Norway and Belgium) and the undertakings concerned derive 33 per cent or more of their EEA-wide turnover from the EFTA states.

Under the Norwegian model, it is likely that the EC would still assume jurisdiction in most of the same cases it does today, given the relatively limited circumstances in which the ESA would assume jurisdiction.

The EC would continue to have the power to conduct dawn raids of premises located in EU member states, but would be unable to do so in premises located in the UK. Instead, the ESA (as well as the UK authorities) would be able to conduct dawn raids in UK premises. ESA officials undertaking a dawn raid could be joined by CMA officials, at the request of either authority. The EC would also be able to ask the ESA to carry out dawn raids in the UK related to EC cartel investigations. As well as the CMA, EC officials would then also be entitled to attend the dawn raid.

Other potential issues

Correspondence between a company and its EEA-outside counsel relating to the company's rights of defence in the context of a cartel investigation is covered by legal professional privilege under current EU rules and is protected from disclosure to the EC. According to case law of the European courts, this privilege currently only applies to external counsel who are qualified to practise within the EEA (so would not apply, for example, to counsel who are only qualified to practise in the US). The draft Withdrawal Agreement envisages that this privilege will continue to apply to counsel who are qualified to practise in the UK (ie, as a solicitor, barrister or advocate in England and Wales, Scotland or Northern Ireland) until the end of the transition period. It remains to be seen how this issue will be dealt with under the future relationship between the EU and UK.

Owing to their significant experience with follow-on litigation and their rules on disclosure and limitation periods, UK courts – in particular the High Court and the UK's specialist competition judicial body, the Competition Appeals Tribunal (CAT) – have so far been a favourite place to bring actions for cartel damages in Europe. Whether this will still be the case after Brexit remains to be seen, particularly given the uncertainty regarding the enforceability of EC decisions in UK courts post-Brexit. The EU Damages Directives aims at harmonising follow-on litigation by adding some features of the UK's regime, such as disclosure rules, to the legal order of other member states. Against this background, Brexit could encourage some claimants to shift cartel damage claims from UK courts to other increasingly important continental fora such as, for example, Germany or the Netherlands.

Conclusion

There remains a great deal of uncertainty regarding what the trading relationship between the EU and UK will look like post-Brexit. Depending on its ultimate form, there may (or may not) be significant changes to cartel regulation and enforcement. As such, the post-Brexit developments will remain of high interest to businesses, legal practitioners and competition regulators alike.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Anna Lyle-Smythe
anna.lyle-smythe@slaughterandmay.com

Hans-Jörg Niemeyer
hans-joerg.niemeyer@hengeler.com

Helen Gornall
helen.gornall@debrauw.com

40 Square de Meeûs
1000 Brussels
Belgium
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

Australia

Carolyn Oddie and Robert Walker
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 sometimes the Supreme Court of an Australian state in criminal cases) that determines whether there has been a contravention of the civil or criminal cartel provisions and the appropriate sanctions and penalties.

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 (JV) exception to cartel conduct by:
  - extending the exception so it more clearly applies to JVs for the acquisition of goods or services (in addition to JVs for the production or supply of goods or services);
  - broadening the exception so it applies to a provision contained in an arrangement or understanding (in addition to a provision contained in a contract);
  - imposing additional requirements on the party wishing to rely on the exception. In addition to demonstrating that the cartel provision is 'for the purposes of' the JV, a party is now required to demonstrate that:
    - the cartel provision is reasonably necessary for undertaking the JV; and
    - the JV is not being carried on for the purpose of substantially lessening competition; and
  - increasing the standard of proof so a party wishing to rely on the exception must prove the relevant matters 'on the balance of probabilities' (previously, a party only needed to produce evidence of 'a reasonable possibility' that relevant matters exist).

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

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

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

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

Application of the law

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

The prohibitions against cartel conduct apply to individuals, corporations and bodies politic. The 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?

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

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

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

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 ACCC within 14 days of the relevant contract, arrangement or understanding being entered into.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

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

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

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

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

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

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

Investigative powers of the authorities

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

The ACCC has broad investigatory powers under the CCA.

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

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

In criminal cartel investigations conducted jointly by the ACCC and the Australian Federal Police (AFP), the AFP can apply for a warrant to intercept telephone conversations or place a listening device to record conversations. The ACCC can also apply for a warrant to access emails, text messages 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

11 | 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

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

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

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

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

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

Burden of proof

14 | 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

15 | 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

16 | What is the appeal process?

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

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

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

SANCTIONS

Criminal sanctions

17 | 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 two criminal cartel convictions in Australia since the criminal provisions were introduced in 2009. In 2017, Japanese cargo shipping liner NYK pleaded guilty to criminal cartel conduct and was fined A$25 million. In 2018, another Japanese shipping company, Kawasaki Kisen Kaisha (K-Line), pleaded guilty to criminal cartel conduct and was fined A$34.5 million.

Criminal charges have also been laid against:

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

Civil and administrative sanctions

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

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

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

In August 2019, the 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, which was increased on appeal from an original penalty of A$9.5 million. The ACCC's action followed similar enforcement actions against Yazaki and other cartel participants by competition regulators in the US and Japan.

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

Guidelines for sanction levels

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

Civil penalties

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

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

Criminal penalties

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

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

Compliance programmes

20 | 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 lectures or seminars 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 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

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

The 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 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

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

Parallel proceedings

23 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 will be stayed if subsequent criminal proceedings are commenced in relation to substantially the same conduct.

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

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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

25 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

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

Civil immunity

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 in paragraph (a), 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 also be 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

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

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

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

29 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

30 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

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

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

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

- by the ACCC in the performance of its duties or functions;
- where the ACCC is required or permitted by law to make the disclosure (this includes where ordered by a court to disclose the information under subpoena, except in relation to 'protected cartel information');
- to the minister, royal commission or designated government agencies; and
- where disclosure is made to a foreign government agency to perform its functions.

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

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

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

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

Settlements

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

Civil offences

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

Criminal offences

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

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

Corporate defendant and employees

33 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

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

See question 29.

DEFENDING A CASE

Disclosure

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

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

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

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

Representing employees

36 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

37 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

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

Civil penalties

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

Criminal penalties

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

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

Taxes

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

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

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

International double jeopardy

40 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

41 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 anti-trust compliance structures, guidelines and systems so as to prevent the repetition of any similar anticompetitive conduct.

UPDATE AND TRENDS

Recent cases

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

On 13 February 2019, the Federal Court of Australia imposed civil penalties of A$1.05 million on Cryosite Limited for engaging in cartel conduct. This was the first case brought by the ACCC alleging gun jumping in a merger, being the coordination of competitive conduct by merger parties prior to completion. The ACCC alleged that the asset-sale agreement, which required Cryosite to refer all customer enquiries to Cell Care after the agreement was signed but before the acquisition was completed, amounted to cartel conduct. This was on the basis that the agreement restricted the supply by Cryosite of services that would compete with Cell Care, and resulted in the allocation of customers between Cryosite and Cell Care. When Cryosite announced the transaction to the ASX on 23 June 2017, it indicated that it had ceased marketing, selling, collecting and processing cord blood and tissue, choosing instead to sell its assets to Cell Care. Although the proposed acquisition of Cryosite by Cell Care was abandoned in January 2018, Cryosite did not re-enter the market, and retained the compensation it received from Cell Care to acquire the assets. The ACCC also alleged that Cryosite and Cell Care engaged in cartel conduct by agreeing that Cell Care would not:

- market to Cryosite's existing customers pre-completion; or
- seek or accept an approach from any Cryosite customers who had had cord blood or tissue stored with Cryosite in the five years preceding completion of the proposed sale, with a view to convincing that person to obtain storage from Cell Care. This was a post-completion restraint.

On 2 August 2019, the Federal Court of Australia 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 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.

Regime reviews and modifications

43 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.

Allens › ‹ Linklaters

Carolyn Oddie
carolyn.oddie@allens.com.au

Robert Walker
robert.walker@allens.com.au

Level 28
126 Phillip Street
Sydney
NSW 2000
Australia
Tel: +61 2 9230 4000
Fax: +61 2 9230 5333

Level 37
101 Collins Street
Melbourne
VIC 3000
Australia
Tel: +61 3 9614 1011
Fax: +61 3 9614 4661

www.allens.com.au

Austria

Astrid Ablasser-Neuhuber and Florian Neumayr
bpv Hügel Rechtsanwälte

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

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

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

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

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

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

Changes

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

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

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

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

Another change concerns the opportunity to appeal against Cartel Court decisions on the ground of errors of fact, which had barely been possible previously. In addition, the amendment now allows for the exemption from the cartel prohibition for agreements between publishers and press wholesalers. As regards the power of the FCA to submit fining applications, from now on every act of investigation or enforcement by the FCA interrupts the limitation period (of five years) as long as the affected undertaking is notified of this measure. An absolute limitation period of 10 years from cessation of the infringement

still applies. The FCA is now also explicitly empowered in the context of dawn raids to inspect documents and data accessible at the premises of the undertaking irrespective of the place of storage and may enforce access by collecting penalty payments.

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

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

Substantive law

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

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

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

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

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

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

Application of the law

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

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

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

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

Export cartels

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

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

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation (see below). The outcome may be shared with the undertakings concerned (section 13 of the Competition Act). If they consider competition law to be infringed, the FCA or the FAP (or both) may file a motion for cease and desist, finding or fines with the Cartel Court. Often, the FCA enters into settlement talks with the undertakings concerned prior to bringing an application before the Cartel Court. Typically, the undertakings are to acknowledge certain facts and their legal qualification for a reduced

fine. As the Cartel Court cannot go beyond the fine applied for by the official parties, an undertaking prepared to settle in such a way has some certainty what its fine will be and the proceedings are by far less elaborate (as taking of evidence and suchlike hardly takes place).

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

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

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

Investigative powers of the authorities

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

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

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

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

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

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

Interplay between jurisdictions

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

See, in particular, questions 10 and 11.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

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

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

Burden of proof

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

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

The Cartel Court is not restricted to the evidence offered. Austrian law does not restrict the forms of permissible evidence. Expert evidence is accepted, although in practice, the courts often only rely on expert

witnesses that they have appointed rather than on the opinions of expert witnesses instructed by one of the parties.

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

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

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

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

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

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

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

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

Circumstantial evidence

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

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

Appeal process

16 | What is the appeal process?

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

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

SANCTIONS

Criminal sanctions

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

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

Bid rigging is punishable by up to three years in prison and fraud, depending on the severity of the offence, by up to 10 years. It should also be mentioned that, pursuant to the Corporate Liability Act, corporations may also be held liable for the criminal offences of their management and employees. In one bid-rigging case, the defendants were subject to prison sentences ranging from nine to 11 months and fines (see Supreme Court 26 September 2001,13 Os 34/01). In another case, one defendant was sentenced to six months in prison and a further 18 months of parole. The other defendants in the case received prison sentences of up to 20 months, which were suspended and the other defendants were released on probation for a three-year period (see Supreme Court 6 October 2004, 13 Os 135/03 – Lower Austrian Window Cartel). Another trial resulted in a five-year prison sentence for the defendant. However, in that case, the defendant was charged not only for serious fraud, but also for other crimes, including embezzlement (see Supreme Court 28 June 2000, 14 Os 107/99).

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

Civil and administrative sanctions

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

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

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

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

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

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

Moreover, where it is certain that a party is entitled to damages but the exact amount is impossible or unreasonably difficult to establish, section 273, paragraph 1 of the Code of Civil Procedure entitles the court to assess the amount in its discretion. The interplay of this provision with the implementation of the EU Damages Directive (establishing a presumption of harm) can be expected to further facilitate private enforcement. Where some claims raised within the same action are comparatively insignificant, or where single claims do not exceed €1,000, the court may even assess both whether damages should be granted at all and the exact amount that should be awarded according to its discretion (section 273, paragraph 2).

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

Guidelines for sanction levels

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

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

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

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

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

Compliance programmes

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

The FCA has developed informal criteria according to which compliance measures – depending on the individual case – can be recognised as a reason for mitigation and thus lead to lower fines. So far, it has been controversial whether compliance measures should be reflected in the size of the fine (and if so, whether negative or positive). In the future, there is at least a chance that a single-digit percentage reduction in fines might be granted if compliance measures were taken.

According to the those criteria, compliance measures will be assessed along the following 12 points:

- Compliance programme backed by management ('tone from the top').
- Programme 'seriously' and distribute at all relevant levels.
- Tailored to the individual needs of the company (no 'one fits all').
- (Attendance) trainings and educations.
- Efficiency of the measures (withstand internal and external stress tests, such as mock dawn raids).
- Quality measures (no minimum standards).

- Consistent documentation and traceability of measures taken.
- Regular monitoring and updates.
- Full cooperation with the authorities necessary in the event of infringement.
- Cooperation must continue until the antitrust proceedings are concluded.
- Disclosure of evidence and, where appropriate, provision as principal witness is welcomed.
- Prevention of a new violation.

Director disqualification

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

Within the framework of procurement procedures, contracting authorities must check the professional reliability of companies and individuals with powers of representation, decision-making or control – for example, management board members, managing directors, supervisory board members. If there is a reason for exclusion, a company is generally excluded from further procurement procedures owing to a lack of professional reliability. A case of professional unreliability occurs, for example, when a legally binding court conviction has been imposed for certain criminal offences committed by the company or the individuals named above. In connection with conduct contrary to antitrust law, fraud in particular should be mentioned.

Debarment

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

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

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

Parallel proceedings

23 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 may well lead to criminal, civil and administrative sanctions in Austria.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

In Austria, only single damages will be awarded but interest is generally payable as from the point in time when the harm occurred, which can lead to very substantial claims. The new rules in the Cartel Act now also expressly refer to section 273 of the Austrian Code of Civil Procedure, which, under certain circumstances, allows the civil courts to estimate (rather than strictly ascertain) the compensation to be awarded to plaintiffs; the amendment made it also clear that when estimating compensation, the civil courts can take into account any gains from the cartel behaviour. As to the reimbursement of legal costs, see question 36.

Class actions

25 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?

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

COOPERATING PARTIES

Immunity

26 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?

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

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

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

enough information to enable a dawn raid or even a direct fine application to the Cartel Court;
- the undertaking cooperates fully, promptly and truthfully with the FCA and must submit all evidence concerning the infringement in its possession or available to it to clarify the circumstances of the case completely; and
- it did not coerce other undertakings or associations of undertakings to participate in the infringement.

Subsequent cooperating parties

27 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?

Principally, only the 'first in' may obtain full leniency (see question 26). However, if the 'second in' provided so much information to directly allow for an application for fines to the Cartel Court while the 'first in' had only provided enough to enable a dawn raid or less, there may still be amnesty.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Subsequent undertakings can qualify for reductions of fines. According to the leniency handbook, the following reductions will typically be granted if all the criteria of section 11(3) of the Competition Act are met and information of significant additional value is provided to the FCA:
- a second undertaking, reduction of 30 per cent to 50 per cent;
- a third undertaking, reduction of 20 per cent to 30 per cent; and
- all later undertakings, reductions of up to 20 per cent.

Approaching the authorities

29 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?

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

Cooperation

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

Confidentiality

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

In general, all leniency information is kept confidential. In this regard, section 39, paragraph 2 of the Cartel Act provides that, in principle, third persons may only access the cartel court file with the consent of the parties to the proceedings concerned. This provision was tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie*), where the court indeed found this provision to be incompatible with EU law. Rather, the national court must determine whether access is allowed by balancing the legitimate interest of confidentiality and the protection of the leniency programme against the individual's interest in the enforcement of its rights. The most recent amendment explicitly determines in section 37k(4) Cartel Act that leniency statements and settlement submissions enjoy absolute protection from disclosure. This, however, does not hold true for documents that are part of the authority's file independently of any proceedings. As regards other files of a competition authority, the balancing of interests conducted by the court also has to take the effectiveness of public enforcement into consideration.

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

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

Generally, proceedings before the Cartel Court are public; everyone can follow the proceedings. However, upon application by a party the general public can be (partially or fully) excluded from oral hearings if regarded necessary for protecting business secrets. In addition, the Cartel Court is obliged to publish final decisions on:
- the cessation of violations;
- the finding of infringements;
- the imposition of fines; and
- certain requests in concentration proceedings.

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

'of public importance'. In general, the decisions of the Cartel Court of Appeals are also published.

Settlements

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

Although a settlement procedure is not explicitly provided for by the law, settlement procedures are available. The FCA published a guideline on settlements reflecting its practice. The FCA being in favour of settlements is of importance, since it is for the FCA to negotiate settlements with the undertakings concerned. Both sides agree on the facts of the case and the amount of the fine to be paid. The settlement reached, however, must not be misunderstood as ceasing the proceedings as a whole. Rather, the undertaking acknowledges its misconduct and the Cartel Court, on the basis of the application filed by the FCA, renders a decision. As regards oversight, the Cartel Court examines the FCA's application only concerning its conclusiveness, but without conducting its own evidence taking. The Cartel Court is bound by the FCA's application as it cannot impose higher fines than determined by the FCA; but the court is free to impose lower fines.

As far as legal protection is concerned, the undertaking in any case has the right to appeal against the Cartel Court's decision, although from a practical point of view, the chances of success are negligible, because the misconduct had to be acknowledged in the first place. A settlement as such therefore needs to be carefully considered, as this decision by the Cartel Court is binding on the civil courts adjudicating follow-on private enforcement cases.

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

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

DEFENDING A CASE

Disclosure

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

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

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

Representing employees

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

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

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

Taxes

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

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

Private damage awards, on the other hand, can be tax-deductible if the relevant wrongdoing is attributable to the business sphere

(as opposed to private actions) (Supreme Administrative Court 2008/15/0259). With cartel activities, this will usually be the case.

International double jeopardy

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

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

Getting the fine down

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

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

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

UPDATE AND TRENDS

Recent cases

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

FCA installed a new whistle-blowing system in February 2019, allowing anyone to contact FCA anonymously around the clock to report any antitrust violations. According to FCA, a total of 39 reports were submitted in 2018, of which four were forwarded to the relevant authorities and 13 are still in an intensive examination phase.

In 2018, investigations in the construction sector were continued by the Office of the Public Prosecutor for Economic Affairs and Corruption and the Federal Office for the Prevention of and Fight against Corruption and numerous Austrian construction companies were raided. The starting point of the investigations in the construction sector was a file found by tax auditors in a Carinthian company. The documents contained in the file suggested the suspicion that price agreements might have been reached in tenders for construction projects. The ongoing investigations of the FCA are very extensive and include a large number of construction projects with varying order volumes.

On 22 November 2018, Signa Holding submitted a notification to FCA of its acquisition of a non-controlling interest of about 49.5 per cent in WAZ Ausland Holding, Essen, Germany. The remaining 50.5 per cent of shares in WAZ are held by Funke Österreich Holding, which thus remains the controlling shareholder. FCA did not submit a request for review to the Cartel Court since FCA considered that the acquisition of a minority shareholding could strengthen a dominant position only in exceptional cases. This was not the case in the present transaction as Signa does not carry out any activities in the media sector or on upstream markets.

bpv HÜGEL

Astrid Ablasser-Neuhuber
astrid.ablasser@bpv-huegel.com

Florian Neumayr
florian.neumayr@bpv-huegel.com

ARES-Tower
Donau-City-Strasse 11
1220 Vienna
Austria
Tel: +43 1 260 50 205
Fax: +43 1 260 50 133
www.bpv-huegel.com

Regime reviews and modifications

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

Within the framework of the obligations under Directive (EU) 2019/1 (ECN+ Directive), which is intended to ensure more effective enforcement of European competition rules and which must be implemented by the member states by 4 February 2021, Austrian law must be adapted.

This concerns, in particular, amendments relating to the acceptance of commitments. Until now, it is unclear whether commitments could only be declared binding once there had been an infringement. This uncertainty has now been removed by the Directive's provisions, according to which 'concerns' will suffice in the future – as it is in the case of the Commission's acceptance of commitments.

To comply with the requirements of the ECN+ Directive, Austria also has to implement the European level default liability of companies for the fine imposed on an association of undertakings.

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 the relevant Belgian market or within a substantial part of it. Under Regulation 1/2003, the BCA should also apply article 101 of the Treaty on the Functioning of the European Union (TFEU) in cases likely to affect trade between EU member states.

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

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

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

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

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

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

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 Belgian Competition Authority and streamlined the different procedures. As regards cartel regulation, the new Belgian Competition Act has brought an increase of the fine cap of 10 per cent of the Belgian consolidated turnover (for details about this cap, see below) to 10 per cent of the worldwide consolidated turnover. This 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 having 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.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

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

Application of the law

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

Article IV.1 CEL applies to any undertaking (including association of undertakings), either individuals or companies.

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

Individuals engaged in cartel activities 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 BCA found that the undertaking concerned infringed article IV. 1 CEL and/or article 101 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 and/or the other national competition authorities (NCAs) of the member states where the case is also investigated.

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

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The IPS is in charge of investigating cartels. It may initiate an investigation following a complaint, ex officio or at the request of Ministries, 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 followed a complaint, the BCA can only close the case by a reasoned decision concluding that the complaint is inadmissible or ungrounded, or prescribed by time-limitation (article IV.44 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 (see below). In the event no settlement is reached or possible, the IPS prepares a statement of objections indicating the antitrust objections and defining the infringement. The statement of objections is sent to the companies (and individuals) concerned. They should reply to the statement of objections within two months and may access the non-confidential version of case's file. The written phase of the investigation is then closed. Based on the replies or in the absence thereof, the IPS submits a draft decision to the President of the BCA. The draft decision is also notified to the parties. In the draft decision, the IPS states the objections, defines the infringement, and proposes a decision to be taken by the Competition College. The parties are also allowed to access the non-confidential version of the case's file. They should submit their written observations within 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

10 | 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

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

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

Interplay between jurisdictions

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

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

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

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

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

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

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

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

Burden of proof

14 | 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

15 | 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

16 | What is the appeal process?

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

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

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

for instance, Case 2015/MR/1, *Fédération Equestre Internationale*, judgment of 22 October 2015)).

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

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

SANCTIONS

Criminal sanctions

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

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

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

Civil and administrative sanctions

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

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

The Competition College may impose fines of up to 10 per cent of the 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 request from the IPS, the Competition College may impose daily penalties of up to 5 per cent of the average daily turnover in the case of non-compliance with the relevant decision.

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

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

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

Guidelines for sanction levels

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

On 26 August 2014, the BCA adopted the Guidelines on the calculation of fines. They are based on the Guidelines on the method of setting fines adopted by the European Commission in 2003, while containing some adjustments in light of the Belgian specificities. They are not binding on the BCA. However, any debarment should be well reasoned.

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

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

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

The final amount of the fine shall not, in any event, exceed 10 per cent of the 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

20 | 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

21 | 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

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

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

Parallel proceedings

23 | 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 bid rigging of public procurements, parallel proceedings are possible by both the BCA and a criminal court. However, the lack of cooperation between both authorities may justify the application of the 'non bis in idem' principle.

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

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 CEL, judicial courts may take into account a passing-on defence invoked by the defendant (ie, the possibility to mitigate the company's liability by demonstrating that all or part of the overcharges have been passed on the victims' customers).

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

25 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 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 (opt-out mechanism). For consumers not based in Belgium, they should express their willingness to be part of the collective action (opt-in mechanism). However, in both cases, the consumers should express their interest to participate in the collective action regarding physical and/or moral damages.

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

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

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

COOPERATING PARTIES

Immunity

26 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 CEL and the Leniency Guidelines of the BCA of 22 March 2016. The leniency programme is only applicable to cartels (including hub-and-spoke infringements).

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

For companies and associations of corporate undertakings 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; and
- the BCA did not have sufficient evidence to find an infringement in connection with the cartel.

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

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

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

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

Subsequent cooperating parties

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

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

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

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

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

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

Approaching the authorities

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

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

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

Cooperation

30 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 (with regard to the timing of cooperation, see question 27).

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

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

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

Settlements

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

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

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

33 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

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

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

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

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

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

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

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

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

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

DEFENDING A CASE

Disclosure

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

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

Representing employees

36 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, however, that their respective interests are aligned.

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

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

Taxes

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

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

International double jeopardy

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

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

Moreover, in case of settlements, the IPS may take into account the commitment from the cartel participant to grant compensation for the damage occurred to the private victims in setting the fine to be imposed. Accordingly, overlapping liability for damages in other jurisdictions could normally be indirectly taken into account by the BCA (see article IV.60(1) CEL).

Getting the fine down

41 | 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

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

On 8 May 2019, the Market Court dismissed as inadmissible the appeal lodged by the Great Circle against a decision of the 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.

DALDEWOLF

Pierre Goffinet
pgo@daldewolf.com

Laure Bersou
lbe@daldewolf.com

Avenue Louise, 81
B-1050 Brussels
Belgium
Tel: +32 2 627 10 10
Fax: +32 2 627 10 50
www.daldewolf.com

On 28 May 2019, the BCA imposed a fine of €1 million on the Professional Organisation of Pharmacists for infringement of article IV.1 CEL and article 101 TFEU. 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. In its decision, 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.

Regime reviews and modifications

43 | 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. Therefore, except for light technical amendments, there is no ongoing or anticipated review of the Belgian legal framework.

Brazil

Onofre Carlos de Arruda Sampaio and André Cutait de Arruda Sampaio

O C 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 the federal or state criminal prosecutors (that 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 Brazilian Antitrust Act No. 12.529/2011 to stimulate private damages claims (introducing the double damage, longer civil statute-of-limitations, inversion of the pass-on defence burden of proof, etc – further details are set out in question 43). 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 Brazilian Antitrust Act, paragraph 3 of which exemplifies 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 violation), 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, may be deemed antitrust violations. Specifically, regarding a cartel, the following items of paragraph 3 are applicable:

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

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

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

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

Application of the law

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

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

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

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 Brazilian Antitrust Law regarding export cartels.

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

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Following the initiation of the administrative process, all defendants shall be served. The defendants shall provide their defences within 30 days. The 30-day deadline starts from the date that the last defendant is served. Exceptionally, in the event the records of the administrative processes is not exclusively electronic, the defence deadline will be in double (to 60 days) if there is more than one defendant represented by different attorneys . The defence deadline may also be extended for an additional period of 10 days at the defendant's request, subject to CADE's discretion. After the filing of such defences and within 30 working days (this deadline is to be considered as a reference), the General Superintendent will determine the evidence to be submitted, which may include the hearing of witnesses, requesting of additional information from the defendants, companies, associations or other entities, economic studies 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 the CADE Tribunal for the final decision.

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

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

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

Investigative powers of the authorities

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

CADE's General Superintendency is responsible for investigating antitrust violations, including cartels.

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

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

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

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

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

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

Interplay between jurisdictions

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

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

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

Burden of proof

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

CADE's General Superintendency that has the burden of proof to sustain the charge against the defendants. Such proofs can be collected through investigative powers of the authorities and also through a leniency agreement 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

15 | 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

16 | What is the appeal process?

A CADE Tribunal decision can be challenged only before the federal courts. The scope of the appeal is broad and may regard the due process, the merit of the case, as well as the balance of the penalties. It is important to clarify that lawsuits in Brazil are not expeditious, usually lasting between 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, the first panel of the Supreme Court declared the impossibility of a judicial review of the merit of the case adjudicated by CADE's 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

17 | 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 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

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

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

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

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

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

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

The complainant seeking damages compensation must prove:

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

Nonetheless, damages recovery lawsuits motivated by antitrust violations are still uncommon in Brazil. One of the most important difficulties in carrying out civil damages recovery lawsuits is the time frame before a final decision is reached. This may take several years, with more than a decade being not uncommon. However, as mentioned in question 3, there is a bill under discussion in the Congress that once approved will introduce relevant changes on the Brazilian Antitrust Act No. 12.529/2011 to incentivise private damages claims (introducing the double damage, longer civil statute-of-limitations, inversion of the pass-on defence burden of proof, etc.). Further details are set out in question 43.

Guidelines for sanction levels

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

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

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

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

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

Compliance programmes

20 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

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

The Brazilian Antitrust Act foresees the possibility that CADE imposes as an additional penalty a professional limitation of individuals involved in 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

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

Parallel proceedings

23 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 parallel). In practice, CADE's decision is the fastest, so it is often used as evidence in both the criminal prosecution and the civil recovery lawsuits.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 Antitrust Act defines that private claims are independent from CADE's 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 TCCs (see question 43).

It is important to clarify that private damage claims in Brazil related to antitrust violations are still not usual and there are only a few cases under discussion in the civil courts.

Class actions

25 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
- the associations legally incorporated in at least one year, which have among its institutional purposes, the protection of interests and rights within the Consumer Protection Code.

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

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

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

COOPERATING PARTIES

Immunity

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

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

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

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

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

Subsequent cooperating parties

27 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, the subsequent companies and individuals that did not come first may execute TCCs with the authority, qualifying for an administrative fine reduction.

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

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

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

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

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

The reduction of the expected fines in a 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), following the ranges below:

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

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

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

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

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

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

Approaching the authorities

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

There are no deadlines to apply for a leniency agreement. However, after the initiation of the administrative process the applicant will be qualified to a fine reduction and not to full immunity of CADE's fines. It is also important to state that the leniency agreement is executed at General Superintendency discretion that will have a less incentive after the initiation of the administrative process.

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

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

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

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

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

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

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

30 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, the more evidence provided, the greater the discount.

Confidentiality

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

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

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

- legal determination;
- specific judicial decision; and
- authorisation by the signatories of leniency 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's 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 CADE's Tribunal, there is no confidentiality obstacle for the Civil Court to access such documents relevant to evidence the illegal conduct that may have resulted in damages to the plaintiff.

Settlements

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

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

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

Corporate defendant and employees

33 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

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

The leniency agreement application can be divided in four phases:

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

A TCC application can be divided into four phases:

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

DEFENDING A CASE

Disclosure

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

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

Representing employees

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

Multiple corporate defendants

37 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

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

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

Taxes

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

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

International double jeopardy

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

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

Getting the fine down

41 | 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

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

Over the past year, CADE has adjudicated eight cases involving cartels, in which four of them were related to international cartels that resulted in direct or indirect effects within Brazilian territory.

Such cases involved the following products:

- liquid crystal display;
- optical disk drives;
- air insulated switchgear; and
- electric power steering.

In short, the fines imposed related to the companies ranged from 3 to 43 million reais for each company. On the other hand, the fines imposed on the individuals related to those companies ranged from 35,000 to 213,000 reais. There were 44 and 29 executions of leniency agreements and TCCs, respectively. All of them were fully complied with.

Furthermore, in the past year, CADE has also:

- shelved investigations against 17 defendants (companies and individuals) because of a lack of evidence; and
- declared the expiration period of statute of limitation regarding one company (*ODD cartel* case) and two individuals (*AIS cartel* case).

O. C. ARRUDA SAMPAIO
SOCIEDADE DE ADVOGADOS

Onofre Carlos de Arruda Sampaio
onofre@arruda-sampaio.com

André Cutait de Arruda Sampaio
andre@arruda-sampaio.com

Alameda Ministro Rocha Azevedo, 882, 8th floor
01410-002 São Paulo, SP
Brazil
Tel: +55 11 3060 4300
Fax: +55 11 3082 2272
www.arruda-sampaio.com

Regime reviews and modifications

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

As mentioned in question 3, there is a bill under Federal Senate analysis that proposes the following changes to Brazilian Antitrust Act No. 12.529/2011:

- double damage to the parties affected by the antitrust violation, with the exception of the defendants that executed leniency agreements or TCCS that will be liable only for single damage;
- 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 leniency agreements or TCCs;
- no presumption of pass-on in cases of cartel – the burden of proof of the pass-on is of the defendants;
- possibility of the Federal Court to grant injunction to the affected parties in damages 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 the affected party take the initiative to request an arbitration.

Currently, the proposed bill is being analysed by the Brazilian's House of Representatives.

Furthermore, CADE recently updated its Internal Rules, which became effective on 24 September 2019. The main purpose of this was the adjustment of rules that have shown the need for reform over the years.

Canada

Neil Campbell, Casey W Halladay and Guy Pinsonnault
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), a unit of the Ministry of Innovation, Science and Economic Development. The commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau, consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners, and approximately 40 officers, investigates all matters relating to cartels, conspiracies and bid rigging.

Canada's attorney general has ultimate discretion and authority to initiate criminal proceedings under the Act. The discretion of the attorney general is exercised by the director of public prosecutions (DPP), who heads the Public Prosecution Service of Canada (PPSC). A team of approximately 15 lawyers from the PPSC are responsible for the conduct of prosecutions under the Act. Prosecutions are brought before the provincial or federal courts.

In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes (see question 29) 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 the manner in which it will determine whether to pursue enforcement action under the criminal cartel or civil competitor agreement provisions.

The Bureau conducted public consultations in October 2017 and May 2018 on proposed revisions to its immunity and leniency programmes. New policy documents introducing the revised immunity and leniency programmes were jointly released by the Bureau and the PPSC in September 2018. These changes are discussed further in questions 9, 19 and 26.

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 supply of a product in the manner described above. To establish the mens rea of the offence, the prosecution must demonstrate that the accused intended to enter into the agreement and had knowledge of its terms.

The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46), and prohibits bid rigging (section 47). In the past, resale price maintenance had been a per se illegal criminal offence. In 2009, this offence was repealed and replaced with a civil 'reviewable practice' under section 76 of the Act.

Section 45 focuses on agreements among actual or potential competitors in the supply of products (defined to include goods and services) that involve price fixing, customer or market allocation, or output restriction. Despite some older reform proposals to the contrary, it does not address group boycotts. Potentially, it could catch other forms of cooperation among competitors, including joint ventures and strategic alliances. However, the Bureau has indicated in its guidelines on competitor collaborations that the conspiracy offence will be reserved for 'naked restraints' on competition. Commercial activities such as dual distribution, joint ventures and strategic alliances will, instead, be assessed under the reviewable practice provision in section 90.1. However, these guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court (see question 24).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. The Act prohibits conspiracies to unreasonably limit the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league. Agreements among federal financial institutions with respect to interest rates, service charges, or the amount and conditions of loans are offences. However, there are exceptions for the sharing of credit information and other matters.

Various sectors and activities are expressly excluded from the operations of the Act. These include labour relations, fishing, shipping conferences, securities underwriting and amateur sport.

The Act recognises the common law 'regulated conduct defence' under subsection 45(7). This subsection provides that the rules and principles of the common law that render a requirement or authorisation by or under another act of parliament or provincial legislature a defence to prosecution under section 45 continue to apply.

Application of the law

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

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 Bureau officials have noted in speeches that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the PPSC seek jail terms. The Bureau and PPSC have charged numerous individuals in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against several companies, although the proceedings were subsequently stayed against all parties. In the past 10 years, more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision in the matter of R v Pétroles Global Inc is the first ruling in Canada regarding an organisation's criminal liability pursuant to section 22.2 of the Criminal Code. 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 has demonstrated a willingness to adopt an expansive interpretation of *Libman*. The Bureau's position is that a foreign cartel that affects Canadian customers triggers substantive jurisdiction. Bureau guidelines and document production orders in various cases confirm the Bureau's interest in claiming jurisdiction over indirect (as well as direct) sales into Canada. Foreign producers of fax paper, sorbates, bulk vitamins, automotive parts and numerous other products have pleaded guilty to violations under the former section 45 for price-fixing and market-allocation agreements that occurred wholly outside Canada but affected Canadian markets, prices and customers.

Personal jurisdiction

The general principle governing personal jurisdiction of a Canadian criminal court is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is prima facie not subject to the process of that court. If there is no special statutory provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person is present in Canada or voluntarily submits to the jurisdiction of the court. For persons who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, Canadian courts will not have personal jurisdiction.

The case of foreign corporations with no Canadian presence or assets in Canada is more complex. Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be

served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof' within the territory of Canada. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of local implementation of the conspiracy, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in the US can be extradited to Canada pursuant to the Canada–US Extradition Treaty, which permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. 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 bid-rigging 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 – the US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act. In a more recent case, three Canadians who operated a deceptive telemarketing scheme based in Toronto, which purported to offer credit cards to Americans for a fee but never delivered the cards, were extradited to the US and were sentenced by the US Federal Court in the Southern District of Illinois. This was the first time a Bureau investigation resulted in extradition.

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.*

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The Bureau routinely commences informal investigations in response to complaints by marketplace participants, its own analysis of public information, or the evidence of informants. If such an investigation leads the commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the commissioner will launch a formal inquiry under section 10 of the Act. In addition, the commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Economic Development (the minister) or by an application under oath by six residents of Canada. Commencement of an inquiry empowers the commissioner to exercise formal powers, such as obtaining judicial orders to compel the production of evidence, search warrants and wiretap orders (see question 10).

After evidence is obtained during an inquiry, the commissioner decides whether to discontinue the inquiry or refer the case to the DPP for prosecution. Unlike many other jurisdictions, Canada has no statute of limitations for the prosecution of indictable offences (such as price fixing or bid rigging). There is thus no statutory deadline within which the commissioner and DPP must decide whether to bring charges against the members of a cartel. While some Bureau investigations have been resolved expeditiously (initiation to resolution in under two years), others have taken several years depending on the complexity of the investigation and the availability of investigative and prosecutorial resources.

If the inquiry is discontinued, the commissioner must make a written report to the minister that summarises the information obtained from the inquiry and the reasons for its discontinuance. The minister may accept the discontinuance or require the commissioner to conduct further inquiry. Although a directive from the minister or a 'six-resident application' cannot compel the commissioner to take any particular enforcement proceedings, the requirement of a written report to the minister upon the discontinuance of an inquiry ensures that the commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur significant costs, uncertainty and inconvenience in connection with such an inquiry, even though no formal charges are ever laid.

As described in question 2, where a matter is referred to the DPP, it will make an independent decision whether to lay charges and pursue a prosecution. In May 2010, the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process. These roles were further clarified in the September 2018 revisions to the immunity and leniency policies, which are discussed in question 34. The PPSC is a co-author of the revised immunity and leniency policies, which represents a change from previous editions where the Bureau was the sole author. This development,provides additional certainty that the DPP, as the head of the PPSC, will not act in a manner contrary to these policies, which had been a potential concern in the past.

Investigative powers of the authorities

10 | 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 – in other words, to use a wiretap. This power is restricted to conspiracy, bid rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded 'thousands' of telephone conversations using its wiretap powers.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records or compel a corporation to prepare written returns of information under oath, within a certain period of time. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his 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 constitutional challenge by Toshiba in the *CRT* investigation and by Royal Bank of Scotland in the *Libor* investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court.

Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Testimony obtained from a person under a section 11 order cannot be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. On the other hand, where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is generally considered admissible against the accused corporation.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 Bureau will often cooperate closely with other competition agencies, either through formal procedures or informally.

Formal procedures involve the invocation of mutual legal assistance treaties (MLATs) with the US and other countries. While they have been used sparingly, the MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters.

The Bureau may also use competition cooperation agreements, such as those with the US, the EU, Australia, Brazil and others. In general, such agreements build upon the 1995 OECD Recommendation Concerning Co-operation between OECD countries and include provisions relating to notification and consultation when an investigation may affect the interests of another jurisdiction. However, these agreements generally do not provide for the exchange of documents or other evidence that is subject to domestic confidentiality protections, and they are therefore of limited use in cartel cases.

In practice, there may be wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry even if confidential evidence is not exchanged. There has also been informal coordination of independent and parallel investigations into numerous international cartels. This has included parallel searches or other use of formal enforcement powers in several cases, including the investigation into air cargo surcharges. This form of cooperation has been very successful and is now the norm in investigations into cartels affecting North America. In addition, the Bureau now regularly requests that cooperating parties under its immunity and leniency programmes provide a 'waiver' allowing the Bureau to discuss common confidential information with the US Department of Justice and certain other cartel enforcement authorities.

Interplay between jurisdictions

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

In light of the MLAT and other inter-agency cooperation discussed in question 11, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is increasingly critical, and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution,

and the lack of any limitation period for cartel conduct, in Canada are factors of particular concern in developing a comprehensive strategy.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Cartel matters are prosecuted as indictable criminal offences. The charges are set out in an indictment and the accused must respond by entering a plea. In practice, many cases are resolved by negotiated plea agreements which are subject to court approval, as discussed further in questions 19 and 32.

If the accused pleads not guilty, a preliminary inquiry is held before a judge to determine whether there is sufficient evidence to order a trial. The DPP may and occasionally does skip this step by issuing a 'preferred indictment' and proceeding directly to trial.

Prosecutions may be brought in any of the regular provincial courts of superior jurisdiction or in the Federal Court – Trial Division. Procedure in these prosecutions is governed by the Criminal Code and the applicable court's rules of criminal procedure. Proceedings are normally undertaken in the provincial superior courts, which have well-established procedures for dealing with trials, evidence, custodial (and other) sentences, and other aspects of criminal proceedings.

Under the Act, a corporation has no right to a jury trial, although individuals may elect trial by jury.

Burden of proof

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

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove each element of the offence beyond a reasonable doubt. The ordinary rules of evidence in criminal proceedings generally apply, although the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases.

Circumstantial evidence

15 | 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

16 | 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 the ground that it is unreasonable or cannot be supported by the evidence, on the ground of a wrong decision on a question of law, or on any ground there was a miscarriage of justice. The court of appeal may dismiss the appeal where the appeal is not decided in favour of the appellant on any ground mentioned above, that no substantial wrong or miscarriage of justice has occurred, or notwithstanding any procedural irregularity at trial the court of appeal is of the opinion that the appellant suffered no prejudice thereby. Where a court of appeal allows an appeal it will quash the conviction and direct a judgment of acquittal or order a new trial. If an appeal is from an acquittal, the court of appeal may order a new trial, or enter a verdict of guilty.

SANCTIONS

Criminal sanctions

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

Given their status as the most serious indictable offences under the Act, cartel prosecutions attract significant penalties – up to C$25 million per count charged for companies and for individuals up to a C$25 million fine or 14 years' imprisonment. There is no maximum fine for foreign-directed conspiracies or bid rigging. Courts have emphasised in both the competition law and general criminal law context that fines must be large enough to deter powerful companies and must not become simply a cost of doing business. C$10 million is the highest fine to date for a single count conspiracy under section 45. This amount (the previous statutory maximum) was imposed for the first time in January 2006 in the *Carbonless Paper* case, and again in 2012 (in respect of conduct occurring under the old offence) in the *Polyurethane Foam* case. The section 46 offence relating to implementing a foreign conspiracy in Canada carries no fine ceiling, and in 1999–2000 SGL Carbon AG and UCAR Inc agreed to pay fines of C$13.5 million and C$12 million respectively under that provision in the *Graphite Electrodes* case.

It is also possible for a prosecution to proceed with multiple counts, each constituting a separate offence. This can result in total fines in excess of the statutory maximum, which has occurred following guilty pleas in a number of cartel cases. These include some of the highest fines in the history of Canadian criminal law: C$50.9 million against F Hoffmann-La Roche for multiple conspiracies involving vitamin products; and C$30 million against Yazaki Corporation in April 2013 for bid rigging in the supply of wire harnesses (auto parts). The latter penalty is the highest fine ever imposed under the bid-rigging offence.

While the maximum prison sentences available under sections 45 (conspiracy) and 47 (bid rigging) of the Act are 14 years, the imposition of custodial sentences against individual cartel offenders to date has been relatively rare. Virtually all prison sentences for cartel conduct have been less than two years, with most of those sentences conditional (ie, to be served in the community). However, legislative amendments to the Criminal Code in 2012 eliminated the availability of conditional sentencing for future section 45 and section 47 convictions.

Civil and administrative sanctions

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

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment discussed in question 16. It is also common for the DPP to seek a prohibition order to prevent future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, the section 90.1 reviewable practice provisions permit the Bureau to pursue a prohibition order against the conduct in question. (Fines are not available.) Alternatively, it might be possible for the commissioner to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act.

Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of dominance provision of the Act of up to C$10 million for a first order and of up to C$15 million for subsequent orders.

To date there have been very few section 90.1 or joint dominance cases, and they have all been settled with consensual remedial agreements.

Guidelines for sanction levels

19 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 its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

The Bureau's September 2018 leniency policy establishes a framework for determining the recommendation that it will make to the DPP regarding the fine to be sought in cases involving cooperating parties. The policy uses an initial starting point of 20 per cent of the volume of commerce affected by the cartel in Canada. Of this 20 per cent starting point, 10 per cent is viewed as a proxy for the overcharge from the cartel activity and 10 per cent is viewed as a deterrent. If the precise overcharge can be calculated on the basis of compelling evidence, then the 10 per cent proxy will be replaced by the actual overcharge. Cooperation discounts (up to 50 per cent) and any aggravating or mitigating factors are then applied to the base fine. In addition to the aggravating and mitigating factors set out above, the September 2018 leniency policy notes that the existence of a credible and effective corporate compliance programme will serve as a mitigating factor in the calculation of the fine amount.

Prior to the September 2018 leniency policy, the 50 per cent cooperation discount, which was automatic, was only available to the first leniency applicant, with subsequent leniency applicants only eligible for discounts up to 30 per cent. The updated leniency policy permits a cooperation credit of up to 50 per cent for every leniency applicant, which is dependent on the value of the leniency applicant's cooperation. See questions 26 and 27 for additional details on the new immunity and leniency policies.

While these criteria and the Bureau recommendations are given significant consideration in the negotiation of guilty plea arrangements, they are not binding on the DPP or on the court when a guilty plea is presented to the court for acceptance. Nor would they bind the DPP when making submissions on an appropriate sentence after obtaining a conviction at trial.

If a guilty plea is negotiated with the DPP, it will usually include agreement upon a joint submission to the court as to the proper penalty. The court is not bound by this recommendation, but will not reject it unless it is either contrary to the public interest or brings the administration of justice into dispute.

Compliance programmes

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

Under the revised Immunity and Leniency programme 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

21 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

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

A new Integrity Regime was put in place by the Canadian government in July 2015. The regime applies to procurement and real property transactions undertaken by federal government departments and agencies. A supplier is ineligible to do business with the government of Canada if it, or a member of its board of directors, has been convicted of bid rigging or any other anticompetitive activity under the Competition Act or a similar foreign offence. Where an affiliate of a supplier has been so convicted, an assessment will be made to determine if there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction. If so, the supplier will be rendered ineligible. If a supplier is charged with an offence, it may also be suspended from doing business with the government pending the outcome of the judicial proceedings.

A supplier convicted of a Competition Act offence will be ineligible for 10 years, but may have its ineligibility period reduced by five years if it demonstrates that it cooperated with law enforcement authorities or has undertaken remedial action to address the wrongdoing. An administrative agreement would then be imposed to monitor the supplier's progress.

Exceptions to the policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier

that has been convicted. Possible circumstances necessary to the public interest could include:

- no other supplier is capable of performing the contract;
- an emergency;
- national security;
- health and safety; and
- economic harm to the financial interests of the government of Canada and not of a particular supplier.

In March 2018, the federal government announced that the Integrity Regime will be enhanced to introduce greater flexibility in debarment decisions and increase the number of triggers that can lead to debarment (including the addition of more federal offences, certain provincial offences, 'foreign civil judgments for misconduct' and debarment decisions of provinces, foreign jurisdictions and international organisations). The government announced that the enhanced Integrity Regime will be reflected in a revised Ineligibility and Suspension Policy, which would be released on 15 November 2018, and would come into effect on 1 January 2019. The modifications have not yet been disclosed and their coming into force is not expected before November 2019.

Many provincial (and also municipal) governments have also establish rules governing debarment from their procurement processes. For example, the Quebec Integrity in Public Contracts Act prohibits a corporation convicted of price fixing or bid rigging under the Competition Act in the previous five years from entering into contracts with public bodies or municipalities.

Parallel proceedings

23 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, 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. As noted in question 4, the Bureau has issued guidelines indicating that hard-core cartel conduct normally will be prosecuted criminally and that other types of competitor collaboration normally will be dealt with under the section 90.1 civil provisions.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The passing-on defence is not permitted. The Supreme Court of Canada held in 2013 that the possibility of double recovery is an issue to be dealt with when assessing damages at trial, and should not be a bar to indirect purchaser claims.

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

25 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 nation-wide 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. However, there is no formal procedure for consolidating or coordinating parallel actions brought in multiple courts.

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. More recently, plaintiffs have settled a long-running class action against Microsoft for C$517 million.

COOPERATING PARTIES

Immunity

26 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 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 DPP on recommendation by the Bureau. As of September 2018, the first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral of the case to the DPP for possible prosecution, is eligible for a grant of interim immunity. The applicant must have terminated its participation in the illegal activities and must not have coerced others

to participate in the illegal activities. The grant of interim immunity is a conditional immunity agreement that sets out the applicant's ongoing cooperation and full disclosure obligations that must be fulfilled in order for the DPP to finalise the immunity agreement.

Pursuant to the grant of interim immunity, the applicant will need to provide complete, timely and ongoing cooperation throughout the course of the Bureau's investigation and subsequent prosecutions. This entails full, frank and truthful disclosure of non-privileged information and records. The applicant's counsel will first proffer what records, evidence or testimony can be provided. Once a grant of interim immunity is concluded with the DPP, witnesses will be interviewed and they may subsequently be called to testify in court proceedings.

As of September 2018, if a company qualifies for immunity, all current directors, officers and employees that desire immunity will need to demonstrate their knowledge of or participation in the unlawful conduct and their willingness to cooperate with the Bureau's investigation. If they do so, they will also receive immunity provided they offer complete and timely cooperation. Former directors, officers and employees of the company who admit their knowledge of or participation in an offence under the Act may also be given immunity in exchange for cooperation, provided they are not currently employed by another member of the cartel that is being investigated. This determination is to be made by the Bureau on a case-by-case basis.

Subsequent cooperating parties

27 | 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. An agreement to plead guilty and cooperate can earn a leniency applicant a reduction of up to 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP. At the request of the first leniency applicant (ie, the first cooperating party after the immunity applicant) that is a corporate applicant, the Bureau will also recommend to the DPP not to charge the directors, officers or employees of the applicant who admit knowledge of or participation in the unlawful conduct and are prepared to cooperate.

Providing all leniency applicants with the ability to receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended is a new development in the September 2018 leniency programme. Previously, only the first-in leniency applicant was eligible for this 50 per cent reduction, which was automatic, with subsequent applicants only eligible for a fine reduction of up to 30 per cent. In the new programme, the percentage of the fine reduction is to be determined having regard to the extent that the leniency applicant's cooperation adds to the Bureau's ability to advance its investigation and pursue other culpable parties. The Bureau will take into account a number of factors, including the timing of the leniency application (relative to other parties in the cartel as well as relative to the stage of the Bureau's investigation), the timeliness of disclosure, the availability, credibility and reliability of witnesses, the relevance and materiality of the applicant's records, and any other factor relevant to the development of the Bureau's investigation into the matter. An additional fine reduction credit of 5 to 10 per cent is available to a party eligible for 'immunity plus' (see question 28).

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

28 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier applicant for immunity in respect of the same alleged cartel conduct. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, be able to request immunity at that time.

Under the Bureau's September 2018 leniency programme, the timing of the leniency application is an important consideration in the determination of the percentage fine reduction that will be available to the applicant. In the previous version of the leniency programme, there was more certainty as the second party benefited from a penalty reduction of 50 per cent of the fine that would otherwise be recommended, but the new programme has made it clear that the extent of the applicant's cooperation will be one of the factors to be considered in this determination. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, so long as they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation in an ongoing manner. Other conspirators who seek to resolve their exposure later in the investigation will have progressively less ability to negotiate favourable fine reductions, unless they are able to demonstrate a higher value associated with their cooperation. In addition, second and subsequent leniency applicants will have less ability to negotiate favourable terms in connection with the exposure of individuals to potential prosecution.

The concept of 'immunity plus' is also addressed in the leniency programme. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for additional favourable treatment if they are the first to disclose information relating to another offence for which they may receive immunity. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognised by the Bureau and the DPP in their sentencing recommendations with respect to the first offence, resulting in an additional 5 to 10 per cent discount off the corporate fine for the first offence and potentially additional favourable treatment for individuals.

Approaching the authorities

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

There are no deadlines for approaching the Bureau. However, the available benefits decline for subsequent cooperating parties as noted in question 28. 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

30 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 '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

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

The Bureau treats as confidential any information obtained from a party requesting immunity or leniency. The only exceptions to this policy are when disclosure:

- is required by law;
- is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- is agreed to by the cooperating party;
- has already been made public by the party;
- is necessary for the administration or enforcement of the Act; or
- is necessary to prevent the commission of a serious criminal offence.

In addition, unless required by law or on consent, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity or leniency applicant.

With respect to private actions, the Bureau's policy is to provide confidential information 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 suchinformation, including by seeking a protective order from the court.

Settlements

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

While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

As discussed in question 19, the DPP and defence counsel may make recommendations but cannot fetter the sentencing discretion of the court. In practice, plea bargains with joint recommendations on sentencing have almost always been accepted. 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

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

If a company qualifies for immunity, all present directors, officers and employees who admit their knowledge of or participation in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for immunity. Agents of a company and past directors, officers and employees who admit their knowledge of or participation in the illegal activity and who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity – for example, if it coerced others to participate – past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming no other contrary factors 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

34 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 (e.g. 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 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 an grant of interim immunity or enters into a plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution of other parties (see question 30).

Immunity agreement (for the immunity programme only)

Once a party has satisfied all of its obligations under the grant of interim immunity, the Bureau will recommend to the DPP to finalise the grant of immunity to the applicant. The final grant of immunity will not ordinarily be finalised until either: (i) the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution; or (ii) the commissioner and the DPP have no reason to believe that further assistance from the applicant could be necessary.

DEFENDING A CASE

Disclosure

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

The 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. A violation of this constitutional right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

Representing employees

36 | 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 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 the potential conflict of interest and confidentiality arrangements as between them. However, the Bureau investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

Multiple corporate defendants

37 | 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 codefendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflict management arrangements have been established between lawyers at the firm engaged in the matters. These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants were not in a situation of actual conflict.

As a matter of current practice, the DPP will be unlikely to participate in joint resolution discussions involving multiple parties.

Payment of penalties and legal costs

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

It is possible for a corporation to indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, there has been at least one instance in which a convicting court ordered a corporation not to pay the fine imposed on an individual employee.

Taxes

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

Fines and penalties can be categorised as follows:

- judicial – these are imposed by a court of law for a breach of any public law; and

- statutory – these are imposed as a result of the application of statutes (for example, the Competition Act).

Damages include a payment in settlement of a damages claim to avoid or terminate litigation, even where there was no admission of any wrongdoing.

Paragraph 18(1)(a) of the Income Tax Act provides that, in calculating a taxpayer's income from a business or property, no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property. As stated by the Supreme Court of Canada in *65302 British Columbia Ltd*: 'if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted.'

For purposes of establishing whether a fine or penalty has been incurred for the purpose of gaining or producing income:

- the taxpayer need not have attempted to prevent the act or omission that resulted in the fine or penalty; and
- the taxpayer need only establish that there was an income-earning purpose for the act or omission, regardless of whether that purpose was actually achieved.

In the *65302 British Columbia Ltd* decision, the Supreme Court of Canada also stated that: 'it is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income'. The court did not, however, give any further guidance in this respect, other than to indicate that 'such a situation would likely be rare'.

International double jeopardy

40 | 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 penalised in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada from the indirect sales.*

Section 718.21 of the Criminal Code requires a court sentencing a corporation to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. It has not been conclusively determined whether this provision should be interpreted as applying only to other sanctions imposed in Canada, or whether fines paid in other jurisdictions can also be considered. However, an obiter comment in a 2012 Federal Court sentencing decision (*R v Maxzone Canada Corporation*) suggested that the mere fact that a company or individual had been penalised in another jurisdiction should not be considered relevant when determining a sentence in Canada.

mcmillan

Neil Campbell
neil.campbell@mcmillan.ca

Casey W Halladay
casey.halladay@mcmillan.ca

Guy Pinsonnault
guy.pinsonnault@mcmillan.ca

Brookfield Place, Suite 4400
181 Bay Street
Toronto
M5J 2T3
Canada
Tel: +1 416 865 7000
Fax: +1 416 865 7048
www.mcmillan.ca

Getting the fine down

41 | 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 reduced fine or leniency for exposed individuals (or both) may be negotiated. Other substantive factors may also be important elements in a negotiated settlement of the company's exposure to prosecution, including the 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 instigation of the offence.

UPDATE AND TRENDS

Recent cases

42 | 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:

- 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. (At trial, only class members that actually suffered harm can recover.);
- umbrella purchasers have a cause of action and their claims can be certified;
- the statutory cause of action under section 36 of the Act is not an exclusive code and does not prevent common law causes of actions; and
- discoverability principles apply to limitation periods for a cause of action under the Act.

Regime reviews and modifications

43 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 such reviews are anticipated.

China

Ding Liang
DeHeng Law Offices

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Anti-Monopoly Law of China (AML) (promulgated on 30 August 2007 and effective as of 1 August 2008) is the main legislation governing cartels. In addition, both the Price Law of 1998 and Bidding Law of 2000 prohibit certain kinds of collusive activities. Unlike those antecedents, the AML imposes this prohibition in the context of a comprehensive competition law enacted for the purpose of protecting competition and enhancing economic efficiency.

In April 2018, the State Administration for Market Regulation (SAMR), a consolidated anti-monopoly enforcement agency, was established according to the State Council Organization Reform Plan. On 26 June 2019, SAMR issued the Interim Provisions on the Prohibition of Monopoly Agreements (the Interim Provisions) effected on 1 September 2019. Article 7-11 of the Interim Provisions provide more detailed rules to regulate cartel conducts.

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 market regulatory departments of people's governments of all provinces, autonomous regions and municipalities directly under the Central Government (the Provincial Market Regulatory Department (PMRD)) are authorities that investigate cartel matters. Under the AML, SAMR renders decisions independently without relying on the court.

According to the AML, the Anti-Monopoly Commission of the State Council (AMC) was established to organise, coordinate and supervise antimonopoly-related activities. The AMC generally serves as a policy making body and is not involved in the specific antitrust cases.

Cartel agreements are not a criminal violation in China. Therefore, except for bid rigging or obstructing law enforcement by means of violence or threat, the criminal prosecution authorities' role is very limited in China's cartel enforcement.

Changes

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

The establishment of SAMR

Before the institutional reform of April 2018, both the State Administration for Industry and Commerce (SAIC) and National Development and Reform Commission (NDRC) had jurisdiction over enforcement of cartel investigation. Since April 2018, SAMR is the consolidated agency to enforce cartel investigation.

Amendment of anti-trust regulations

To echo the changes to anti-cartel enforcement, the regulations issued by NDRC and SAIC relating to cartel investigation was also replaced by the Interim Provisions. With the promulgation of the Interim Provisions and other anti-trust regulations and guidelines, the calls for the amendment of the AML are getting louder. The Standing Committee of the 13th National People's Congress has included the amendment of the AML into the legislative plan. The amendment is expected to be released in 2020.

Substantive law

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

Article 13 of the AML prohibits certain types of cartel agreements, including:

- fixing or changing the prices of products;
- restricting output or sales volume of products;
- allocating sales or purchasing markets for raw materials;
- restricting the purchase of new technology or new equipment, or restricting the development of new technologies or new products;
- group boycotts; and
- other monopoly agreements as determined by the anti-monopoly enforcement agency.

Article 7-11 of the Interim Provisions are the specific provisions dealing with price fixing; restricting output, market/customer allocation; restricting innovation and new technology; and group boycotts.

Though the AML does not expressly include bid rigging here, it may be seen as a type of cartel conduct. In practice, NDRC investigated and fined bid rigging related conduct applying article 13 of the AML in several high-profile cases, including the *Auto Parts and Bearings* case (2014) and the *Auto Maritime Transportation* case (2015).

Also, according to article 13 of the AML and the Interim Provisions, concerted practices constitute a form of horizontal monopoly agreement. Finding concerted practices does not require the existence of any written or oral agreements between the competitors, rather only (i) uniformity of behaviour among competitors; (ii) some opportunity for communications or exchange of information between competitors; (iii) the uniformity cannot be reasonably explained other than as the result of improper communication among competitors; and (iv) the market structure, competition status, market changes and other situations of the relevant markets.

Although cartels theoretically are subject to exemption under article 15 of the AML, the agency effectively treats cartels as per se illegal. On the other hand, Chinese courts seem to consider the actual effects of a claimed cartel. Under the Supreme Court's Provisions on Several Issues concerning the Application of Law in the Civil Disputes

Arising from Monopoly Conduct (2012) (the Anti-Monopoly Judicial Interpretation), the anticompetitive effect of a cartel is presumed. However, the presumption seems weak.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

5 | 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

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

Article 12 of the AML defines 'undertaking' as a natural person, a legal person or any other organisation that engages in the production or operation of commodities or provisions of services. As a result, the law generally applies to both individuals and corporations. However, when an employee is involved in a cartel on behalf of a corporation, only the corporation is liable as the corporation is the undertaking in that situation.

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 article 2 of the AML, the law is applicable to monopolistic conduct outside the territory of China that has the effect of eliminating or restricting competition in the domestic market of China. There have been a number of cartel cases, including the *LCD Panel* case (2013), *Auto Parts and Bearings* case (2014), and *Auto Maritime Transportation* case (2015), where conduct outside China was found to be in violation of the AML.

To establish that conduct outside China has an anticompetitive effect in China: (i) the product under investigation must be imported into China; and (ii) there is a reasonable causal nexus between the alleged conduct and the anticompetitive effect in China.

Export cartels

8 | 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.

INVESTIGATIONS

Steps in an investigation

9 | 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. SAMR or local PMRD may also initiate an investigation if they have reason to believe there has been a cartel infringement.

Pre-investigation

At this stage, SAMR or local PMRD will conduct an external investigation to understand the background and verify the evidence obtained to determine whether to formally initiate the antitrust investigation. The local PMRD may communicate with SAMR before initiating the investigation.

Initiation of an investigation

A local PMRD shall, within seven working days after the initiation of an antitrust 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 the local PMRD. SAMR or the local 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 the local PMRD has broad investigative power and may take the following measures during the fact-finding stage. For instance, after the initiation of the investigation, SAMR 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 requesting the undertaking under investigation to provide documents.

Undertakings which are under investigation and interested parties have the right to voice their views. SAMR shall verify the facts, reasons and evidence presented by undertakings under investigation or interested parties.

SAMR 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 well 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 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 under investigation 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 fact, the violation found, the fine base and the rate of fine. It will state the right for the undertaking under investigation to make a statement, 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 and/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 the trade secret of the undertaking under investigation.

Publication

A decision on the administrate penalty or a decision on suspension or termination of investigation, will be released to the public through SAMR's website: www.samr.gov.cn/fldj/tzgg/xzcf/.

Administrative review or administrative lawsuit

If the undertaking under investigation 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

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

Article 39 of the AML grants SAMR or local PMRD broad investigative powers, including to:

- conduct on-premise inspections of the place of business of the investigated undertaking or other relevant places;
- question the investigated undertaking, interested parties, and other relevant entities and individuals, requiring them to provide relevant information;
- examine or copy relevant documents and information including related documentation, contracts, accounting books, business mails, and electronic data, etc, of the investigated undertaking, interested parties, and other relevant entities or individuals;
- seal up and detain relevant evidence; and
- enquire about the bank accounts of the undertakings.

SAMR or local PMRD 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 local PMRD for approval.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

SAMR has pursued bilateral cooperation with their counterparts in other jurisdictions. Since the enactment of the AML in 2008, they have entered into at least 55 cooperation agreements or memorandum of understandings (MoU) with competition authorities in 28 countries and regions, including the US, the EU, Japan, Korea and Australia.

- US: In July 2011, the NDRC, the MOFCOM and SAIC signed an antitrust MOU with the US Federal Trade Commission and Department of Justice to foster cooperation in the enforcement of their competition laws and policies.
- EU: In September 2012, the NDRC, the SAIC and DG Competition of EU signed a MOU, which creates 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.
- Japan: In May 2019, SAMR concluded a memorandum on cooperation 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.
- Korea: 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.
- Australia, In November 2015, NDRC and the Australian Competition and Consumer Commission have signed an MOU to allow the agencies to take coordinated action in response to anticompetitive 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 of the Organisation for Economic Co-operation and Development (OECD). However, consolidation of China's three antitrust agencies will smooth SAMR-ICN and SAMR-OECD communication and coordination. As a UN member, China is involved in some work of the competition group of the United Nations Conference on Trade and Development.

Interplay between jurisdictions

12 | 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 antitrust enforcement agencies in other jurisdictions, this inter-jurisdictional cooperation remains high level, and so far there is no clear indication of working-level coordination between jurisdictions in specific investigations.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

After SAMR or local PMRD establishes a finding of a monopoly agreement, it will issue a formal penalty decision and a public announcement.

Usually SAMR or local 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 for a formal hearing or otherwise submit a written representation or defence but often has only a few days to do so. There is no mandatory time limit between the issuance of the prior notice for administrative penalties and the formal decision, and SAMR or local PMRD has the discretion.

The hearing or written submission provide the investigated parties with an opportunity to challenge the to-be-issued formal penalty decision before resorting to the appeal process. If the defence is accepted by SAMR or local PMRD, no penalty will be imposed.

Burden of proof

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

In public enforcement, SAMR or local PMRD bears the burden to prove the existence of a cartel. Once SAMR or local PMRD has proved the existence of a cartel, it is hard for the parties to rebut the presumption of anticompetitive effects.

As to cartel-related private actions, according to the Anti-Monopoly Judicial Interpretation, for the types of specific cartel conduct listed under items 1 to 5 of article 13(1) of the AML, the defendant bears the burden to prove that the alleged agreement does not have the effect of eliminating or restricting competition. The plaintiff is responsible for proving the existence of a cartel, as well as standard items in civil litigations such as damages and causation between the alleged violation and the damages. Generally, in Chinese civil litigation, the level of proof is balance of probabilities.

Circumstantial evidence

15 | 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

16 | What is the appeal process?

There are two routes for an undertaking to challenge an administrative penalty decision of SAMR or local PMRD after the formal penalty decision has been made: administrative review and administrative litigation. The two routes are alternative to each other. After the formal penalty decision is made, the undertaking has 15 days to pay the penalties. The application for administrative review or filing of administrative suit with the court will not halt the payment of penalties.

Administrative review

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 local PMRD can be challenged either at the provincial government or at SAMR, subject to the discretion of the applicant. The review is, in principle, limited to on-paper review, with the possibility of a hearing or consultation upon request by the applicant or the discretion of the reviewing agency.

In terms of timing, the undertaking must apply for administrative review within 60 days of receipt of the formal decision. The agency has 60 days from acceptance to make a decision, which can be extended by up to 30 days upon approval. The applicant still has the opportunity to file an administrative litigation if it is unsatisfied with the administrative review decision.

Administrative litigation

An undertaking can challenge SAMR or local PMRD's penalty decision via an administrative suit in the court. The undertaking must file the administrative suit within six months of receipt of the formal penalty decision. Administrative lawsuits are usually accepted at the time of filing if formalities are complete; if not, the court will provide a time limit for the plaintiff to supplement the formalities. The court must make its first instance decision within six months of acceptance of the case. This period can be extended upon approval.

According to article 2 of the Provisions of the Supreme People's Court on Several Issues Related to the Intellectual Property Tribunal, the IP tribunal of the SPC tries the following cases: '... appellate cases due to disobeying judgments and rulings of administrative cases of first instance on . . . administrative penalty for monopoly made by higher people's courts, intellectual property courts and intermediate people's courts . . .'. Either party can appeal the first instance decision to the SPC within 10 or 15 days, depending on the nature of the court decision, after receipt of the first instance decision. The SPC must make the final decision within three months of receipt of the appellate petition, which is also extendable similar to the above.

SANCTIONS

Criminal sanctions

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

Except for bid rigging or obstructing law enforcement by means of violence or threat, cartels are generally not criminal violations in China.

Bid rigging

Article 223 of the Criminal Law provides: 'Bidders who act in collusion with each other in offering bidding prices and thus jeopardise the interests of bid-inviters or of other bidders, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.' The longest sentence is two years and six months in a bid-rigging case, where the offender paid '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

Article 277 of the Criminal Law provides: 'Whoever by means of violence or threat, obstructs a functionary of a State organ from carrying out its functions according to law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance or be fined.'

Civil and administrative sanctions

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

According to article 46 of the AML, where an undertaking has violated the provisions of the AML by entering into and implementing a monopoly agreement, SAMR or local PMRD shall order the undertaking:

- to stop the illegal act;
- to confiscate the illegal income; and
- to pay a fine ranging from 1 per cent to 10 per cent of the sale volume of the preceding year.

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 local 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.

As a general trend, in recent years, enforcement against cartels has increased, with increasingly higher penalties imposed on the cartel members and any industry association organising the cartel activities. The highest fines against cartel conduct to date is the 2014 penalty decision against 12 Japanese auto parts and bearing companies. Eight auto parts manufacturers are imposed fines totalling 831.96 million yuan (Hitachi is exempted of the penalty). Four bearing manufacturers are imposed fines totalling 403.44 million yuan (Nachi-Fujikoshi is exempted of the penalty). The combined amount of the fines reaches RMB 1.24 billion yuan, representing 4 to 8 per cent of the penalised companies' annual turnover. In a 2017 penalty decision against 23 electricity companies and the electricity industrial association in Shanxi Province, the industrial association organising the price-fixing agreement was fined 500,000 yuan, the maximum fine available for industrial association under the AML.

In terms of civil sanctions, a plaintiff can file a civil lawsuit seeking compensation for damages caused by the alleged cartel activities. In addition, the party losing the litigation generally bears the litigation fees charged by the court; upon plaintiff's request, the court may also incorporate plaintiff's reasonable costs for investigation and prevention of the cartel activity into the amount of damages.

Guidelines for sanction levels

19 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: To determine the fine base

The fine will be imposed on the basis of the preceding year's sales revenue. In general, the 'preceding year' shall be the year prior to the initiation of the investigation. In some cases, the 'preceding year' is the year prior to the decision of imposing the fine.

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 the establishment of SAMR, it 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 is not enacted yet, but it reflects the practice of the authority and can be used as a helpful reference. For the 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

Adjustments owing to aggravating circumstances

Aggravating circumstances	Adjustment
Playing a leading role or coercing other undertakings to implement the monopolistic conduct or preventing other undertakings from discontinuing the monopolistic conduct.	+1 per cent
Committing multiple monopolistic conduct in the same case or having violated the AML in the past.	+1 per cent
Committing multiple monopolistic conduct in the same case or having violated the AML in the past.	+1 per cent
As to the duration, one year shall be taken as the base; the proportion of fines will increase by 1 per cent for each additional year; by 0.5 per cent for addition of a period less than six months; and by 1 per cent for addition of a period more than six months but less than one year.	+0.5 per cent up to a total of 10 per cent
Continuing the monopolistic conduct after being ordered to stop by the anti-monopoly enforcement agency.	+0.5 per cent
Other aggravating circumstances.	+0.5 per cent

Adjustments owing to mitigating circumstances

Mitigating circumstances	Adjustment
Being coerced by other undertakings to implement the monopolistic conduct.	-1 per cent
Being forced or coerced by administrative authorities to implement the monopolistic conduct.	-1 per cent
Cooperating with the anti-monopoly enforcement agency and making meritorious performance.	-1 per cent
Taking the initiative to eliminate the harm and consequences of illegal activities.	-1 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' violation of the AML.	-0.5 per cent
Other aggravating circumstances.	-0.5 per cent

SAMR has full discretion to adjust the initial fine rate by considering the above aggravating or mitigating circumstances.

Compliance programmes

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

The AML is silent on whether the existence of a compliance programme affects the level of the fine. Based on the past practice of SAMR and PMRD, the mere existence of a compliance programme is not recognised as a factor affecting the level of the fine. Establishing or strengthening the antitrust compliance programme going forward, even after SAMR and PMRD initiated an investigation, is more helpful as this shows that the parties are willing to cooperate and take the law enforcement authority's competition concerns seriously.

Director disqualification

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

There is no relevant laws and regulations to prohibit the individuals from serving as director, supervisor or senior officer of a company owing to conducting the cartel.

Debarment

22 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 anticompetitive conduct including cartel infringements. However, article 53 of the Bidding Law provides debarment for bid rigging. Specifically, for severe bid-rigging violations, the bidder shall be disqualified for one to two years from taking part in bidding for projects for which a bid invitation is required by law.

Parallel proceedings

23 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 local PMRD does not preclude private civil litigation against the same conduct. According to article 2 of the Anti-monopoly Judicial Interpretation, both the 'stand alone' actions and 'follow-on' actions after the decision of SAMR or local PMRD are permitted. There are examples of private litigation following an administrative penalty decision, claiming damages arising from the same penalised conduct. The first such case was *Tian Junwei v Carrefour and Abbott* (2016), which was a follow-on private litigation of an NDRC penalty decision against baby formula manufacturers for resale price maintenance. However 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, decision of administrative penalty issued by NDRC only proved that Abbott and its downstream undertakings have a fixed vertical monopoly agreement on the price of milk powder when reselling milk powder to a third party, but was not clear who is the other party of the vertical monopoly agreement, therefore, it is not reasonable to directly conclude that Carrefour Shuangjing store and Abbott certainly have vertical monopoly agreement. Consequently, this case demonstrates the possibility of parallel proceedings and de novo review by the court.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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?

Neither the AML nor the Anti-Monopoly Judicial Interpretation distinguishes between direct purchasers and indirect purchasers. Although it is still untested, indirect purchasers seem to be allowed to file antitrust civil actions with courts as no laws or precedents have prohibited this.

Pursuant to article 119 of the Civil Procedure Law, the claimant should have a direct interest in the case. Although the definition of 'direct interest' remains unclear, considering article 1 of the Anti-Monopoly Judicial Interpretation, claimants who have standing to bring a lawsuit are not only limited to direct purchasers or those directly affected, but also include those who suffer direct or indirect loss, or parties disputing a contract or disputing the terms of articles of association of industry associations. Therefore, private parties, including indirect purchasers, who suffer loss from conduct in violation of the AML, or who rely on the AML in disputes concerning contracts or articles of association of industry associations, may bring lawsuits under the AML.

In *Tian Junwei v Carrefour and Abbott* (2016), Abbott is alleged to fix the resale price of milk powder. Carrefour is the direct purchaser and reseller of Abbott's milk powder, its discretion on pricing is restricted by the resale price maintenance imposed by Abbott. Tian Junwei is the consumer who indirectly purchases the Abbott's milk powder through Carrefour, and sued both manufacturer Abbott and reseller Carrefour. The Beijing IP Court held that Tian Junwei, as an indirect purchaser, had the right to bring an antitrust action in court. In the appeal, the Beijing High People's Court rejected the jurisdictional challenge filed by Abbott and Carrefour.

Similarly, the passing-on and double recovery issues have not been addressed by courts or legislators at this point. However, it is clear that Chinese courts have been cautious not to overcompensate parties. Against this backdrop, it is more likely than not that the court will accept the 'passing-on' defence, by which defendants may argue that plaintiffs have passed price increases or other injury onto downstream customers.

Double or treble damages (or other kinds of punitive damages) are not available under the AML.

According to the Anti-Monopoly Judicial Interpretation, upon request from the plaintiff, the court may consider the plaintiff's reasonable costs for investigation and prevention of the monopoly conduct when deciding the amount of damages.

Class actions

25 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.

After obtaining special authorisation from the plaintiffs that they represent, the representatives may attend open-court trials, change or waiver claims, recognise claims of the opposing party, settle with the opposing party or enter into a settlement agreement with the opposing party, and lodge a counterclaim or appeal.

COOPERATING PARTIES

Immunity

26 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 46 of the AML provides the legal basis for a leniency regime, which gives SAMR or local PMRD discretion to reduce or waive penalty for undertakings participating in a cartel if they: voluntarily report the relevant facts and provide material evidence.

Articles 33 and 34 of the Interim Provisions provide more detailed rules regarding leniency regime. Where an undertaking as a party to a

cartel agreement voluntarily reports the relevant circumstances for the conclusion of the agreement and provides material evidence, an application for mitigated penalty or exemption from penalty may be filed in accordance with the law.

The term 'material evidence' refers to evidence which may lead to the launch of an investigation by SAMR or local PMRD or makes an essential contribution to the finding of a cartel agreement, including: the identities of undertakings as parties to monopoly agreements; scope of commodities concerned; content and method of conclusion of the monopoly agreement; and actual implementation of the monopoly agreement.

SAMR or local PMRD shall decide whether to give a mitigated penalty or exempt the undertaking from penalty by considering the 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.

For the first applicant in a case, the anti-monopoly law enforcement agency may exempt such undertaking from penalty or reduce the fine amount by not less than 80 per cent.

Undertakings that coerce or organise other undertakings to participate in concluding or implementing monopoly agreements or prevent other undertakings from stopping illegal practices, SAMR or local PMRD may not exempt them from penalty, but may give a mitigated penalty.

Subsequent cooperating parties

27 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?

As indicated in question 19, there are many ways to mitigate the fine after an immunity application has been made. Usually, subsequent cooperating parties to a cartel investigation could benefit from a reduction in the fine.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

According to the Interim Provisions, 'second in' and 'third in' could benefit from a reduction in the fine. The reductions are as follows:

- first in: exempt from penalty or reduce the fine amount by not less than 80 per cent;
- second in: reduce the fine amount by 30 per cent to 50 per cent; and
- third in: reduce the fine amount by 20 per cent to 30 per cent.

Neither the AML nor the Interim Provisions provides 'immunity plus' or 'amnesty plus' option. In practice, if an undertaking applies leniency in one investigation and reports information about another antitrust violation occurring in a separate industry, it may not get additional benefits from SAMR or local PMRD because if the authority decides not to investigate the reported conduct, it cannot prove the truthfulness of such reports.

Approaching the authorities

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

According to the Interim Provisions, where an undertaking participating in a monopoly agreement voluntarily reports the relevant information on conclusion of monopoly agreement and provides material evidence, it may apply for reduction or exemption of penalty pursuant to the law.

The deadline for initiating an application for leniency is when the applicant obtained or can obtain material evidence to prove the existence of a cartel agreement. Earlier than that the leniency application may not be formally accepted because it does not meet the general requirement of 'material evidence'.

The deadline for completing an application for leniency is when SAMR or local PMRD verified the alleged cartel agreement. At this point, the applicant cannot meet the requirement of 'voluntarily report', because all the facts have been investigated and verified by the authority.

The 'marker' system is detailed in the Draft Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements (draft for public comments) (the Draft Leniency Guidelines). According to the Draft Leniency Guidelines, undertakings that temporarily cannot provide complete materials when they apply for leniency may submit a preliminary report to the authority as a 'marker'. In the preliminary report, the undertaking shall:

- explicitly admit that its involvement in entering into the monopoly agreement is in violation of the AML; and
- give a brief description of the monopoly agreement, including:
  - the identities of undertakings as parties to monopoly agreements;
  - the scope of commodities concerned; and
  - the date of entering into the monopoly agreement and its implementation.

If the undertaking submits all necessary supplemental materials within the specified period by the authority, the date of the 'marker' shall be regarded as the leniency application date. If the undertaking fails to do so within the specified period, it shall be considered that no leniency application has been filed by the undertaking.

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

30 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 local PMRD to start the investigation or to make the final decision.

In addition, pursuant to the Draft Leniency Guidelines, the applicants should also fulfil the following obligations:

- timely stop the suspected illegal conduct;
- cooperate with SAMR or local PMRD in the investigation in a prompt, continuous, comprehensive and faithful manner;
- properly keep and provide evidence and information, and not conceal, destroy, transfer evidence or submit false material and information;
- not disclose information about the leniency application without prior approval of SAMR or local PMRD; and
- not engage in any other conduct that may affect the enforcement.

The subsequent applicants are expected to do the same to obtain partial leniency.

Confidentiality

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

In practice, SAMR or local PMRD keeps the identity of the leniency applicants confidential during investigations. However, the applicants' identities will be revealed in SAMR or local PMRD's final decision. Usually SAMR or local 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.

Except for identity information, SAMR or local PMRD usually is cautious not to disclose other leniency-related information or materials. According to the Draft Leniency Guidelines, all reports submitted and documents generated under the leniency application will be kept in special archives by SAMR or local PMRD and must not be disclosed to any third party without the consent of the undertakings concerned. No other agencies, organisations or individuals can obtain access to such information.

Settlements

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

According to article 45 of the AML, during the process of investigation, SAMR or local PMRD may accept commitments from undertakings in which the undertakings undertake or commit to eliminate the anti-competitive effect of the infringing conduct within a period approved by the authority.

The investigation against cartel arrangements may be settled through commitment negotiation. The process is as follows:

- timely files the application to suspend the investigation, together with the initial commitment to establish the foundation of the negotiation between undertakings and SAMR or local PMRD;
- the undertaking may negotiate with SAMR or local PMRD regarding the content of commitments; and
- if SAMR or local PMRD, after considering the nature of the behavior, duration, consequences, social impact, measures committed by the undertaking and their expected effects, holds that (i) the facts are clear; and (ii) the committed measures are sufficient to eliminate the effects caused by the suspicious monopolistic conduct, SAMR or local PMRD may decide to suspend the investigation.

Then, SAMR or local PMRD will supervise the undertakings to fulfil their commitments, and decide to terminate or resume the anti-monopoly investigation according to the undertakings' fulfilment of their commitments.

According to the Interim Provisions, the commitment does not apply to three types of cartel agreements: price fixing, restriction on output and sales, and dividing market. In another word, the undertaking cannot settle with SAMR or local PMRD to suspend the investigation for price fixing, restriction on output and sales, and dividing market.

Corporate defendant and employees

33 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.

Dealing with the enforcement agency

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

In practice, an application for leniency could be filed with SAMR or local PMRD by: (i) the legal representative of the undertaking; (ii) authorised legal counsel; and (iii) an employee who has specific authorisation to make the application. According to the Draft Leniency Guidelines, undertakings can communicate, orally or in writing, anonymously or by name, with SAMR or local PMRD before applying for leniency.

To secure leniency, an undertaking should report the monopoly agreement and provide important evidence. Although there is no standard application form, the following elements need to be included in the report:

- the identities of undertakings as parties to monopoly agreements;
- scope of commodities concerned;
- content and method of conclusion of the monopoly agreement; and
- actual implementation of the monopoly agreement.

DEFENDING A CASE

Disclosure

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

Usually the parties have very limited access to the case information during the investigation. SAMR or local PMRD may disclose information or evidence to the parties at its discretion. In addition, SAMR or local PMRD is required to issue the prior notice for administrative penalties to the parties before formally making a decision. The prior notice for administrative penalties includes the basic facts found by SAMR or local PMRD.

When challenging SAMR or local PMRD's penalty decision in an administrative litigation or an administrative review, the parties theoretically may be able to gain access to SAMR or local PMRD's case files.

Representing employees

36 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 AML, unless they obstruct the investigation. But the law does not prohibit counsel from representing employees as well as the corporation, provided there is no conflict of interest.

Multiple corporate defendants

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

There is no specific rule on this under the AML. As a general principle, multiple corporate defendants in an antimonopoly investigation may be represented by the same counsel, if no conflicts of interest exist.

It does not necessarily depend on whether the corporate defendants are affiliated.

Payment of penalties and legal costs

38 | 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 and/or financial penalties imposed on that employee, whether former or current, as no rules or regulations prevent the company from doing so.

Taxes

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

According to the tax laws in China, fines, penalties and private damages awards are not tax-deductible.

International double jeopardy

40 | 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?

Most countries prohibit 'double jeopardy' – that is, multiple prosecutions for the same acts or offences. Since there are no criminal penalties against cartel except for bid-rigging and there are no specific rules on international double jeopardy under the AML, the penalties imposed in other jurisdictions under the criminal procedure will not be taken into account by SAMR or local PMRD.

There also are no precedents in China suggesting that the court would take into account the damages imposed in other jurisdictions.

Getting the fine down

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

The best way to reduce potential penalties is to cooperate with SAMR or local PMRD. Voluntarily ceasing the suspected conduct and taking actions to eliminate the potential anticompetitive effects may persuade SAMR or local PMRD to reduce a fine.

The AML is silent on whether the existence of a compliance programme affects the level of the fine. Based on SAMR or local PMRD's past practice, the mere existence of a compliance programme is not recognised as a factor affecting the level of the fine. Establishing or strengthening the antitrust compliance programme going forward, even after SAMR or local PMRD initiated an investigation, is more helpful as this shows that the parties are willing to cooperate and take SAMR or local PMRD's competition concerns seriously.

UPDATE AND TRENDS

Recent cases

42 | 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/kilo to 28 yuan/kilo or RMB33/kilo. In December 2018, the SAMR fined the three undertakings at 4 per cent of their turnover in the preceding year, 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 turnover 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

43 | 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 four guidelines are expected to be issued in 2020, which will more or less change the cartel rules in China, including:

- the Antitrust Guidelines on the Abuse of Intellectual Property Rights;
- the Antitrust Guidelines for the Automotive Sector;
- the Guidelines regarding Exemption of Monopoly Agreements; and
- the Guidelines regarding Leniency Application for Horizontal Monopoly Agreements.

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

Colombia

Danilo Romero Raad and Bettina Sojo
Holland & Knight

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia, and Decree 2153 of 1992 is the principal statute for cartel regulation. In addition, Law 256 of 1996 prohibits unfair methods of competition, and Law 1340 of 2009 establishes procedural aspects regarding investigations for restrictive competition practices, and benefits for competitors that cooperate with investigation and prosecution authorities.

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?

Law 1340 of 2009 appointed the Superintendency of Industry and Commerce (SIC) as the national authority for the investigation and prosecution of cases regarding infringement of competition regulations, including cartel matters.

In addition, since 2011 the prosecution authorities have been empowered to investigate and penalise participants in bid-rigging cases.

Changes

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

Bill 038 was submitted to the Colombian Congress in 2015. This proposal suggested changes to the business concentration and unfair competition regimes, the SIC's investigative and prosecution powers and the immunity regime for infringers of the competition regulations that cooperate with the authorities. The bill did not pass into law.

Bill 083 of 2018 was recently submitted to the Colombian Congress, suggesting an amendment to Law 80 of 1993 (Public Procurement Act) directly related to the competition regime. In fact, article 8 of Law 80 of 1993 establishes different situations that constitute inabilities for individuals to enter into agreements with public entities or to participate in public tenders. Bill 083 of 2018 suggests the inclusion of an additional situation of inability directly related to the infringement of competition regulations. In this sense, the proposal is to establish that individuals declared responsible by the SIC of conducts prohibited by the competition regime in Colombia will not be allowed to enter into agreements with public entities for a period of 20 years. At the same time, this inability will be extended to the corporations to which this individual was a part at the moment of performing the prohibited conduct as legal representative, manager or member of the board of directors. This bill is currently under review by the Colombian Congress.

Substantive law

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

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia.

More specifically, Decree 2153 of 1992 prohibits the following types of competitor agreements, among others:

- price fixing;
- determining selling conditions or discriminatory marketing practices;
- market allocation within producers or within distributors;
- allocation of production or supply quotas;
- allocation or limitation of input sources;
- restriction to technical developments;
- tied selling;
- refraining from producing goods and services on the market or affecting their levels of production;
- bid rigging; and
- restraining competitors from accessing new markets or commercialisation channels.

These conducts are considered per se violations of article 47 of Decree 2153 when they are effectively perpetrated by competitors, but also when competitors have the intention of performing them. The simple intention of generating a restrictive effect among competitors will be sufficient for a finding of liability.

The intention or the effect of the conduct in the market may be determined from different perspectives, as agreements among competitors do not need to be formal or in writing. Agreements may result from repetitive conducts that have not been agreed among competitors, but that have the intention of generating a restrictive result on competition.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific infringements, defences or exemptions regarding cartel conduct.

According to article 2 of Law 1340 of 2009, legislation regarding protection of competition in Colombia comprises regulations applicable to commercial restrictive practices, more particularly agreements, acts

and abuse of dominant market position, and the business concentration regime; these regulations are applicable to anyone who performs an economic activity in the Colombian market, or to anyone that affects or may affect the development of this economic activity regardless of the economic sector where this activity is performed.

Notwithstanding the above, article 1 of Law 155 of 1959 states that the government is entitled to allow agreements that, despite restricting competition, have the purpose of defending the stability of a basic sector of the economy. Article 2.2.2.29.5.1 of Decree 1523 of 2015 regulates this, defining 'basic sectors' as all economic activities that will have an essential importance in future in order to rationally structure the country's economy. With this in mind, Decree 1523 states as basic sectors the production and distribution of goods aimed at satisfying the needs of the Colombian population in nutrition, clothing, healthcare and housing, as well as the provision of banking, educational, utilities and transport-related services.

Application of the law

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

Article 2 of Law 1340 of 2009 states that legislation with regard to the protection of competition in Colombia applies to anyone who performs an economic activity, or to anyone that affects or may affect the development of this economic activity, regardless of its legal form. With this in mind, the law applies 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?

No, the regime applies to conduct that occurs in Colombia.

Export cartels

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

No, as stated in article 1 of Law 1340 of 2009, the applicable laws in Colombia related to the protection of competition are intended to protect and enable free competition in the national territory.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The SIC may initiate an investigation:

- voluntarily and based on information that the SIC possesses;
- relying on information received by a third party who submits a complaint before the SIC; or
- based on a reference made by another authority.

Based on the information that it holds, the SIC may decide either to close the case and not investigate, or start a preliminary investigation. In the latter case, the SIC will collect evidence for gathering broader information, in order to decide whether to open a formal investigation.

When the formal investigation is opened, the parties investigated will be notified and will have the chance to present evidence for the analysis of the case, or to present warranties before the SIC. The offer of warranties enables the SIC to conclude the investigation, as the investigated parties submit a pledge guaranteeing the cessation of the infringing conduct.

If the investigated parties submit evidence to the investigation, the SIC will study the evidence and, based on this analysis, the superintendent appointed will prepare a report to the Superintendent of Industry and Commerce (who will issue the final decision), stating if the investigated parties have infringed the applicable laws.

The investigated parties will have access to the superintendent's report, in order to prepare their closing arguments before the Superintendent of Industry and Commerce issues a final decision on the case.

There are no strict time frames in cartel investigations.

Investigative powers of the authorities

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

The investigative powers of the SIC include:

- access to work devices of the investigated parties (mobile phones and computers);
- requests for information by means of office action to the investigated parties and to related parties (other competitors, trade associations or different participants in the affected market);
- inspections at the investigated parties' premises for gathering more information and evidence without previous notice (dawn raids), including head offices, branches and subsidiaries; and
- inspections of the commercial books of the company.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 is generally established in trade agreements between Colombia and other countries (see question 12). Brazil, Chile, Ecuador, Mexico and the United States are among the countries that cooperate with Colombia in cartel matters.

Interplay between jurisdictions

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

Rules regarding cooperation between jurisdictions are generally established in trade agreements that Colombia has entered into. Colombia has subscribed to trade agreements with, among others, Canada, Chile, Mexico, the European Union and the United States.

Cooperation and competition policies are also covered by regional organisations in which Colombia participates, for example, the Andean Community, MERCOSUR and the Pacific Alliance.

These treaties are intended to generate cooperation in the area of competition policy and coordination between the respective authorities and consequently efficiency in the investigation, prosecution and penalising of cartel activity.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by means of a written resolution issued by the Superintendent of Industry and Commerce (see question 9). The investigated parties may appeal against this final decision.

When the investigated parties submit an appeal, the Superintendent of Industry and Commerce is the authority in charge of studying the case again, as the superintendent represents the ultimate authority in the SIC with regard to cartel cases.

Burden of proof

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

An interpretation of article 11 of Decree 2153 of 1992 indicates that the SIC has the burden of proof to sustain the charges in cartel cases. As mentioned in question 10, this entity is entitled to perform dawn raids, to issue requests for information and documents not just to the parties investigated, but also to related parties in order to gather as much information as possible.

As mentioned in question 9, investigated parties have the opportunity to submit evidence to prove the lack of an infringement. However, the SIC retains the burden of proof.

Circumstantial evidence

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

Yes. As mentioned in question 4, agreements do not need to be formal or in writing.

Article 45 of Decree 2153 of 1992 defines 'agreement' as any contract, arrangement, concentration, concerted practice or consciously parallel practice between two or more companies. Cartels resulting from contracts and direct arrangements are easier to prove, as evidence is generally written.

However, concerted and consciously parallel practices result from repetitive conduct that has not been agreed between competitors, but that has a clear intention of creating an anticompetitive agreement. In these cases, circumstantial evidence is used in the investigation, as direct evidence of the actual agreement is not possible to collect.

Appeal process

16 | What is the appeal process?

The investigated parties may file an appeal against the final resolution before the same officer that issued this final decision (ie, the Superintendent of Industry and Commerce).

SANCTIONS

Criminal sanctions

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

Bid rigging is the only restrictive conduct that is penalised under criminal law in Colombia. In 2011, Law 1474, which implemented administrative measures against corruption, introduced a new article (410A) in the Colombian Criminal Code in order to penalise cartels, but specifically restricted to bid rigging.

In bid-rigging cases, the Criminal Code imposes fines of between 147,543,400 and 737,717,000 Colombian pesos; and individuals may also face sanctions of between six and 12 years' imprisonment and debarment from government procurement procedures for eight years.

Additionally, article 410A of the Criminal Code establishes the following benefits for infringers who cooperate with the SIC during an investigation: reduction by one-third of the term of imprisonment, reduction of 40 per cent of the fine imposed and reduction of the time period of debarment from government procurement procedures up to five years.

Civil and administrative sanctions

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

The SIC may impose fines of up to 100,000 monthly minimum wages (approximately US$25 million for 2019) to each corporation that had participated in a cartel, or if the fine must be higher, it may impose a fine up to 150 per cent of the profit derived from the cartel activity.

Regarding individuals, fines may be up to 2,000 monthly minimum wages (approximately US$510,000 for 2019) for each individual participating in a cartel activity.

Civil penalties are currently higher as the level of fines increased in 2009 by means of Law 1340. Before this law was enacted, fines for corporations were up to 2,000 monthly minimum wages, and regarding individuals, fines were up to 300 monthly minimum wages.

Guidelines for sanction levels

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

According to article 4 of Decree 2153 of 1992 (amended by means of articles 25 and 26 of Law 1340 of 2009), in order to decide the amount of the sanction the SIC shall take into account the following criteria, which are binding for this entity:

- for corporations:
  - the impact of the conduct in the market;
  - the extent of the affected market;
  - the benefit obtained by the infringer with the conduct;
  - the offender's degree of participation;
  - the offender's behaviour during the process;
  - the market share of the infringing company, as well as its assets and sales involved in the infringement; and
  - the wealth of the company; and
- for individuals:
  - the persistence of the conduct;
  - the impact of the conduct on the market;
  - the reiteration of the prohibited conduct;
  - the offender's behaviour during the process; and
  - the offender's degree of participation.

The degree of participation and the behaviour during the process are the main aggravating and mitigating factors for establishing a penalty.

Compliance programmes

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

Even if mitigating factors are the ones established in article 4 of Decree 2153 of 1992 (see question 19), compliance programmes could be considered for sanctions reductions. However, the magnitude of the reduction will depend on an examination by the authority of the mitigating factors that would apply in the specific case.

Director disqualification

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

There is no prohibition stated by law, this would correspond to a corporate or internal decision from the company involved in the cartel.

Debarment

22 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 bid-rigging cases. Infringers may be debarred for up to eight years.

Parallel proceedings

23 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?

As the SIC does not have criminal powers, in bid-rigging cases the same conduct may be pursued by the SIC from the administrative perspective, and by criminal courts at the same time to establish criminal sanctions. In addition, civil courts may impose civil sanctions if consumers submit a complaint for damages.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 direct purchasers; nevertheless, the SIC does not have civil powers in order to pronounce with regard to damage claims for antitrust infringements. This was a proposal in Bill 038 of 2015 to amend the competition regime; however, as mentioned in question 3, this bill did not pass into law.

The authorities in charge of damage claims in Colombia are the civil courts. However, damage claims for antitrust infringements have not been recurrent, and at present there is no relevant precedent regarding this matter in Colombia. On the other hand, umbrella purchaser claims are not applicable in Colombia.

Class actions

25 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 possible regarding damage claims for antitrust infringements.

Class actions are regulated in Law 472 of 1998, and the main requirements are as follows:

- no fewer than 20 individuals in order to submit a class action;
- the class action must be submitted during the two years after the date the damage was caused, or after the termination of the action that caused the damage; and
- class actions may be presented by both individuals and corporations that have suffered prejudice individually.

There are no precedent cases in Colombia regarding class actions in cartel matters.

COOPERATING PARTIES

Immunity

26 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, the Benefits for Cooperation Programme was established for the first time in article 14 of Law 1340 of 2009, and was subsequently regulated by means of Decree 1523 of 2015.

According to this programme, benefits are awarded to corporations and individuals who have participated in the infringing conduct, and decide to inform to the authority about the existence of the cartel, or to cooperate by providing information and evidence (including the identification of other parties).

In order to apply for immunity, the informer must submit its request for benefits before the time frame given to the investigated parties to submit evidence during a formal investigation (see question 29). For entering into an Agreement of Benefits for Cooperation with the applicant, the SIC will analyse the following requirements:

- if the applicant has recognised its participation in the cartel;
- if the information and evidence provided is useful in order to establish the existence, form, duration and effects of the conduct, as well as the identity of the participants, its degree of participation and the benefit obtained by means of the prohibited conduct;
- if the applicant complies with the office actions and instructions issued by the SIC during the negotiation of the agreement; and the commitment of the informer to cease its participation in the cartel activity.

To determine the informer's benefits, the SIC will take into account the following factors:

- date of filing of application, in order to establish who is the 'first in' to cooperate, and who are the subsequent cooperating parties;
- the efficiency of the cooperation in the clarification of the facts and the perpetrated conduct; and
- the pertinent time when informers submitted the information and evidence.

Benefits include the total or partial exemption of the fine, depending on the time when informers submit their application (see question 28). Nevertheless, the cartel's initiator is completely banned from benefits.

The importance of being 'first in' to cooperate is the complete exemption of the sanction (100 per cent).

Subsequent cooperating parties

27 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. See question 26.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The second participant applying to the Benefits for Cooperation Programme will have a reduction of between 30 and 50 per cent of the fine, depending on the utility of the information and evidence submitted.

Information and evidence are considered useful by the SIC when they add value to the information and evidence that it already possesses, including that submitted by other applicants or informers.

In addition, third and subsequent applicants will have a reduction of up to 25 per cent, depending on the utility of the information and evidence submitted.

Approaching the authorities

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

According to article 2.2.2.29.2.5 of Decree 1523 of 2015, the informer must submit its application within the time frame given to the investigated parties to submit evidence and arguments during a formal investigation: 20 working days after the formal opening of the investigation by the SIC. Markers are used in order to establish who is the first applicant and who are the subsequent applicants.

Cooperation

30 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?

It is expected that information and evidence provided by applicants will be useful to determine the existence of the cartel and its operation, including the following: objectives, main activities, operation, identity of participants, degree of participation, participants' residence, product or service involved, geographic area affected and estimated duration of the cartel.

As mentioned in question 28, information and evidence submitted by subsequent parties are considered useful when they add value to the information and evidence that the SIC already possesses, including that submitted by other applicants or informers.

Confidentiality

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

According to paragraph 2 of article 15 of Law 1340 of 2009, as per the informer's request, the SIC shall grant its identity confidentiality when according to SIC criteria the informer may be exposed to commercial retaliation because of the information and evidence provided.

In addition, according to article 15, the investigated parties can request that information related to trade secrets, or any type of information classified as confidential, is kept confidential.

These confidentiality standards apply to all informers and participants, regardless of whether they are 'first in' to cooperate or subsequent cooperating parties.

Settlements

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

If the applicant fulfils the admission requirements of the Benefits for Cooperation Programme, the corporation or individual will subsequently submit an Agreement of Benefits for Cooperation with the SIC (see question 26). This agreement constitutes the settlement between the enforcement agency and the informer resolving liability and penalty of the latter with regard to the alleged cartel activity, and the corresponding benefits for the informer are established by means of this document.

To conserve the benefits settled in the agreement, the informer must refrain from the conduct listed in question 34.

Corporate defendant and employees

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

Benefits granted to a corporation are extended to its current and former employees to the extent that they apply and qualify for the Benefits for Cooperation Programme.

Dealing with the enforcement agency

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

The informer and the SIC negotiate and submit an Agreement of Benefits for Cooperation, by means of which the benefits for the informer are settled before concluding the investigation.

The benefits agreed in this document are granted by means of the final decision in the case; therefore, to conserve these benefits, the informer must refrain from the following conduct:

- denying during the investigation facts that were acknowledged during the negotiation of the agreement;
- obstructing the testimony of its employees or representatives;
- disregarding office actions issued by the SIC to verify information provided and facts acknowledged;
- destroying or obstructing access to relevant information or evidence with regard to the cartel activity; and
- breaching any of the obligations settled in the agreement.

The informer also loses all benefits if it is proven at any time during the process that it is the cartel's initiator.

DEFENDING A CASE

Disclosure

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

The information or evidence disclosed to a defendant is that gathered by the SIC by its own means, and that submitted by other defendants and by informers during the investigation.

Representing employees

36 | 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. The employee shall be represented by a separate counsel in case there is a conflict of interest between the corporation and the current or former employee.

Multiple corporate defendants

37 | 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.

Payment of penalties and legal costs

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

No, employees must pay the legal penalties. They must submit their income tax return to the SIC.

Taxes

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

Neither private damages awards nor fines are tax-deductible.

International double jeopardy

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

When deciding the amount of the fine to be imposed on individuals or corporations the SIC does not take into account penalties imposed in other jurisdictions, and regarding private damage claims, overlapping liability for damages in other jurisdictions is not taken into account.

Getting the fine down

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

The level of the fine is decided by the SIC while negotiating the Agreement of Benefits for Cooperation with the informer, but the amount initially decided by the SIC may be recalled if the informer performs any of the conducts detailed in question 34. The timing and extent or quality of cooperation will influence the magnitude of the sanction.

On the other hand, regarding investigated parties that do not cooperate with the authorities, the amount of the fine imposed by means of the final resolution of the Superintendent of Industry and Commerce may be reduced if the defendant submits an appeal against this decision; however, this depends on the arguments submitted by the defendant in the appeal.

Holland & Knight

Danilo Romero Raad
danilo.romero@hklaw.com

Bettina Sojo
bettina.sojo@hklaw.com

Carrera 7 # 71-21
Torre A, Piso 8
Bogotá, DC
Colombia
Tel: +57 1 745 5720
Fax: +57 1 541 5417
www.hklaw.com

UPDATE AND TRENDS

Recent cases

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

The most important case for 2019 corresponds to a sanction imposed by the SIC to two companies participating in the market of production and commercialisation of concrete pipes for sewerage. The total amount of the sanction was 12 million Colombian pesos and involved two companies and five individuals. The SIC established that these companies took part in a restrictive agreement consisting of allocating the market by means of discount percentages offered to its customers.

Additionally, in April 2019, the jurisprudence C-165/19 was issued by the Constitutional Court, by means of which it declared the constitutionality of the SIC's investigative powers, more particularly the power to conduct inspections at the investigated parties' premises without requiring a judicial order.

Regime reviews and modifications

43 | 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 currently.

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 rules, dawn raids, leniency and compliance are accessible through the website of the Danish Competition and Consumer Authority (DCCA) at http://en.kfst.dk/Competition/Legislation.

Section 6 of the Act contains a general prohibition against certain anticompetitive agreements.

Danish competition law is, to a large extent, similar to EU competition law. For instance, sections 6 and 8 of the Act largely correspond to article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Moreover, the Danish rules are interpreted in accordance with case law from the European Commission as well as the European Court of Justice.

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 Danish Competition and Consumer Authority (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 cartel matters and other competition law infringements and ensures compliance with the competition rules in general.

Cartel cases are generally investigated and prepared by the DCCA and subsequently decided by the Council in the first instance.

Decisions by the Council may be appealed to the Danish Competition Appeal Tribunal (the Appeal Tribunal) and subsequently to the Danish courts.

Where the Council finds that an intentional or grossly negligent breach of competition law has been committed, the Council may decide to refer the case directly to the State Prosecutor for Serious Economic and International Crime (the State Prosecutor) for further investigation and prosecution. The Council may delegate this authority to either the chairman of the Council or, in specific cases, to the Director General of the DCCA.

Changes

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

On 27 December 2016, the Danish Act on Actions for Damages for Infringements of Competition Law (the Damages Act), which implements the Damages Directive (Directive 2014/104/EU), entered into force. The act constitutes an 'over-implementation' as, in line with Danish legislative tradition, the Danish parliament has chosen to maintain consistency between Danish competition law and EU competition law, meaning that the rules apply to infringements of the Danish Competition Act as well as articles 101 and 102 TFEU.

An amendment to the Danish Competition Act entered into force on 1 January 2018. The amendment concerned the following topics: the abolition of the system for notification of agreements; a change in the Danish de minimis thresholds from being turnover-based to being market share-based; the addition of a 'stop-the-clock' rule, mandating the DCCA to suspend the deadline in merger cases; the addition of a rule permitting preliminary leniency applications; and a rule limiting the right to 'own access' (the right to get access to a file in cases mentioning an individual's or an undertaking's name) in the DCCA's cases.

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 and suchlike to enter into agreements that directly or indirectly have as their object or effect the restriction of competition. The prohibition laid down in section 6(1) further applies to decisions made by associations of undertakings as well as concerted practices between undertakings (see section 6(3) of the Act).

The principle of per se illegality is not applied under Danish law. As is the case under EU law, certain anticompetitive agreements are considered hard-core infringements under Danish law (ie, price-fixing agreements, restrictions on production or sales, market and customer sharing and bid rigging). However, there are no specific provisions dealing with these types of agreements. Thus, all anticompetitive agreements are dealt with under the general prohibition set out in section 6(1) of the Act and are subject to a competitive effects test (section 8 of the Act).

Section 8(1) of the Act provides that the prohibition set out in section 6(1) does not apply if agreements, decisions or concerted practices between undertakings:

- contribute to improving the efficiency of the production or distribution of goods or services or to promoting technical or economic progress;
- provide consumers with a fair share of the resulting benefits;
- do not impose restrictions on the undertakings that are not necessary to attain these objectives; and
- do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific infringements and no industry-specific defences or antitrust exemptions.

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 (section 3 and section 5(1) of the Act).

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).

Application of the law

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

The substantive provisions of the Act apply to agreements between undertakings, decisions made by associations of undertakings and concerted practices between undertakings.

The Act applies to economic activity, whether carried out under private or public management. There are no requirements in terms of corporate form. The decisive criterion is whether or not the undertaking concerned carries out economic activity on a market.

The Act also applies to individuals who carry out economic activity or have a controlling interest in one or more undertakings. Furthermore, the Act applies to individuals practising a liberal profession, such as lawyers, accountants, doctors and dentists. Finally, members of the board, the management and employees of the relevant undertakings must adhere to the competition rules and may be held liable for competition law infringements, as criminal sanctions may be imposed on both undertakings and individuals.

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. Consequently, a cartel between two undertakings situated outside Denmark may infringe the Danish competition rules.

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).

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Cartel investigations are primarily carried out by the DCCA but may also be carried out by the State Prosecutor, if there is reasonable cause to suspect an infringement that will lead to a penalty.

The DCCA may initiate a cartel investigation on its own initiative, for example following an analysis of the competitive environment in a specific sector. Cartel investigations may also be initiated on the basis of a leniency application, a complaint or a tip from a third party. In this regard, the DCCA has introduced a feature on its website and an app making it possible for employees or others who may have knowledge of a cartel to inform the DCCA anonymously.

During the investigation, the DCCA will generally carry out a dawn raid on the premises of the relevant undertaking to secure evidence. Following the dawn raid, the DCCA will conduct a review of the secured material, which can be a lengthy procedure. Electronic material copied from the undertaking's IT system must be reviewed within 40 workdays after the dawn raid has been carried out. The search in the electronic material must be concluded with a report listing the documents, which the DCCA has tagged as potentially relevant for the investigation. The undertaking subject to the dawn raid will then typically have 10 days (according to the DCCA's guidelines on dawn raids) to go through the tagged material and make protests if the DCCA has included material, which the undertaking does not find relevant for the investigation or which is covered by the principle of legal professional privilege. The 10 days constitute a stand-still period for the DCCA, because the DCCA does not work with the case during this period.

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 for two to three months.

The investigation may result in a decision by the DCCA:

- to close the case;
- to refer the case to the State Prosecutor (if the DCCA finds that an intentional or grossly negligent infringement of competition law has been committed); or
- to continue the investigation and present the case to the Council in order for the Council to render a decision (where after the DCCA may refer the case to the State Prosecutor).

Investigative powers of the authorities

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

Under section 17 of the Act, the DCCA may demand all 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.

Furthermore, under 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 take copies of the undertaking's IT system and electronic medias pursuant to 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 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.

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, it has not yet been tested in case law whether the State Prosecutor will have access to such correspondence.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 other EU member states. The 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 EEA area in connection with these authorities application of articles 101 and 102 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 WTO.

Interplay between jurisdictions

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

In general, jurisdictions within the EU (and the ECN) interplay with the Danish competition authorities (see also question 11).

Moreover, under section 18a of the Act, the DCCA may, subject to reciprocity, disclose information covered by its duty of confidentiality to other competition authorities if such information is necessary to assist in the enforcement of the competition rules by these authorities, and if the DCCA thereby fulfils Denmark's bilateral and multilateral obligations.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Decisions on cartel infringements can be made by the Council based on investigations by the DCCA or directly by the courts in a criminal trial.

The Danish competition authorities do not have the power to impose administrative fines or criminal sanctions on undertakings or individuals.

If a case is referred to the State Prosecutor (either directly by the DCCA or following a Council decision), the undertakings involved or the responsible individuals may be formally charged with a competition law infringement, and the case will be brought before the courts.

Under section 23b of the Act, the Danish competition authorities or the State Prosecutor may offer undertakings a fine in lieu of prosecution by issuing a fixed penalty notice (fixed penalty notices issued by the Danish competition authorities are subject to approval by the State Prosecutor). If the undertaking accepts the fine, there will be no further proceedings and the case may therefore be closed relatively quickly. If the fine is not accepted, the case will be brought before the courts.

Burden of proof

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

The Act does not contain any provisions on the burden of proof, or the level of proof required. Consequently, the general rules of Danish law apply as regards the burden of proof.

As a general rule, 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 on 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 generally free to assess evidence. No hierarchy or forms of evidence are set out in any statutory provisions. Accordingly, it is for the authorities and the courts to determine when the burden of proof has been lifted with the result that the burden of counter proof shifts to the undertaking.

In criminal proceedings, it is required that there is no reasonable doubt about the guilt of the defendant (the *in dubio pro reo* principle). For fines to be imposed, an infringement of the competition rules must be intentional or grossly negligent, while the requirement for imprisonment for a cartel agreement is that the breach committed is intentional and of a grave nature.

Circumstantial evidence

15 | 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, section 6(1) of the Act establishes that a restriction of competition can be committed without proof of a specific agreement.

The DCCA must prove its case, but the DCCA and the courts are free to assess all the evidence. (See question 14 with regard to the necessary burden of proof).

Case law from the European Court of Justice (ECJ) serves as guidance in relation to the inclusion of circumstantial evidence by the DCCA and the courts. In this regard, the ECJ has held that the existence of an anticompetitive infringement can 'be inferred from a number of coincidences and indicia that, taken together, can, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules' (case T-113/07, Toshiba).

Appeal process

16 | 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

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

On 1 March 2013, new rules on sanctions for competition law violations entered into force. The object of the rules was to increase the level of fines for companies and individuals and to introduce imprisonment in cartel cases. The rules apply to competition infringements committed after 1 March 2013 and infringements commenced prior to 1 March 2013, which are continued after this date.

Imprisonment

In cartel cases, imprisonment may be imposed on individuals if their participation in a cartel has been intentional and if the breach has been of a grave nature, especially owing to the extent of the infringement or its potentially damaging effects. The maximum term of imprisonment is usually one and a half years but may be increased up to six years in the case of aggravating circumstances.

Fines

Under section 23(5) of the Act, the gravity of the infringement and its duration must be taken into account when deciding on a penalty to be imposed. When deciding on a penalty to be imposed on legal persons, the legal person's worldwide turnover must also be taken into consideration. It is stated in the preparatory works of the Act that fines should not exceed 10 per cent of the legal person's worldwide turnover.

The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level of the fines for each category of gravity is specified below (before and after 1 March 2013, respectively). It should be noted that the courts are assigned considerable discretion when imposing penalties.

Gravity	Examples	Previous indicative level	New indicative level	Indicative level of fines for individuals
Less grave	Exclusive purchase obligations lasting more than five years	Up to 400,000 kroner	Up to 4 million kroner	Minimum 50,000 kroner
Grave	Resale price maintenance; certain types of exchange of information; certain types of joint bids	400,000 to 15 million kroner	4 million to 20 million kroner	Minimum 100,000 kroner
Very grave	Coordination of prices, production, customers or bids; certain types of abuse of dominance	More than 15 million kroner	More than 20 million kroner	Minimum 200,000 kroner

Civil and administrative sanctions

18 | 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 information requested by the DCCA

Also, as described in question 13, the Danish competition authorities may offer undertakings and individuals a fine in lieu of prosecution, subject to acceptance by the State Prosecutor.

Guidelines for sanction levels

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

See question 17.

Compliance programmes

20 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, it can be taken into consideration as a mitigating circumstance when assessing the level of a fine, if an undertaking or a person has actively tried to ensure all relevant employees' compliance with the Act through compliance programmes or similar measures. The compliance programme 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

21 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

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

Under section 137(1)(6) 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.

The contracting authority has the decision-making power. 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

23 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 penalties do not exist under Danish competition law.

The Danish competition authorities have the power to decide whether agreements are in breach of competition law and whether agreements must be reported to the State Prosecutor. 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 will be reported directly to the State Prosecutor.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 Damages Act, supplemented by the general principles and practice concerning liability in tort. The Damages Act ensures a right to full compensation for competition law infringements. The Damages Act only applies to infringements initiated after 27 December 2016.

Under Danish law, a claimant may be granted damages if (i) the competition law infringement was committed with negligence or intent; (ii) there is a causal and foreseeable loss; and (iii) 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 caused by a competition law infringement in accordance with the 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 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 Co* case from 2008, the District Court dismissed the case on the basis of absence of actual data or calculations of the plaintiff's loss. In the *Cheminova A/S* case from 2015, where Cheminova had claimed damages 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

25 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 generally possible under Danish law. Class actions are regulated by the rules of the Danish Administration of Justice Act, and, as a general rule, a class action is subject to the same procedure as other Danish court cases.

Additionally, section 16 of the Damages Act states that where several persons have raised claims for damages because of infringements of the Act or articles 101 or 102 TFEU, the Consumer Ombudsman may be appointed as a representative for the class for the purpose of recovering such damages under a class action.

Case law concerning class actions in competition cases is scarce. 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

26 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 Act provides for a leniency programme, which is by and large comparable to the leniency programme set out under EU law.

Thus, section 23a of the Act provides that anyone who acts in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will, upon application, be granted withdrawal of the charge that would otherwise have led to a fine or imprisonment for participating in the cartel, provided the applicant, as the first one, approached the authorities about the cartel, submitting information which the authorities were not in possession of at the time of the application.

The possibility of withdrawal of the charge is subject to certain conditions. First, withdrawal of the charge will be granted only if before having conducted an inspection or a search regarding the matter in question, the authorities are given specific grounds to initiate an inspection, conduct a search or inform the police of the matter in question, and if the authorities are enabled to establish an infringement in the form of a cartel after an inspection or search regarding the matter in question has been conducted (see section 23a(1) of the Act).

Furthermore, withdrawal will be granted only if the applicant cooperates with the authorities throughout the entire case, brings the participation in the cartel to an end no later than by the time of the application, and has not coerced any other party into participating in the cartel (see section 23a(2) of the Act).

If the requirements set out in section 23a(1) of the Act are not met (ie, if the leniency applicant is not the first one to apply for immunity), the leniency application will be treated as an application for a reduction of the penalty (see section 23a(3) of the Act). Thus, anyone acting in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will be granted a reduction of the fine that would otherwise have been imposed for participation in the cartel, provided the applicant submits information about the cartel that constitutes significant added value compared to the information already in the authorities' possession, and provided the requirements in section 23a(2) of the Act, as described above, are satisfied.

The amendment to the Act, which is described in question 3, introduced a rule permitting preliminary leniency applications (see section 23a (6) of the Act). The rule makes it possible for a cartel participant to 'reserve' its place in the queue while putting together a final leniency application.

Subsequent cooperating parties

27 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?

See question 26.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Under section 23a(5) of the Act, the applicant that goes in second (and is therefore unable to obtain full leniency, see question 26) 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

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

As such, there are no formal deadlines for the initiation or completion of a leniency application. However, it should be stressed that a leniency application must be submitted at a point in time when the authorities have not yet conducted an inspection or a search regarding the matter in question or when the submitted information constitutes significant added value to an ongoing investigation. Moreover, the applicant must bring the participation in the cartel to an end before submitting the application (see question 26).

Cooperation

30 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?

See question 26.

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

31 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, 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

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

Plea bargaining as such does not exist under Danish law. However, it is, to some extent, common for the DCCA and the State Prosecutor to enter into negotiations or talks with the undertakings involved regarding the level of the fine to be imposed.

Corporate defendant and employees

33 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) (see question 26).

A leniency application from an undertaking or an association must be filed by a person who has the power to bind the undertaking or association – for example, a CEO. 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

34 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

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

Usually the defendant will receive a notice of concern (NOC) from the DCCA at the beginning of the case. The NOC will contain the DCCA's immediate opinion in regard to the claimed breach of the Act. The opinion is non-binding for the DCCA.

As stated in question 31, the Danish Public Administration Act applies to competition cases and provides a right of access to documents for the defendant. The right of access includes all registered documents in regard to the defendant, excluding internal working papers and confidential material, for example, competition-sensitive information.

If it is clear to the DCCA that the defendant is liable to punishment the case will be referred to the State Prosecutor who will initiate criminal proceedings. This information is not necessarily disclosed to the defendant. According to the general procedural rules in criminal cases, the defendant has the right to be informed of any criminal charges against oneself.

Representing employees

36 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 parties unless the representation will create a conflict of interest. If there is a conflict of interest – or an immediate risk that a conflict of interest will arise – a present or past employee should be advised to seek independent legal advice.

It should always be carefully considered whether there is a conflict of interest.

Multiple corporate defendants

37 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 unless there is a conflict of interest.

Payment of penalties and legal costs

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

A corporation may pay the legal penalties imposed on its employees as well as their legal costs. However, such payments must be taxed as income for the relevant employees.

Taxes

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

Under Danish law, the general rule is that expenses incurred by an undertaking are tax-deductible if the expenses are considered a natural operating expense.

Generally, fines and other penalties are not considered a natural operating expense and will, thus, not be tax-deductible.

Regarding damages incurred as a consequence of a criminal offence, the issue of whether such an expense is considered a natural operating expense, and consequently, tax-deductible depends on a specific assessment. However, the courts will generally be reluctant to accept any deduction if the undertaking concerned has acted with intent or gross negligence.

International double jeopardy

40 | 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).

Regarding 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

41 | 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. Furthermore, undertakings that contact the DCCA to settle the case by paying a fine in lieu of prosecution (see question 13) will generally be granted a reduction of the fine.

Additionally, section 82 of the Danish Criminal Code provides for a number of mitigating circumstances, the most relevant of which provides the basis for the leniency programme.

Finally, as described in question 20, the existence of a compliance programme at the time of the offence may constitute mitigating circumstances.

UPDATE AND TRENDS

Recent cases

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

In December 2018, 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 Act and TFEU article 101. The two undertakings, Clear Channel Danmark A/S and AFA JCDecaux A/S, had coordinated rebates concerning media commission, security compensation, information compensation and cash discount. The Council found that the objects of the agreements and concerted practices had been to restrict competition. The case is currently pending before the Tribunal.

In December 2018, the Supreme Court decided to grant third instance review of a case regarding road marking. In June 2015, the Council 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, which were 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 Tribunal upheld the 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 and Tribunals' 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 submitting 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 LFK and Eurostar could have submitted individual bids for all three districts (and not just one or two districts). The case is of interest as a review by the Supreme Court is reserved only for cases with questions of fundamental character or when other exceptional reasons speak for a third instance review.

In June 2019, the Danish Maritime and Commercial High Court upheld a decision from the 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 did also themselves offer 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.

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

Regime reviews and modifications

43 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 because of the enhanced focus.

European Union

Hans-Jörg Niemeyer and Laura Stoicescu Hengeler Mueller
Helen Gornall and Maikel van Wissen De Brauw Blackstone Westbroek
Anna Lyle-Smythe and Murray Reeve Slaughter and May

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Within the EU member states (as well as Iceland, Liechtenstein and Norway, by virtue of the 1992 EEA Agreement), both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is article 101 of the Treaty on the Functioning of the European Union (TFEU). Council Regulation No. 1/2003 contains the implementing rules and procedural rules.

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 can be investigated by the European Commission (the EC) or national competition authorities (NCAs), or by both. Regulation No. 1/2003 contains the implementing rules regarding enforcement procedures. The key provisions that relate to cartel proceedings are as follows:

- the principal enforcement agency in the EU is the EC, with Directorate-General for Competition being the service responsible for the enforcement of the competition rules;
- where an NCA within the EU uses domestic competition law to investigate a cartel, if that cartel affects trade between member states, it must also apply article 101 TFEU;
- there is close cooperation between the EC and the NCAs of member states, including exchange of confidential information, within the framework of the European Competition Network (ECN) established between the EC and the NCAs;
- the EC has extensive powers of inspection, including the power to take statements, seal premises or business records, and ask for oral, on-the-spot explanations about particular documents or facts during an inspection;
- the EC can impose substantial fines for breaches of the procedural rules (eg, for failure to provide information); and
- the EC has the power to impose structural remedies (eg, divestments) and fines for breaches of article 101 TFEU.

The EC has also adopted an implementing regulation (Regulation No. 773/2004) further clarifying the proceedings under Regulation No. 1/2003. This lays down rules concerning the initiation of proceedings and the conduct of investigations by the EC, as well as the handling of complaints and the hearing of the parties concerned.

In addition, the EC has published various notices providing guidance for the application of article 101 TFEU. Notices have been adopted, inter alia, on cooperation within the ECN, on cooperation between the EC and the courts of EU member states, on the handling of complaints and on the effect on trade concept contained in articles 101 and 102 TFEU.

National courts must apply, in addition to national antitrust rules, articles 101 and 102 TFEU. They may not adopt decisions that run counter to a EC decision on the same subject matter. The EC can transmit opinions and statements as amicus curiae in proceedings before national courts that must apply articles 101 and 102 TFEU.

In August 2019, the EC published guidelines for national courts on how to estimate the passing-on of overcharges to indirect purchasers in the context of damages claims for breaches of competition law. The guidelines provide judges and interested parties with a number of practical examples. The guidelines are intended to be used together with the Damages Directive and the EC's Practical Guide on Quantifying Harm.

Changes

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

There are no current proposals to change the overall legislative regime. However, in November 2014, a directive on actions for damages for violations of EU competition law was adopted (the Damages Directive). Member states were required to implement the Damages Directive by 27 December 2016; all member states have now transposed the directive into national legislation.

The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions (see question 24). In August 2015, the EC adopted amendments to its Regulation No. 773/2004 and four related notices (Notices on Access to the File, Leniency, Settlements and Cooperation with National Courts) to reflect the provisions of the new directive on accessing and using information in the files of competition authorities for the purposes of follow-on damages litigation. In August 2019, the EC adopted guidelines for national courts on how to estimate the share of overcharge that would have been passed on to the indirect purchaser. The guidelines are intended to give national courts, judges and other stakeholders in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain. The guidelines are intended to supplement the Practical Guide on Quantifying Harm (which focuses on how to quantify the damage caused by antitrust infringements), published in 2013.

In March 2017, the EC published a draft directive to grant greater enforcement powers to NCAs. As stated above, NCAs and courts apply

the EU competition rules within their jurisdictions on the basis of Regulation 1/2003. To ensure the consistent application of these rules, the EC and the 28 NCAs of the EU work together in the ECN. However, not all NCAs currently have the same investigative and enforcement powers. The Directive aims to address this problem by requiring that NCAs be given powers such as the ability to inspect private homes and to summon people for interview, as well ensuring that NCAs can impose more severe penalties for infringements. The Directive will also ensure that NCAs have greater operational independence when making enforcement decisions. A provisional political agreement on the directive was reached in May 2018 by the European Parliament and the Council, and the European Parliament's Economic and Monetary Affairs Committee approved the compromise text in July 2018. The final draft was adopted in December 2018. 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 101(1) TFEU provides that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' are prohibited. Article 101(1) TFEU provides a non-exhaustive list of prohibited practices, which includes agreements, decisions or concerted practices that: directly or indirectly fix purchase or selling prices or any other trading conditions (price fixing); limit or control production, markets, technical development or investment (eg, output restrictions); or share markets or sources of supply. Both horizontal and vertical restraints fall within article 101(1) TFEU. For horizontal agreements, specific guidance is given on the status of research and development (R&D) agreements, production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. For vertical agreements specific guidance is given on single branding agreements, exclusive distribution agreements, exclusive customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and RPM.

Article 101(2) TFEU provides that agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the EC that the agreement breaches article 101 TFEU. Article 101 TFEU is also capable of enforcement before the national courts and NCAs in EU member states.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of article 101(1) TFEU. The EC's view is that these types of restriction are hard-core and may be presumed to have negative market effects (this approach was confirmed by the European Court of Justice (ECJ) in Dole (2015)).

According to article 1(2) of Regulation No. 1/2003, agreements that satisfy the conditions of article 101(3) TFEU are not prohibited, no prior decision to that effect being required. This requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is almost inconceivable that a hard-core cartel agreement could qualify for such an exemption. As regards vertical restraints, article 4 of Regulation No. 330/2010 (vertical agreements block exemption) provides a blacklist of agreements to which the block exemption will not apply (eg, where the object of the agreement is to impose a fixed or minimum resale price or an export ban). Horizontal cooperation agreements between competitors (such as information exchange, standardisation and R&D agreements) are assessed in line with the EC's 2010 Regulations and Guidelines.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific offences or defences. There are, however, special rules governing the application of article 101 TFEU to the agricultural and transport sectors. The Insurance Block Exemption Regulation expired on 31 March 2017 with no replacement.

Application of the law

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

Article 101 TFEU applies only to undertakings, not to individual employees or officers of undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in an economic or commercial activity (whether or not it is profit-making). It covers, for instance, limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and non-profit-making bodies. National legislation within some member states may, however, provide for criminal sanctions (see, eg, the UK chapter), administrative fines (see, eg, the Netherlands chapter) or other personal sanctions (see, eg, the Germany chapter, as well as directors' disqualification orders in the UK chapter) where individuals participate in infringements of article 101 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 101 TFEU can apply to agreements, decisions and concerted practices concluded between undertakings located outside the EU but that have an effect on competition within the EU. This is wide enough to cover indirect sales provided the conduct may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the internal market. The EC may choose not to take indirect sales into account if the fine based on direct sales alone is regarded as having a sufficient deterrent effect (LCD, 2010). When setting its fine the EC is entitled to take into account sales of products in the EEA that include cartelised component products produced and sold outside the EEA (ECJ, *InnoLux* (2015)). As a consequence, manufacturing companies that produce and sell components outside Europe can still come under the EC's scrutiny if those components are then built into products sold in Europe. The EU courts have recognised that it is not necessary that companies involved in the alleged cartel activity have their seats inside the EU, that the restrictive agreements were entered into inside the EU, or that the alleged acts were committed or business conducted within the EU. In *Wood Pulp I* (1988), the ECJ found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented. Where parties established in third countries implement a cartel agreed outside the EU with respect to products sold directly into the EU, the cartel will be subject to investigation under article 101 TFEU. Overall, according to the 'effects doctrine', the application of competition rules pertaining to cartels is justified under public international law whenever it is foreseeable that the relevant anticompetitive agreement or conduct will have an immediate and substantial effect in the EU (see also Commission Notice of 27 April 2004

on the effect on trade concept contained in articles 101 and 102 TFEU, paragraph 100). Recent cases in which the EC assumed jurisdiction over cartel members incorporated outside the EEA include *Automotive Wire Harnesses* (2013), *Power Cables* (2014), *Smart Card Chips* (2014), *Automotive Bearings* (2014), *Optical Disc Drives* (2015), *Alternators and Starters* (2016) and *Capacitors* (2018). In Intel (2017), the ECJ confirmed that the EC has jurisdiction to apply EU competition law not only against conduct which is implemented in the EEA but also where it is 'foreseeable' that the conduct will have an 'immediate and substantial effect' in the EEA, confirming the alternative character of the implementation test and the qualified effects test. In *Optical Disc Drives* (2019), the GC found that some of the optical disk drives covered by the cartel were sold in EU member states to entities owned by Dell and HP or shipped to those states for operators acting on behalf of Dell and HP. Consequently, the court confirmed the EC's assessment that the geographic scope of the cartel at issue covered the entire EU and therefore that the EU competition law rules were applicable.

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 under EU law. However, on the basis of the effects doctrine (see question 7), conduct can only be caught under article 101 TFEU if it affects customers or other parties within the EEA. Such conduct must be 'foreseeable' and have an 'immediate and substantial effect' in the EEA. In the absence of such effect, the conduct will not fall within the scope of article 101 TFEU.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Investigations may be triggered as a result of one or more of the parties to an agreement or a concerted practice approaching the EC (as a whistle-blower under the EC's leniency programme), a third party making a complaint, an NCA raising the matter with the EC or the EC launching an inquiry on its own initiative.

If complainants wish to make formal complaints, they are required to use form C. However, the EC may dispense with a complainant's obligation to provide all the information and documents required by form C where it considers that this information is unnecessary for the examination of the case. The form must be provided in triplicate and, if possible, an electronic version should be sent to the EC (see article 5 of Regulation No. 773/2004).

Once a case comes to its attention (which may be as a result of a leniency or immunity application – see questions 26 and 29), the next step for the EC is to collect further information, either informally or using its formal powers of investigation (including dawn raids – see question 10) to decide whether to take action on the complaint. Following the initial fact-finding, if the EC considers that there is evidence of an infringement of article 101 TFEU that should be pursued, it will decide to open formal proceedings.

The EC may then make use of the formal settlement procedures (see question 32) or proceed to serve a formal statement of objections on the parties setting out the EC's case. If the EC issues a statement of objections, the parties are then allowed to examine the documents in the EC's file (access to the file) and to respond to the statement of objections, in writing and at a hearing within the time limit set by the EC (see article 27 of Regulation No. 1/2003 and article 10 et seq of Regulation No. 773/2004). In 2011, the EC strengthened and expanded the role of the hearing officer to safeguard the parties' procedural rights and issued a notice on best practices in antitrust proceedings. The EC further expanded on this Notice by publishing the Antitrust Manual of Procedures in March 2012, which is its internal working document intended to give practical guidance to staff on how to conduct an investigation applying articles 101 and 102 TFEU.

Before the EC takes its final decision, it must consult the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of officials from each of the member states' competition authorities (see article 14 of Regulation No. 1/2003). The final decision is taken by the full College of Commissioners and then notified to the undertakings concerned.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition, they usually take several years.

Investigative powers of the authorities

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

The EC's principal powers of investigation under Regulation No. 1/2003 are the power to require companies to provide information (article 18), and the power to conduct voluntary or mandatory on-the-spot investigations (dawn raids) on company premises (article 20) and to inspect employees' homes and cars and suchlike (article 21). It also has the power to take voluntary statements from natural or legal persons under article 19.

Generally, the EC has a wide discretion to collect any information that it considers necessary. The EC may also request a member state's NCA to undertake any investigation or other fact-finding measure on its behalf (article 22). These powers are, however, subject to the general principles of proportionality and the rights of the defence. Certain documents will be protected by the principle of lawyer–client confidentiality (or legal professional privilege, LPP), although what this covers is limited and is ultimately for the courts to decide. In September 2010, the ECJ in *Akzo Nobel* confirmed its decision in AM&S (1982), which excluded the advice of in-house legal counsel from LPP. The ECJ clarified that, for the confidentiality of legal advice to be protected by LPP, such communication must emanate from independent EEA-qualified lawyers, and that the requirement of independence means the absence of any employment relationship. The adherence of many in-house lawyers to professional and ethical obligations was not sufficient to render them independent from their employers for this purpose. National rules may, however, continue to recognise LPP for in-house lawyers (see, eg, the UK and Netherlands chapters).

Information requests

Information requests ('article 18 requests' under Regulation No. 1/2003) are widely used by the EC as a means of obtaining all necessary information from undertakings and associations of undertakings. A company that is the subject of an investigation can receive several such requests. Information requests may also be addressed to third parties, such as competitors and customers. These requests are addressed in writing to the companies under investigation and must set out their legal basis and purpose, as well as the penalties for supplying incorrect or misleading information. The requests must also be adequately reasoned. The statement of reasons cannot be excessively brief, vague or generic, having regard in particular to the length of the questions asked (ECJ, *Heidelberg Cement* (2016)).

The EC can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. The EC's choice whether to

issue a simple information request or a formal decision needs to be proportionate (ECJ, *Schwenk Zement* (2014)). With respect to non-EU companies, the EC is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

Undertakings or associations of undertakings that supply incorrect or misleading information in reply to a simple information request or incorrect, misleading or incomplete information to a formal decision, or who do not supply information within the time limit set by a formal decision, are liable to fines that may amount to up to 1 per cent of their total annual turnover.

The EU courts have recognised a privilege against self-incrimination, albeit one limited in scope. In *Orkem* (1989), the ECJ held that undertakings are obliged to cooperate actively with the ECs investigation. The Court also observed, however, that the EC must take account of the undertaking's rights of defence. Thus, the EC may not compel an undertaking to provide it with answers that might involve an admission on its part of the existence of an infringement that it is incumbent on the EC to prove. In this respect, the Court distinguished between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members on the other. Whereas the former type of questioning is generally permitted, the latter infringes the undertaking's rights of defence. The approach taken in *Orkem* was confirmed in *Mannesmannröhren-Werke* (Court of First Instance 2001, now the General Court (GC) after the entry into force of the Lisbon Treaty) and *Tokai Carbon* (GC 2004, ECJ 2006). The European courts have refused to acknowledge the existence of an absolute right to silence, as claimed by the applicants by virtue of article 6 of the European Convention on Human Rights. However, the GC held in *Tokai Carbon* (2004) that the EC may not request undertakings to describe the object and the contents of meetings when it is clear that the EC suspects that the object of the meetings was to restrict competition. The same applies to requests for protocols, working documents, preparatory notes and implementing projects relating to such meetings. On the other hand, in *Tokai Carbon* (2006), the ECJ clarified that undertakings subject to a EC investigation must cooperate and may not evade requests for production of documents on the grounds that, by complying with the requests, they would be required to give evidence against themselves.

Dawn raids

Dawn raids may be conducted on two grounds: pursuant to a written authorisation only (article 20(3) of Regulation No. 1/2003) and pursuant to a formal EC decision (article 20(4)). In an investigation made pursuant to a decision, the company must allow the investigation to proceed, and fines may be imposed for refusal to submit to the investigation. However, if the investigation is by request only, the company is not obliged to comply but is asked to submit to the investigation voluntarily.

According to the EC's Explanatory Note on Inspections Pursuant to Article 20 (4) of Council Regulation 1/2003, when carrying out a dawn raid, EC officials may:

- enter the premises, land and means of transport of undertakings or an association of undertakings;
- examine the books and other business records of the company (including computers, private devices used for professional purposes, external hard drives and cloud-computing services) falling within the scope of their investigation;
- take copies of books and records; and
- require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection.

The EC may also seal any business premises and books or records for the time necessary for the investigation. The breach of a seal is considered a violation of the undertakings' obligation to cooperate and can lead to significant fines, with a fine of €38 million imposed on E.ON confirmed by the GC in 2010 and by the ECJ in 2012, and fines of €8 million imposed on Suez Environnement and Lyonnaise des Eaux in 2011. The Czech company EPH was also fined €2.5 million in 2012 for obstructing the EC's inspection. The EC can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there. During the investigation procedures in *Marine Hose* (2009), the EC carried out an on-the-spot investigation in a private home.

EC officials have no power of forcible entry under Regulation No. 1/2003. They may, however, rely on the cooperation of member states' NCAs, who may use force to enter premises according to national procedural law. Forcible entry may require a court warrant under the applicable national law. In practice, officials will have obtained such a warrant before conducting the search. Under Regulation No. 1/2003, a national court called upon to issue such a warrant cannot call into question the legality of the EC's decision or the necessity of the inspection. It may only assess whether the EC decision is authentic and verify that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. To that end, it may ask the EC for detailed explanations, in particular on the grounds the EC has for suspecting infringement of article 101 TFEU, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. It cannot demand that it be provided with the information contained in the EC's file.

The EC team conducting a dawn raid usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The EC officials are normally accompanied by two or three officials from the relevant NCA assisting the EC in its investigation.

As is the case for information requests, the undertaking concerned is only required to cooperate if the EC has taken a formal decision. The EC usually issues such a decision in the case of a dawn raid. The decision must specify the subject matter and the purpose of the inspection, so that the undertakings understand the scope of their duty to cooperate (ECJ, *Nexans* (2014)). Apart from relying on the cooperation of national authorities to gain forcible entry, the EC may also impose periodic penalty payments if the undertaking does not submit to an inspection ordered by a EC decision. These penalty payments may amount to up to 5 per cent of the average daily turnover in the preceding business year.

The EC has the power to ask for on-the-spot oral explanations on facts or documents relating to the subject matter and purpose of an inspection from any representative or member of staff of a company and to record the answers. The company must cooperate actively and ensure that the most appropriate staff of sufficient seniority and knowledge of operations are available to deal with the enquiries. The EC may also compel an undertaking to provide copies of pre-existing documents and factual replies.

As is the case for information requests, a company has certain fundamental rights of defence during a dawn raid, including:

- the right not to be subject to an unauthorised investigation;
- the right to legal advice;
- the right not to be required to produce legally privileged documents (limited to correspondence with EEA-qualified external counsel – see above); and
- the right not to be required to incriminate itself (see above).

In the *Deutsche Bahn* case (2015), the EC had informed the officials conducting the dawn raid of another complaint against Deutsche Bahn, which was not the subject of the investigation at hand, and was not mentioned in the warrant. The ECJ ruled in 2018 that the use of the documents relating to the suspected infringements of which the officials had been informed (but that were not mentioned in the warrant) violated the right of defence of the companies involved. The Court clarified the *Deutsche Bahn* case finding that the conduct of an initial unlawful dawn raid will only be relevant to questioning the validity of follow-up inspection decisions based on the information resulting from the initial unlawful raid, rather than previous decisions (including the decision which authorised the initial raid itself) (*Alcogroup and Alcodis* (2018)).

Power to take statements

In addition, the EC has the power to take statements from any natural or legal person on a voluntary basis only (that is, such persons cannot be summoned to testify). This power is additional to the EC's power to ask for on-the-spot oral explanations during a dawn raid.

Where the EC takes statements or conducts interviews, the recent ECJ decision in *Intel* (2017) has clarified that there is no distinction between 'formal' and 'informal' interviews and has made clear that the EC must record any interview it conducts for the purpose of collecting information relating to the subject matter of an investigation. The ECJ set a high bar to establish that the EC's procedural breach provides a sufficient basis for annulling the EC's decision. A firm seeking to rely on non-disclosure must show that it did not have access to exculpatory evidence and that it could have used such evidence for its defence.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The EU has cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Japan, Switzerland, Brazil and South Korea. These agreements can help the EC to obtain information and evidence located outside the EU. The EC also has memoranda of understanding (MOUs) with China, Brazil, Russia, India, South Africa and Mexico that allow the relevant authorities to engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement. The MOUs also provide a mechanism for positive comity (allowing one authority to request that another engages in enforcement activity) and negative comity (to avoid conflicts if one authority's enforcement activity may affect the other in its enforcement).

The most significant of the cooperation agreements are the 1991 and 1998 EU–US agreements envisaging the exchange of information and establishing positive comity between the EC and US antitrust authorities. They provide for the EC and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anticompetitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been significant cooperation between the EU and the US in cartel matters (eg, in *Automotive Wire Harnesses* (2013) and *Automotive Bearings* (2014)).

These cooperation agreements do not allow the EC to disclose confidential information received from companies in the course of its investigations. However, there are proposals under way for 'second generation' cooperation agreements to facilitate the exchange of company confidential information: the EU has signed such a 'second generation' agreement with Switzerland, and is in the process of negotiating a similar agreement with Japan. For the moment, the talks have hit a stumbling block – the Japanese officials are concerned with the unique set up of the EC, which shares investigative information with the antitrust regulatory bodies of its member states. Another stumbling block is the uncertainty surrounding the outcome of the Brexit process in terms of evidence-sharing with Japan. The EC is a also member of the International Competition Network (ICN), a network of competition agencies and a multilateral forum to address international cooperation and convergence.

Obviously, the EC cooperates extensively with the NCAs in member states. Regulation No. 1/2003 increased the scope of this cooperation within the framework of the ECN, which encompasses all member states' competition authorities as well as the EC. The members of the ECN closely cooperate in the application of the EU competition rules. One authority may ask another for assistance by collecting information on its behalf. When an authority is assigned a case, it may decide to reallocate that case to another authority that is better placed to deal with it. The EC may decide to take up a case, which will end the NCA's competence to apply article 101 TFEU (but not its equivalent national rules). Members of the ECN can also exchange information, including confidential information, for the purpose of applying article 101 TFEU or for parallel national proceedings under national competition law. Information so exchanged may only be used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information, or where the information was collected respecting the same level of rights of defence as in the receiving state and where the sanction does not involve imprisonment. Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on Cooperation within the Network of Competition Authorities. In particular, the EC will be assigned a case if it has an impact in more than three member states. See question 3 for more details regarding the newly adopted NCA directive.

Interplay between jurisdictions

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

It is increasingly the case that a cartel investigation in the US may lead to the EC launching an investigation in the EU. This raises a particular problem, in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the US and could increase exposure to civil damages (see question 34).

As regards the interplay between the EU and the NCAs in the member states, the work allocation between the different authorities is regulated within the framework of the ECN (see question 11). There is generally cooperation between the different authorities to decide which authority pursues a case. Once the EC decides to initiate proceedings, the NCAs lose their competence to apply article 101 TFEU. However, there is no formal rule on avoiding double sanctions in the event that there are multiple investigations by several authorities. Nevertheless, the ECJ, in its *Walt Wilhelm* judgment (1969), recognised a general requirement of natural justice that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. By contrast, the EC does not consider that fines imposed elsewhere (outside the EU), especially in the US, have any bearing on the fines to be imposed for infringing European competition rules. Nor does the possibility that undertakings may have been obliged to pay damages in civil actions have any relevance (*Lysine*, 2000). The GC confirmed this view (*Lysine*, 2003).

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The EC both investigates and adjudicates on cartel matters. At the end of an investigation by the officials of DG Competition, the final decision is taken by the College of Commissioners.

Burden of proof

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

The burden of proof lies with the EC to establish the facts and assessments on which its infringement decision is based. However, if a party is claiming that the relevant agreement or concerted practice satisfies the conditions for an exemption under article 101(3) TFEU, the burden of proof lies with the party making that claim. The legislative framework does not provide for precise rules regarding the standard of proof. Case law emphasises the presumption of innocence and clarifies that the EC must produce 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place' (*GC, Danone* (2005)).

Circumstantial evidence

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

Yes, direct evidence of a cartel is often difficult to find. It is therefore possible to prove the existence of a cartel on the basis of circumstantial evidence which, as a whole, provides 'sufficiently precise and consistent evidence' of the existence of a cartel. Furthermore, direct evidence of an agreement or a decision is not needed if there are grounds to show that there is a concerted practice, which amounts to a form of coordination between undertakings without having reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risk of competition (*ICI* (1972)). Parallel market conduct will often create suspicion that a concerted practice has occurred, although on its own this is not conclusive evidence of a concerted practice, unless there is no other possible explanation (*Åhlström* (1994)). See also question 14.

Appeal process

16 | What is the appeal process?

EC decisions can be appealed to the GC in Luxembourg. The GC has jurisdiction to review the legality of and reasons for EC decisions and the procedural propriety of the decision, and to assess the appropriateness of the amount of the fines imposed. The GC may cancel, reduce or increase the fine. From the GC, appeals on points of law may be made to the ECJ in Luxembourg.

Companies do not necessarily have to pay their fine immediately if they lodge an appeal before the GC. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest. Alternatively, the company may pay the fine into a ring-fenced account pending the outcome of the appeal. Typically, cartel cases before the GC last approximately two-and-a-half to three years and cases before the ECJ an additional one-and-a-half to two years. In January 2017, the GC ordered the EU to pay more than €50,000 in damages to Gascogne (along with fines to a number of other companies involved in a cartel in the industrial plastic bags sector) for the excessive length of proceedings before the GC. The proceedings involving Gascogne lasted for more than five years and nine months (*GC, Gascogne Sack Deutschland and Gascogne* (2017)). The EC appealed the GC's decision. In December 2018, the ECJ overturned the GC's ruling due to the lack of a causal link between the breach of the obligation to adjudicate within a reasonable time and the loss sustained by Gascogne as a result of paying bank guarantee charges during the relevant period.

SANCTIONS

Criminal sanctions

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

EU law sanctions only undertakings and not individuals. National legislation within some member states may, however, provide for criminal or administrative sanctions where individuals participate in infringements of article 101 TFEU (see, for example, the UK and Netherlands chapters). For penalties on undertakings, see question 18.

Civil and administrative sanctions

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

The sanction available to the EC is the imposition of fines on the undertakings or associations of the undertakings concerned. In general, the EU courts have confirmed that the EC has wide discretion in setting the level of fines within the limits of Regulation No. 1/2003. The fines imposed can be up to 10 per cent of worldwide group turnover in the preceding business year where an undertaking or association of undertakings has infringed article 101 TFEU. The ECJ has confirmed that fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling (*Pre-insulated Pipe Cartel Appeals* (2002)). Regulation No. 1/2003 states that these fines are not of a criminal nature. However, given the size of the potential fines, there are strong arguments as to why, pursuant to the European Convention on Human Rights (ECHR), the fines should be characterised as criminal or quasi-criminal (with the higher level of procedural protection this involves under article 6 of the ECHR).

The EC imposes fines according to its Guidelines on the method of setting fines using a two-step method. In a first step, the basic amount of the fine is calculated taking into account the value of the undertaking's direct or indirect sale of goods or services concerned by the infringement within the EEA. For undertakings without EEA sales, the EC has used an alternative method taking into account sales outside the EEA to calculate the hypothetical turnover within the EEA. This happened, for example, in *Automotive Wire Harnesses* (2013), *Power Transformers* (2009), *Marine Hoses* (2009) and *Aluminium Fluoride* (2008). In a second step, the amount of the fine may be adjusted taking into account aggravating or mitigating circumstances. The basic amount of the fines may be increased by up to 100 per cent in the case of recidivism. A fine may also be increased for the purpose of deterrence. In *InnoLux* (2015), the ECJ confirmed that for a vertically integrated company the fine calculation may be based on non-EEA sales of cartelised components if they are built into a final product that is subsequently sold in the EEA as a 'direct EEA sale through transformed products'. In *AC Treuhand II* (2015) the ECJ confirmed that the EC was entitled to fix the fine as a lump sum instead of using value of sales because AC Treuhand, a consultancy firm, did not have any sales in the markets concerned.

Under a draft directive published in 2018, member states will be obliged to establish non-criminal penalties that can be imposed at the domestic level for breaches of EU competition law, although whether these can be imposed by the NCA itself in its own proceedings or requires judicial action is a matter of discretion for member states. The proposals also require that the maximum fine available to NCAs must be at least 10 per cent of global turnover, which will represent a significant

increase in some jurisdictions once implemented. Fines will also be able to be collected from the members of insolvent corporations provided the fines relate to the member's activities, for instance in respect of joint ventures. NCAs will also be empowered to impose structural and behavioural remedies, such as requiring the divesting of certain assets, which are not available in all member states at present.

The EC also has the power to require the parties to terminate the infringement and may require them to undertake any action necessary to ensure their conduct in future is lawful. For this purpose, it has in some circumstances the power to impose structural remedies and to accept binding commitments. The EC also has the power to take interim measures in relation to infringements of article 101 TFEU. Such measures are intended to preserve the position before the parties entered into the agreement in question. Performance of such orders can be compelled by means of periodic payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day.

The EC's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the EC intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the EC began to impose much heavier fines in landmark cases such as Polypropylene (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the EC has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years, the EC has at various times reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. Recent years have brought new record fines: the Trucks cartel (2016/2017) was fined a total of €3.81 billion, the largest fine ever imposed by the EC in a single cartel investigation, including a fine of €1.01 billion on Daimler, €881 million on Scania, and €753 million on DAF, being to date the largest fines imposed on single companies for their involvement in cartel activity. In February 2018, in three separate decisions, the EC fined four maritime car carriers €395 million, two suppliers of spark plugs €76 million, and two suppliers of braking systems €75 million, for taking part in cartels. The same year, the EC fined eight Japanese manufacturers a total of €254 million for their involvement in an alleged cartel concerning the supply of aluminium and tantalum capacitors. In March 2019, the EC fined Autoliv and TRW a total of € 368 million for breaching EU antitrust rules by taking part in two cartels for the supply of car seatbelts, airbags and steering wheels to European car producers. In May 2019, Barclays, RBS, Citigroup, JPMorgan and MUFG were fined by the EC a total of €1.07 billion for participating in foreign exchange spot trading cartel.

It is very difficult to rebut the presumption of actual decisive influence by a parent company over a wholly owned subsidiary. The failure to comply with a parent company's instruction is not sufficient, as long as the failure to carry out instructions is not the norm (ECJ, *Evonik Degussa and Alzchem* (2016)). The ECJ has, in *DuPont and Dow* (2013), confirmed that, in addition to penalties for infringements by their wholly owned subsidiary companies, parent companies may also be held liable for the penalties imposed in respect of article 101 TFEU infringements committed by their full-function joint venture subsidiaries, provided that the EC is able to establish that the parent company did, in fact, exercise 'decisive influence' over that joint venture company. More recently in *Power Cables* (2014), Goldman Sachs, the former 47 per cent financial investment shareholder of Prysmian, was fined €37 million jointly and severally with Prysmian. Liability was based on Goldman Sachs's decisive influence over Prysmian, which, the EC found, was to all intents like that of a traditional industrial owner. In July 2018, following an appeal from Goldman Sachs, the GC confirmed the EC's decision. The GC observed that the bank's voting rights (which fluctuated between 84 and 91 per cent) and other powers gave it decisive influence comparable to a sole owner and that it failed to show that its interest was intended solely as a pure financial investment (*Goldman Sachs Group* (2018)). In late 2018, Goldman Sachs appealed the GC's ruling before the ECJ, arguing that it did not exercise decisive influence in the sense required by the case law. Equally anticipated is the ECJ's ruling in Deutsche Telekom's appeal of the GC's decision in particular regarding the concept of decisive influence; the initial GC appeal was filed by Deutsche Telekom's concerning its Slovak broadband market antitrust fine (*Slovak Telekom*, 2014).

Guidelines for sanction levels

19 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's *Guidelines on the Method of Setting Fines*, having the status of soft law, are only self-binding on the EC, and do not have a binding effect on the European courts or on NCAs or national courts.

Compliance programmes

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

While the EC positively regarded the existence of compliance programmes during the 1990s when calculating the fine, the mere existence of a compliance programme today is no longer regarded as a mitigating circumstance regarding sanctions. This was confirmed by the ECJ in *P Dansk Rørhrindustri* (2005) and by the GC in *BASF/UCB* (2007) and in *Donau-Chemie* (2014).

Director disqualification

21 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 a cartel from serving as corporate directors or officers (although such sanctions do exist at the member state level, see, eg, UK chapter).

Debarment

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

The sanctions available under Regulation No. 1/2003 do not include the possibility of debarment from government procurement procedures for cartel infringements. However, an exclusion from the tendering process is possible under the rules on public procurement (article 57 of Directive 2014/24). The public contracting authorities may, in a discretionary decision, exclude the undertaking where they have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition. They may further apply the catch-all element of grave professional misconduct. The time period for debarment due to anticompetitive conduct is subject to national law and fixed at a maximum of three years by Directive 2014/24. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability.

Parallel proceedings

23 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?

Not applicable; see questions 17 and 18.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour in breach of article 101 TFEU can sue for damages before the national courts.

The precise rules of standing, procedure and quantification of damages may, however, vary between member states. In November 2014, the Damages Directive was adopted. The Directive is designed to ensure that victims of competition law infringements in Europe have access to effective mechanisms for obtaining compensation for the harm they have suffered. Victims should obtain full compensation for the actual loss suffered as well as for lost profits. The Directive also allows for the use of passing-on as a defence, and for EC and NCA decisions to be binding on the national courts and to serve as evidence of an infringement. This further reinforces the requirement that EC infringement decisions must be unambiguous (*GC, British Airways* (2015)). If an antitrust infringement is shown to have been committed, the Directive provides a reversal of the burden of proof to the detriment of the infringer in terms of a rebuttable presumption that cartels cause harm. The Directive also provides a common standard for limitation periods and the protection of leniency applicants. All member states have now transposed the directive into national legislation , so it will be interesting to observe if there are any changes to the number of claims and quantum of the damages in follow-on damages cases.

In August 2019, the EC adopted the guidelines for national courts on how to estimate the share of overcharge that was passed on to the indirect purchaser, by taking into account the stakeholders' views expressed during the public consultation on the topic. The guidelines are intended to give national courts, judges and other stakeholders in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain. The guidelines are intended to supplement the Practical Guide on Quantifying Harm (which focuses on how to quantify the damage caused by antitrust infringements), published in 2013.

A related development is that the ECJ held that there should be no national rule preventing third parties from seeking compensation from cartelists for loss allegedly suffered owing to the surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from the cartel by increasing their own prices (*Kone* (2014)).

The German highest court confirmed in the *Grauzementkartell II* case in 2018, that owing to the *Kone* case and a cartel where participants had over 71.3 per cent market share, it could be assumed that the pricing of a non-cartel member was influenced by the cartel and therefore damages for its customers would also be available. The Oberlandesgericht Düsseldorf also assumed in the 2019 *Schienenkartell III* case, that damages could be caused by a non-cartel member raising its prices higher than it would have without the cartel.

In relation to the jurisdiction of national courts over cartel damages claims, the ECJ held in May 2015 that cartel victims may sue for damages in the country where any one of the cartelists is domiciled and that the jurisdiction of the national court is not in principle affected by the claimant's withdrawal of its action against the sole participant domiciled in the member state in which the court is seised. The claimant also has the option to bring its action for damages in the jurisdiction where the cartel was concluded, where an agreement implying the existence of the cartel was concluded, or where the loss arose (the latter generally presumed to be the claimant's registered office). Furthermore, the ECJ found that jurisdiction clauses that derogate from the provisions of the Brussels I Regulation only encompass disputes relating to the payment of damages arising from an unlawful cartel if the claimant has consented to such derogation (*Cartel Damage Claims (CDC) Hydrogen Peroxide SA* (2015)).

Class actions

25 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?

While the Damages Directive does not include a requirement for member states to introduce collective redress mechanisms for damages suffered as a result of breaches of competition rules, in 2013 the EC published a non-binding recommendation setting out common principles regarding collective redress mechanisms. The recommendation, which invited member states to implement appropriate measures by 26 July 2015, was intended to bring more coherence to the different systems of collective redress within the EU. From 22 May 2017 to 15 August 2017, the EC conducted a consultation to assess the implementation of the recommendation on the basis of practical experience and determine whether further measures to promote the principles set out in the recommendation should be considered.

Following this consultation, a report on the practical application of the principles of the recommendation was published. The report showed that the availability of collective redress mechanisms, as well as the implementation of safeguards against the potential abuse of such mechanisms, was still unevenly distributed across the EU. Therefore, in April 2018, the EC proposed new legislation (Proposal for a Directive on Representative Actions for the Protection of Collective Interests of Consumers, and repealing Directive 2009/22 (the Injunctions Directive)), which, if implemented, will effectively introduce an EU-wide right of collective redress, allowing certain entities (see below) to seek redress (eg, compensation, replacement or repair) on behalf of consumers who have been harmed by an illegal commercial practice. It is, however, of note that the proposal focuses on consumer law, rather than antitrust breaches.

Owing to a number of safeguards designed to prevent abuse of the procedure, the EU collective redress mechanism will be different from US-style class actions: only qualified entities (eg, consumer organisations and independent public bodies) will be able to begin an action (not private law firms), and such entities will have strict obligations of transparency regarding the source of their funding. Accordingly, the proposal concludes that it is necessary to amend existing consumer protection Directives and repeal the existing Injunctions Directive. As a general rule, collective redress mechanisms should be based on the opt-in principle, according to which every represented party individually needs to join the action (in contrast to opt-out actions, which are possible without identifying the individual parties to the lawsuit). In March 2019, the European Parliament adopted a common position on the proposal.

However, it appears unlikely that consensus will be reached by the end of 2019. One of the main concerns is the potential for 'forum shopping' that the proposal might facilitate.

COOPERATING PARTIES

Immunity

26 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?

To qualify for full immunity from fines (and, under the Damages Directive, to benefit from a softening of joint and several liability in any follow-on actions such that a successful applicant can generally only be liable to compensate their direct or indirect purchasers or providers) a party must be the first to inform the EC of a cartel, and must provide sufficient information and evidence for the EC either to carry out an inspection at the premises of the companies allegedly involved in the cartel or to find an infringement. The informing party must also cooperate fully with the EC on an ongoing basis throughout the investigation, offer up all evidence in its possession, and cease committing the infringement immediately. A party cannot, however, benefit from immunity if it was active in coercing other parties to participate in the cartel.

Companies that have recently benefited from full immunity include:

- Valeo in *Lighting Systems* (2017);
- Denso in *Thermal Systems* (2017);
- Johnson Controls in *Car Battery Recycling* (2017);
- Takata in *Occupant Safety Systems* (2017);
- Denso in *Spark Plugs* (2018);
- TRW (and Continental for one cartel) in *Braking Systems* (2018);
- Sanyo Electric and its parent Panasonic Corporation in *Electrolytic Capacitors* (2018); and
- MOL in *Maritime Car Carriers* (2018)
- Takata in *Occupants Safety Systems II* (2019)
- UBS in *Forex* (2019)

Any information and documents submitted by a party in the course of an application for immunity or leniency (see below) are treated with confidentiality by the EC. The response to question 27 provides more information on the practicalities of approaching the EC.

In March 2017, the EC introduced an anonymous whistle-blower tool for individuals to alert the EC anonymously about secret cartels and other antitrust violations.

Additionally, in April 2018, it announced a proposal for new legislation to guarantee a high level of protection for whistle-blowers by introducing new EU-wide standards. Under the proposal, all companies with more than 50 employees, or with an annual turnover of over €10 million, will be required to set up an internal procedure to manage whistle-blowers' reports. A provisional agreement on the proposal was reached in March 2019 between the European Parliament and the member states, the next step being the formal approval of the text by both the European Parliament and the Council.

The EC recently formed a special unit to uncover cartels by employing computer experts which trawl the internet for clues of unlawful behaviour. The EC also created a 'centralised intelligence network', which facilitates the gathering of information from other EC services, other EU institutions, and from non-competition national enforcers.

Subsequent cooperating parties

27 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 Notice (part III), favourable treatment is also available to companies that do not qualify for immunity but that provide evidence representing 'significant added value' to that already in the EC's possession, and that immediately terminate their involvement in the cartel activity. Provided these conditions are met, the cooperating company may receive up to a 50 per cent reduction in the level of fine that would have been imposed had it not cooperated. The envisaged reductions are split into three bands:

- 30 to 50 per cent for the first company to provide significant added value;
- 20 to 30 per cent for the second company to provide significant added value; and
- zero to 20 per cent for any subsequent companies to provide significant added value.

The amount received within these bands depends upon the time at which they started to cooperate and the quality of evidence provided.

Companies that have recently benefited from a reduction of their fines include:

- Volvo/Renault, Daimler and Iveco (40 per cent, 30 per cent and 10 per cent respectively) in Trucks (2016);
- Sony, Panasonic and Sanyo (50 per cent, 20 per cent and 20 per cent respectively) in Rechargeable Lithium-ion Batteries (2016);
- Eco Bat and Recycle (50 per cent and 30 per cent respectively) in Car Batteries Recycling (2017);
- Bosch and NGK (28 per cent and 42 per cent, respectively) in Spark Plugs (2018); and
- Hitachi Chemical, Rubycon, Elna and NEC Tokin (35 per cent, 30 per cent, 15 per cent and 15 per cent respectively) in Electrolytic Capacitors (2018);
- TRW and Autoliv (50 per cent and 30 per cent respectively) in Occupants Safety Systems II (2019);
- Barclays, RBS, Citigroup and JPMorgan (50 per cent, 30 per cent, 20 per cent and 10 per cent, respectively) in the Three Way Banana Split infringement, and Barclays and RBS (50 per cent and 25 per cent respectively) in the Essex Express infringement - in FOREX (2019).

There is currently no 'immunity plus' or 'amnesty plus' option.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 25.

Approaching the authorities

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

In practice, the decision on whether to apply for leniency if a violation is discovered internally requires an assessment of the risks, advantages and disadvantages. Factors include:

- risk of the authorities being on the trail already;
- the danger that another participant will get in first and 'slam the door';

- the jurisdictions in which liability to sanctions may arise;
- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty;
- the consequences in terms of civil liability, including punitive or triple damages in some jurisdictions; and
- the implications of a leniency application in terms of document disclosure requirements in other jurisdictions.

Where the EC grants a marker, it will specify the time period in which the applicant undertaking must perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. If the undertaking complies within the time frame, the marker is deemed perfected at the time it was first granted. If the undertaking fails to supply the information and the deadline is not extended, the undertaking can still present an application for immunity, but its place in the queue is no longer protected.

There is no specific deadline for immunity or leniency applications; these are possible at any time in the EC's investigation provided the criteria are met (see questions 24 and 25). However, applications cannot be made once settlement discussions have commenced.

Recent cases have shown that international cartels are highly likely to result in exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as possible and, where appropriate, simultaneously. If an undertaking wishes to benefit from full leniency at the EU level, it needs to tell the EC as soon as it has gathered evidence of the cartel's existence sufficient for purposes of the Leniency Notice. Otherwise, it runs the risk that one of the other cartelists may blow the whistle first.

Within the ECN (see question 11), an application for leniency to a given authority is not considered as an application for leniency to any other authority and leniency programmes of the national competition authorities are autonomous in respect of other national programmes and the EU leniency programme (ECJ, *DHL* (2016)). When an undertaking decides to seek immunity, it is therefore in its interest to apply for leniency to all competition authorities that are competent to apply article 101 TFEU and that may potentially deal with the case under the work allocation rules within the ECN.

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members, but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place; that the EC is 'particularly well placed' to deal with the case in accordance with the Notice on Cooperation within the ECN; and that the NCA authority 'might be well placed' to act.

Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity. NCAs are not required to assess a summary application submitted to them in the light of an application for immunity submitted to the EC, or to contact the EC where the summary application has a more limited material scope (ECJ, *DHL* (2016)). Changes have been proposed to ensure that applicants for immunity to an NCA can also request a place in the leniency queue and receive a marker at that time, even if it transpires that they are not eligible for immunity.

Cooperation

30 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 receive immunity, the Leniency Notice provides that the applicant must provide a corporate statement including a detailed description of the alleged cartel arrangement and explanations of the evidence provided, full details of the applicant and the other members of the cartel and information on which other competition authorities have been or will be approached, as well as all other evidence relating to the alleged cartel where no inspection has yet been conducted.

Only one undertaking can qualify for full immunity. To obtain full immunity a company must, in addition, cumulatively satisfy the following conditions:

- put an end to its involvement in the illegal activity immediately following its application, except for what would, in the EC's view, be reasonably necessary to preserve the integrity of the EC's inspection;
- cooperate genuinely, fully, on a continued basis and expeditiously with the EC – the company is expected to provide the EC with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not have taken steps to coerce other undertakings to participate or remain in the cartel.

The Leniency Notice explains that full cooperation also entails:

- providing the EC promptly with all relevant information and evidence that comes into the undertaking's possession or is available to it;
- remaining at the EC's disposal to respond to any request promptly;
- making current and, if possible, former employees and directors available for interview;
- not destroying, falsifying or concealing evidence of the cartel, or disclosing any information, except to other competition authorities; and
- unless otherwise agreed, not disclosing the fact or any content of the application before a statement of objections has been issued.

A company is not required to provide decisive evidence for a grant of full immunity, nor is the company automatically excluded for having acted as an instigator of, or for having played a determining role in, the cartel. Full immunity may also still be available after an investigation has been initiated.

A noteworthy case in 2005 concerned the Italian raw tobacco market. The immunity applicant, Deltafina, had been granted conditional immunity at the beginning of the procedure under the terms of the 2002 Leniency Notice. However, the final decision withheld such immunity owing to a breach by Deltafina of its cooperation obligations (confirmed by the GC in 2011): Deltafina had revealed to its main competitors that it had applied for leniency before the EC could carry out dawn raids.

As far as the level of cooperation is concerned, any subsequent leniency applicants must satisfy the same conditions as the first. Only the quality of evidence differs insofar as the second (and subsequent) applicant has to provide evidence representing significant added value to that already in the EC's possession.

However, there are proposals to ensure that directors, officers and employees of applicants in immunity (but not leniency) applications before NCAs also receive immunity from individual sanctions provided they cooperate with investigations, unless proceedings are already under way against individuals prior to their cooperation. This

will mitigate the risks of non-compliance by persons working for applicants for fear of revealing their role in unlawful actions. However, this immunity is subject to a derogation allowing member states to opt for cooperation as a mitigating factor for individual sanctions imposed, rather than blanket immunity.

Confidentiality

31 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 treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file. According to the EC Notice on Access to the File (December 2005, as amended in August 2015), no access will be granted to internal documents of the EC or of NCAs (including correspondence between the EC and NCAs or between NCAs, and the internal documents received from such authorities), documents containing business secrets and other confidential information (which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking). The EC's notes of meetings with leniency applicants are classified as internal documents. Where, however, the leniency applicant has agreed to the minutes, such minutes will be made accessible to third parties after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the EC's evidence in the case.

The Leniency Notice further provides that any written statement made as regards 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. The amendments made to the Leniency Notice in August 2015 following adoption of the Damages Directive add that the EC will not transmit leniency corporate statements to national courts for use as evidence in support of actions for damages for breaches of EU antitrust law. The EC also stresses that documents received in the context of the Leniency Notice will not be disclosed under Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations.

In practice, the EC does not reveal the name of the whistle-blower as long as the investigations continue. In the *Stanley Adams* case (1985), the ECJ held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity by an individual whistle-blower, if the EC accepts such information, it is bound to comply with such a condition. Failure to do so meant that the EC was liable to pay damages. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final EC decision. The 2015 Guidance on the Preparation of Public Versions of Commission Decisions explains the types of information that companies may request be redacted on the grounds that it contains business secrets or is confidential. The GC highlighted in *AGC Glass Europe* (2015) that the EC should not be prevented from publishing, in its decision bringing the administrative procedure to an end, information relating to the description of an infringement that has been submitted to it as part of the leniency programme. The ECJ in 2017 upheld the *AGC Glass Europe* ruling by the GC as a mistake by the EC on the powers of the hearing officer did not provide grounds for annulment.

The ECJ in *Evonik Degussa* (2017) also found that the EC is not prevented from supplementing the cartel decision with information provided by a leniency applicant. The ECJ ruled that the fact that immunity is granted cannot protect a leniency applicant from civil damages claims. The only protection available to leniency applicants is protection concerning immunity from, or reduction in, the fine, in return for providing the EC with evidence of the cartel, and the EC's non-disclosure of documents and written statements that it has received in accordance with the Leniency Notice. As a result, the EC is allowed to publish verbatim quotations of information included in the documents provided by a leniency applicant, provided that business secrets, professional secrecy and other confidential information is protected. It is for the hearing officer to take account of all the arguments related to general EU law principles raised by a leniency applicant to protect the information's confidentiality. However, verbatim quotations from the leniency statement itself may not be published under any circumstances. According to the EC, summaries of parts of the leniency statement can be published.

Parties to international cartels need to bear in mind that written submissions to the EC may be subject to US civil discovery rules in US proceedings regarding damages claims. In the interest of its leniency policy, the EC has attempted to address these concerns by adjusting both the Leniency Notice and its overall practice as regards US civil proceedings (see question 32). In such cases, it may be advisable to make a paperless application (either orally or via the EC's eLeniency portal) to the EC via external lawyers benefiting from legal privilege. The continuing conflict between public and private enforcement of competition law raises concerns over the future effectiveness of leniency programmes at national and European level. In its *Pfleiderer* ruling (2013), the ECJ held that the provisions of European law did not per se preclude private damages claimants from obtaining access to documents submitted to a national competition authority under a leniency programme. However, the ECJ left open the question of how to weigh conflicting concerns of obtaining compensation versus protecting leniency programmes.

Further, in the UK case *National Grid v ABB & Ors*, National Grid applied to the High Court seeking disclosure from the defendants of the EC's confidential decision and some leniency materials from the defendants. In light of the *Pfleiderer* decision, National Grid argued that the national court had jurisdiction to order the disclosure of such documents and was no longer required to make a request to the EC under article 15 of Regulation No. 1/2003.

The High Court concluded that the ruling of the ECJ clearly applies to the EC's leniency programme as well as to national leniency programmes, and that the EC does not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme. It is open for a national court to request the EC to provide leniency materials, and there is nothing in Regulation No. 1/2003 precluding a national court from applying its national procedures for access to documents. Further, *Pfleiderer* expressly established that, in the absence of binding regulation under EU law on the subject, the question of access to leniency materials by the victim of a cartel is to be determined under national rules. The High Court also commented that if every application for disclosure of leniency materials had to be referred to the EC, it would place a significant burden on the EC to carry out the balancing exercise required by Pfleiderer and would also give rise to significant delay.

The High Court held that other relevant considerations for the *Pfleiderer* balancing exercise included whether the information is available from other sources, the relevancy of leniency materials to the issues in context, and the evidential difficulties facing claimants seeking damages for an infringement of EU competition rules.

The Damages Directive provides that national courts must be able to order a defendant or third party to disclose evidence independently of whether such evidence is in the possession of a competition authority and regardless of the medium in which the information is stored. The

directive provides, however, a specific exemption to this rule that affords absolute protection to leniency corporate statements and settlement submissions held by the EC or an NCA. Under the directive, no national court can order the disclosure of such documents in a damages action, as their disclosure would pose a serious risk to the effectiveness of the leniency programme and settlement procedures. The directive was followed by, among others, amendments to the Notices on Access to the File and Leniency in August 2015. Access to the file will only be granted on the condition that the information thereby obtained is used for the purposes of judicial or administrative proceedings for the application of EU competition rules. In addition, the EC will not send leniency corporate statements to national courts for use in actions for damages for breach of EU antitrust provisions (except for the sole purpose of confirming that they are 'leniency statements' or 'settlement submissions' as defined by the Damages Directive).

Settlements

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

The EC does not have authority to enter into plea bargaining or similar arrangements. However, in 2008, the EC introduced procedures for a simplified handling of cases in which the parties to a cartel and the EC concur about the nature and scope of the illegal activity and the appropriate penalty. These rules on the conduct of settlement procedures aim at ensuring the continued effectiveness of the EC's long-term zero-tolerance policy by simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing EC resources to pursue more cases. The rules allow for settlements of cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it, but also agree to a faster and simplified procedure, as well as the imposition of lower fines on those who agree to the settlement procedure.

The EC's initiative is intended to complement the Leniency Notice (see questions 24 to 29) and the Fining Guidelines. The settlement procedure aims at simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing EC resources to pursue more cases.

Under the settlement procedure, the EC neither negotiates nor bargains the use of evidence or the appropriate sanction. Instead, the parties are expected to acknowledge their participation in and liability for the cartel, and reach a common understanding with the EC about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with a 10 per cent reduction in fines (cumulative to any reduction received under the Leniency Notice) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two). Parties also benefit from a shorter public decision. Such cooperation differs from the voluntary production of evidence to trigger or advance the EC's investigation, which is already covered by the Leniency Notice. Parties have neither the right nor the duty to settle. Parties would be made aware of the EC's anticipated objections and be given an indication of the potential maximum fine they can expect. They would be informed about the evidence and allowed to state their views prior to any formal objections. If parties chose to introduce a settlement submission (which would include an acknowledgment of liability), the EC's statement of objections could be much shorter than the usual statements of objections issued to face contradiction. The abbreviated statement of objections would endorse the contents of the parties' settlement submission.

Since parties would have been heard effectively in anticipation of the 'settled' statement of objections, other procedural steps would be simplified. After confirmation by the parties, the EC could, after consulting member states in the framework of the Advisory Committee, adopt an accelerated final decision. However, the EC retains the possibility to depart from the parties' settlement submission until the final decision, in which case the standard procedure would apply. Once parties choose to dispense with the settlement procedure, the EC is not bound by its indications given during settlement discussions with regard to the levels of fines (GC, Timab (2015), confirmed by the ECJ (2017)).

The amendments to Regulation No. 773/2004 accommodate the settlement option within the existing framework. The changes amend provisions on issues such as the initiation of proceedings, access to the file and oral hearings and choice for a different sequence of procedural steps, advancing some before the adoption of the statement of objections.

The Settlement Notice sets out the specifics of the procedure. It provides guidance for the legal and business community and foresees that companies could anticipate the kind and extent of cooperation expected from them to settle and estimate the individual benefits of settling. The Settlement Notice also provides that settlement submissions may be given orally and will be given the same protections as those granted to leniency applications. Settlement decisions may be appealed to the GC and, on points of law, to the ECJ.

The EC has settled more than 28 cases so far four out of seven cartel decisions reached in 2017 were full settlement cases, while three out of four cartel decisions issued in 2018 were settlement cases.

A recent trend has been the use of 'hybrid' cases, in which one or more parties decides not to settle. For example, in *Trucks* (2016/2017), the EC agreed a 10 per cent reduction in fines for those undertakings which agreed to settle, but pursued Scania under the ordinary procedure. *Trucks* was also notable as the procedure only shifted to a settlement procedure after issuing of a formal statement of objections pursuant to the ordinary procedure. In *Panalpina* (2016) the GC recalled that the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. It confirmed that the EC was entitled to choose not to apply the settlement procedure, particularly given the large number of parties involved (47) and the fact that many were not willing to cooperate on the basis of the Leniency Notice. In its *Icap* judgment of 2017 the GC warned against 'hybrid' settlements, where an early settlement with some parties risks infringing the presumption of innocence applying to non-settling parties. Following this criticism, the EC now appears to be pursuing settlement and adversarial procedures in the same cases in parallel rather than sequentially (see, for example, recent (ongoing) *bioethanol* investigation). The recent 2019 *Forex* decision comprised a classic settlement enforcement, where all the parties cooperated with the EC and were rewarded accordingly.

Corporate defendant and employees

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

Not applicable at the EU level, as the EC cannot impose penalties on individuals. However, there may be implications for criminal proceedings against individuals that may arise under national legislation (see, eg, the United Kingdom chapter).

Dealing with the enforcement agency

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

In general, the procedure applicable to cartel investigations is the standard one for all antitrust cases as provided for by Regulation No. 1/2003 (see questions 1, 3 and 10).

If an undertaking wishes to take advantage of the leniency programme, it should contact DG Competition, primarily through the following dedicated email address: comp-leniency@ec.europa.eu (assistance is given via the following dedicated telephone numbers: +32 2 298 4190 or +32 2 298 4191). Only persons empowered to represent the enterprise for that purpose or intermediaries acting for the enterprise, such as legal advisers, should take such a step.

Application for immunity (Part II of the Leniency Notice)

Following initial contact, the EC will immediately inform the applicant if immunity is no longer available for the infringement in question (in which case the applicant may still request that its application be considered for a reduction of fines, under Part III of the Notice). If immunity is still available, a company has two ways to comply with the requirements for full immunity. It may choose:

- to provide the EC with all the evidence of the infringement available to it; or
- to initially present this evidence in hypothetical terms, in which case the company is further required to list the evidence it proposes to disclose at a later agreed date; this descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence; the applicant will be required to perfect its application by handing over all relevant evidence immediately after the EC determines that the substantive criteria for immunity are met.

In either of the two scenarios, immunity applicants will be informed speedily about their situation and, if they meet the substantive criteria, conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

Application for reduction of a fine (Part III of the Leniency Notice)

Applicants wishing to benefit from a reduction in fine should provide the EC with evidence of the cartel activity at issue. Following the necessary verification process by the EC, they will be informed of whether the evidence submitted at the time of their application passed the 'significant added value' threshold, as well as of the specific band within which any reduction will be determined, at the latest on the day of adoption of a statement of objections. The specific amount to be imposed will be finalised in the EC's decision.

In practice, companies applying either for immunity or reduction of fines provide a written statement (sometimes referred to as the corporate statement) for the purposes of the leniency application, in which they give their own description of the cartel activity and assist the EC in understanding any related evidence (internal notes, minutes of meetings, etc). Given the broad scope of US civil discovery rules, producing such documentary evidence may expose EU leniency applicants in the event of US civil litigation (in particular, regarding claims for treble damages), where US plaintiffs are keen to get hold of documents, statements and confessions provided to the EC by companies. To avert the undermining of its leniency policy, the EC protects leniency applications from disclosure in the following ways:

- asserting in the Leniency Notice that any written statement made as regards the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 101 TFEU (see, however, recent case law regarding disclosure in the context of private enforcement and also the position under the Damages Directive in question 29);
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of amicus curiae (the EC has intervened in this way in a number of cases); and
- accepting oral corporate statements or statements via its eLeniency portal.

In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, with a view to avoiding admission of misconduct with effects in the US or elsewhere.

DEFENDING A CASE

Disclosure

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

See also questions 31 and 32.

The disclosure of information and evidence depends on whether the normal or the settlement procedure is followed (see questions 9 and 32).

In the normal procedure, the written statement of objections must contain all factual and legal aspects that the EC intends to use in its decision, ie, clarification of the nature, area, duration and gravity of the infringement and the responsibility of each undertaking, but not the range of potential fines. The objections must be sufficiently clear to enable the undertakings concerned to properly identify the alleged conduct. The parties are then allowed to examine the documents in the EC's file (access to the file), but no access will be granted to internal documents of the EC or of NCAs, documents containing business secrets and other confidential information, unless it is necessary to prove the infringement (article 27(1), (2) of Regulation No. 1/2003, articles 10(1) and 15(1), (2), (3) of Regulation No. 773/2004).

In the settlement procedure, parties are informed of the EC's anticipated objections and are given an indication of the potential maximum fine they can expect. They are given access to the evidence the EC intends to base its findings upon (such as corporate statements by the other participants in the alleged conduct and historical documents) and are allowed to state their views prior to any formal objections. The EC's statement of objections may be much shorter than the document used in non-settlement proceedings. A subsequent access to the file is only granted if the statement of objections does not reflect the contents of the parties' settlement submissions, as parties should have been sufficiently informed beforehand (article 15(1a) of Regulation No. 773/2004).

Representing employees

36 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 individuals cannot be penalised for breach of the EU competition rules, this is not generally a concern at the EU level. However, the issue of separate representation may arise where, for instance, the employee may be subject to disciplinary measures pursuant to his or her contract of employment, or in the event of possible criminal proceedings under relevant national legislation (see, eg, the United Kingdom chapter).

Multiple corporate defendants

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

Conflicts of interest are governed by the relevant bar rules in each member state. Conflicts of interest arise fairly regularly between alleged parties to a cartel.

Payment of penalties and legal costs

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

Penalties cannot be imposed on individual employees at the EU level.

Taxes

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

The tax consequences of fines or other penalties for competition law infringements are governed by national law. The EC has the power under article 15(3) of Regulation No. 1/2003 to present written observations to national courts as amicus curiae. Notably, on 30 October 2012, the EC published amicus curiae observations on a case then before the Belgian Constitutional Court that concerned the question of whether fines imposed by the EC for competition law infringements are tax-deductible. The EC was of the opinion that allowing such penalties to be tax-deductible would diminish their deterrent effect, and would effectively mean that a part of the fine was borne by the relevant state. The Belgian Constitutional Court followed the EC's opinion.

In respect of private damages awards, tax consequences are governed by national law.

International double jeopardy

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

In principle, penalties imposed in other non-member state jurisdictions (regarding member state jurisdictions, see question 12) are not taken into account by the EC when determining sanctions for a cartel (reaffirmed by the ECJ in *InnoLux* (2015)). However, when it comes to including indirect sales for the purpose of calculating the amount of the fine, the EC may take into account the fact that these sales have also been included in sanctions imposed in another jurisdiction. In *Automotive Wire Harnesses* (2013), the EC is believed to have refrained from including the indirect sales of cars manufactured in Japan and exported into the EEA in its calculation, taking into consideration the fact that the Japanese FTC had already imposed sanctions with respect to these cars.

Getting the fine down

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

The EC's leniency programme has led to a significant change in the defence strategy of companies involved in cartel cases. The EC has repeatedly emphasised its willingness to give companies the chance to get off the hook if they cooperate actively at the earliest possible opportunity. At the same time, it has made clear that companies that do not seize this chance must be aware of the responsibilities they will face. If the company decides to cooperate, it is therefore crucial to develop a cooperation strategy as early as possible tailored to the particular case and with the aim of providing the EC with as much evidence as possible. The rules on the conduct of settlement procedures (introduced in 2008) allow the EC to reward companies for their cooperation to attain procedural economies by means of a 10 per cent reduction in fines in addition to any reduction granted under the Leniency Notice.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Hans-Jörg Niemeyer
hans-joerg.niemeyer@hengeler.com

Laura Stoicescu
laura.stoicescu@hengeler.com

Helen Gornall
helen.gornall@debrauw.com

Maikel van Wissen
maikel.vanwissen@debrauw.com

Anna Lyle-Smythe
anna.lyle-smythe@slaughterandmay.com

Murray Reeve
murray.reeve@slaughterandmay.com

40 Square de Meeûs
1000 Brussels
Belgium
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

UPDATE AND TRENDS

Recent cases

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

In August 2019, the EC adopted guidelines for national courts on how to estimate the share of overcharge passed on to the indirect purchasers. The guidelines are intended to supplement the 2013 Practical Guide on Quantifying Harm and in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain.

In March 2017, the EC introduced a whistle-blower tool for individuals to alert the EC anonymously about secret cartels and other antitrust violations.

Additionally, in April 2018, it announced a proposal for new legislation to guarantee a high level of protection for whistle-blowers by introducing new EU-wide standards. Under the proposal, all companies with more than 50 employees, or with an annual turnover of over €10 million, will be required to set up an internal procedure to manage

whistle-blowers' reports. A provisional agreement on the proposal was reached in March 2019 between the European Parliament and the member states, the next step being the formal approval of the text by both the European Parliament and the Council.

The EC recently formed a special unit to uncover cartels by employing computer experts that trawl the internet for clues of unlawful behaviour. The EC also created a 'centralised intelligence network', which facilitates the gathering of information from other EC services, other EU institutions, and from non-competition national enforcers.

In March 2019, the EC unveiled its eLeniency platform – its new online tool for cartel leniency and settlements and non-cartel cooperation. It was designed to ease the burden for companies and their legal representatives in submitting statements and documents as part of leniency and settlement proceedings in cartel and non-cartel cooperation cases. Users can directly submit corporate statements and upload supporting documents on a dedicated secure EC server. eLeniency can also be used for submitting replies to requests for information made under the EC's Leniency Notice.

Regime reviews and modifications

43 | 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 settlement procedure is being extended outside purely horizontal cartels. The new EC cooperation mechanism has not been codified yet and is still being considered in its testing phase. In the nine cases it has been applied insofar, the fine was reduced by 10 per cent to 50 per cent.

The amount of fines reduction depends on an overall evaluation of the timing and the amount of the cooperation, as well as the resulting procedural efficiencies. So far, the system is optional and can be applied when companies express their interest in it, but companies are not obligated to cooperate. The EC then estimates the range of likely fines, while the company indicates its willingness to acknowledge the infringement under the condition of a maximum fine. Cooperation is possible before and after a statement of objections has been issued. The final decision still can be challenged before the GC.

This procedure does not include plea-bargaining with the EC, and focuses on companies' acknowledgement of the facts, their legal qualification and the companies' liability for the infringement. In addition, cooperation on evidence, as well as the proposal and design of suitable remedies is rewarded.

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 four units dealing with competition matters. Unlike, for example, the European Commission, the FCCA does not itself have the authority to impose fines on undertakings for competition infringements but shall make a penalty payment proposal to the Market Court.

The Market Court is a special court for market law, competition law, public procurement and civil IPR cases in Finland. It has a dual role in competition restriction matters. On the one hand, it is the first instance ruling on the FCCA's penalty payment proposals, and on the other hand, it is the first instance of appeal for decisions made by the FCCA.

The SAC is the ultimate appellate body in competition cases. The SAC is the second and final instance of appeal for the FCCA's decisions and the first and final instance of appeal for the Market Court's decisions imposing fines.

In addition to the three main institutions, the regional state administrative agencies have powers to investigate competition infringements in cooperation with the FCCA. In practice, however, it is almost exclusively the FCCA that bears responsibility for the investigation of suspected cartels.

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 on 17 June 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+). Possible amendments are expected to relate to inter alia structural remedies for violations of articles 101 and 101 of the TFEU and the equivalent provision of the Competition Act and the rules concerning the hearing of natural persons by the FCCA. The deadline of the national implementation is 4 February 2021.

Substantive law

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

The prohibition against anticompetitive agreements and concerted practices, section 5 of the Competition Act, corresponds to article 101(1) TFEU with the exception that it does not require that trade between the EU member states is affected. It prohibits all agreements and concerted practices between undertakings or associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition. Section 5 contains a list of practices 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.

Competition restrictions prohibited by section 5 may be covered by the legal exemption in section 6 of the Competition Act, the criteria of which are similar to those of article 101(3) TFEU. In practice, however, hard-core restrictions are unlikely to qualify for an exemption.

If a competition restriction affects trade between member states, the FCCA and the Finnish courts apply article 101 TFEU directly.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

5 | 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

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

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

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 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

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

There is no specific exemption or defence. Regarding the applicability of the Competition Act to conduct taking place outside Finland, see question 7.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

If the FCCA suspects that an undertaking or an association of undertakings is engaged in conduct contrary to the Competition Act or EU competition law, it shall initiate the necessary proceedings to eliminate such conduct. Investigations into suspected competition restrictions can be commenced by the FCCA either on its own initiative, or following a complaint or a leniency application. Investigations of serious competition restrictions typically start with the FCCA's dawn raid at the undertakings' business premises.

Further along in the investigations, the FCCA normally requests written explanations and clarifications and may also conduct interviews. Having assessed all the obtained information, the FCCA generally either prepares a draft penalty payment proposal for the undertaking to comment on or closes the investigation without making any penalty payment proposal.

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Other FCCA decisions can generally be appealed to the Market Court.

There are no legal time frames for the FCCA investigations apart from the statutory limitation periods.

Investigative powers of the authorities

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

The FCCA has extensive investigative powers that are largely similar to those of the Commission.

An undertaking or an association of business undertakings shall be obliged, at the request of the FCCA, to provide the authority with all the information and documents needed for the investigation of the content, aim and effect of a competition restriction. Such request may be supported by a conditional fine. Furthermore, submitting incorrect information to the authority such as the FCCA may cause criminal liability under the Finnish Penal Code.

The FCCA has the right to conduct inspections to supervise compliance with the Competition Act and is, at the request of the Commission, obliged to conduct an inspection as prescribed in EU competition law. After the 2011 reform of the Competition Act, the FCCA can now also carry out inspections outside business premises such as at private residences of directors with an authorisation of the Market Court. The Market Court does not grant an authorisation if it considers a search to be arbitrary or excessive.

The Competition Act does not expressly require the FCCA to present a written inspection decision when carrying out a dawn raid. It is nonetheless established practice that the FCCA issues a decision describing the scope and the aim of the inspection as well as the sanctions for opposing the inspection.

The FCCA officials must be allowed to enter any business premises, storage areas, land and vehicles in an undertaking's possession. Further, the officials performing the inspection shall have the right to

examine all correspondence, financial accounts, computer files and other documents that may be relevant for ensuring compliance with Competition Act. The officials may also take copies of documents and seal business premises, books or records. When necessary, the police shall upon request provide official assistance in conducting the inspection. As of June 2019 the FCCA has also the right of a continued investigation, ie. 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 (ie, necessary for identifying documents and understanding other facts). Further, the FCCA has a right to invite representatives of undertakings or persons who may, for a justified reason, be suspected of having acted in the implementation of a competition restriction, to appear before it. These interviews may also be recorded.

Undertakings' rights of defence, which pose certain limits on the FCCA's investigative powers, are set out in section 38 of the Competition Act. For example, an undertaking is not under an obligation to submit to the FCCA documents that contain confidential correspondence between an outside legal counsel and the client. Moreover, when an undertaking responds to the questions raised by the FCCA, it cannot be obliged to concede it has participated in a competition restriction.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The FCCA is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of EU competition rules throughout the EU.

The FCCA also actively cooperates for example with the Nordic competition authorities and partakes in the international cooperation conducted within the Organisation for Economic Co-operation and Development, the International Competition Network and the European Competition Authorities.

Interplay between jurisdictions

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

The FCCA is responsible for investigating suspected competition infringements and adopting the infringement decisions to that effect. It has competence to, for example, order an undertaking to terminate conduct that violates competition rules, but cannot impose any fines.

Should the FCCA consider it necessary to impose a fine for anti-competitive conduct, it has to make a penalty payment proposal to the Market Court. The Market Court provides the undertaking to which the proposal relates with an opportunity to respond in writing or orally. The Market Court shall include a statement of reasons in its decision that indicates which facts and evidence have affected the decision and on which legal grounds it is based. The Market Court decision may be appealed to the SAC.

Burden of proof

14 | 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

15 | 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

16 | 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

17 | 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

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

Upon the proposal of the FCCA, the Market Court may impose a penalty payment on undertakings that have violated competition rules unless the conduct is deemed minor or the imposition of fine otherwise unjustified with respect to safeguarding competition. In fixing the amount of fine, the gravity, extent and duration of the competition restriction shall be taken into account. Repeat offenders may be fined more heavily. The amount of the fine may be up to 10 per cent of the total turnover of the undertaking concerned in the last year of its cartel participation.

A fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within five years from the occurrence of the competition restriction or, in the case of a continued infringement, from the date on which the restriction ended. The five-year limitation period is interrupted by certain FCCA investigatory measures. Moreover, there is an absolute limitation period according to which a fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within 10 years of the applicable dates (date on which the restriction occurred, or on which it ended in case of a continued infringement).

The FCCA may also order an undertaking to cease the activities prohibited in the Competition Act (or article 101 TFEU), and support its order by imposing a conditional fine. A conditional fine can also be used to enforce an undertaking's obligation to provide information and documents as well as the obligation to contribute to the inspections conducted under the Competition Act. The enforcement of conditional fines rests with the Market Court.

By a decision, the FCCA may order that commitments offered by the parties shall be binding if the commitments are such that they eliminate the restrictive nature of the conduct. The FCCA may also take interim measures if the application or implementation of a competition restriction shall be prevented at once. Prior to issuing an interim order, the FCCA should provide the undertaking with an opportunity to be heard. However, this is not necessary if the FCCA considers that the urgency or another specific weighty reason demands otherwise. After ordering interim measures the FCCA must take a decision on the substance of the matter within 90 days.

Guidelines for sanction levels

19 | 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

20 | 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

21 | 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

22 | 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 time period.

Parallel proceedings

23 | 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

24 | 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

25 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

26 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 Competition Act, the first undertaking to expose a cartel may benefit from immunity if the undertaking:

- produces information or evidence, on the grounds of which the FCCA may conduct a dawn raid; or
- following such a dawn raid, delivers information or evidence, on the grounds of which the FCCA can establish that section 5 of the Competition Act (or article 101 TFEU) has been violated.

Section 14 of the Competition Act applies only where competitors have agreed to fix purchase or selling prices or other trading conditions, to limit production or sales or to share markets, customers or sources of supply. Only one undertaking can obtain full immunity. This means that the undertaking must be first to provide the required information or evidence to the FCCA. An undertaking that has coerced others to participate in the infringement cannot benefit from full immunity but can still qualify for a reduction in fine. A leading role in the formation and sustenance of the cartel does not as such debar the undertaking from applying for full immunity.

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;
- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application or the content of 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.

Subsequent cooperating parties

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The Competition Act does not provide for an 'immunity plus' or 'amnesty plus' option. Applicants submitting significant information and evidence to the FCCA after the immunity applicant may be entitled to a reduction in the penalty payment as set out in section 15 of the Competition Act (see question 27).

Approaching the authorities

29 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

30 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. See questions 26 and 27 for further details.

Confidentiality

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

The Competition Act does not contain provisions on the issue of confidentiality in competition proceedings. Therefore, the Act on Openness of Government Activities (621/1999, as amended) applies. The Act applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

In a previous competition restriction case, one of the investigated companies requested disclosure of materials that its competitor had submitted to the FCCA pursuant to a leniency application. The FCCA refused to grant access. Upon appeal, the Administrative Court of Helsinki concluded that the requested materials were not public. The competitor of the leniency applicant was considered as a party to the proceedings. Access to the materials was nonetheless denied by the Administrative Court on the basis that such access would have been contrary to a very important public interest at the stage when the matter was still pending before the FCCA. The SAC upheld the decision.

Further, according to section 17 of the Competition Act, information and evidence provided to the FCCA in immunity or leniency application can, as a starting point, be used in handling of the public enforcement case by the FCCA, the Market Court or the SAC. According to the government bill, such information and evidence cannot therefore be used, for example, for private damages actions. The FCCA may share the documents with other members of the ECN.

The new Finnish Act on Antitrust Damages Actions that came into force in December 2016 contains rules on the use of leniency material in private enforcement proceedings. These rules largely follow the EU Directive on Antitrust Damages Actions.

Settlements

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

The Competition Act does not provide for any settlement procedure for cartel cases.

Corporate defendant and employees

33 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

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

See questions 26 and 29.

DEFENDING A CASE

Disclosure

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

Upon request, the undertaking under investigation has the right to receive information, orally or in another appropriate manner, on the documents concerning the investigation and the phase of the proceedings insofar as it cannot harm investigations in the matter, unless otherwise provided in the Act on the Openness of Government Activities (621/1999, as amended) or EU laws.

The Act on Openness of Government Activities applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if

it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

An undertaking has the right to be heard prior to the FCCA making a proposal for a penalty payment, or a decision stating a violation of sections 5 or 7, or articles 101 or 102 of the TFEU. The FCCA shall inform the undertaking in writing of the claims and grounds relating to the issues that have arisen during the investigation. The FCCA shall fix a reasonable time limit within which the undertaking may present its comments either orally or in writing.

Representing employees

36 | 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 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

37 | 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

38 | 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

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

Under Finnish tax laws, fines are generally not tax-deductible. By contrast, recent tax authority praxis indicates that private damages are tax-deductible under certain circumstances.

International double jeopardy

40 | 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.

Frontia
Attorneys at Law Ltd

Mikael Wahlbeck
mikael.wahlbeck@frontia.fi

Antti Järvinen
antti.jarvinen@frontia.fi

Niko Hukkinen
niko.hukkinen@frontia.fi

Lönnrotinkatu 11
00120 Helsinki
Finland
Tel: +358 50 362 1951
www.frontia.fi

Getting the fine down

41 | 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 26 to 30. 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.

UPDATE AND TRENDS

Recent cases

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

In the biggest competition 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.

By its decision of 20 August 2019, the Supreme Administrative Court (SAC) increased the fines originally imposed by the Market Court for the participants of a bus cartel. According to the SAC, the Market Court had not taken into account the differences in the sizes of the companies when setting the level of fines, which was against the principle of equal treatment. The fines imposed by the SAC exceed in total €8 million, considerably more than the total of €1.1 million by the Market Court. The proposal by the FCCA to the Market Court was in total more than €30 million.

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 preliminary ruling concerning whether economic succession is applicable in competition law damage cases, and if so, in which circumstances. The European Court of Justice 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, the Supreme Court ruled on defendant YIT's appeals in two cases and

accepted them partly. In addition to the claims before the Supreme Court, there are about 20 new claims pending before district courts.

The long-running litigation related to raw wood procurement ended in January 2019 when the Supreme Court denied Metsähallitus leave to appeal. Consequently, all cases against the defendants – originally more than 1,500 private enforcement claims – have now been dismissed or otherwise terminated.

Regime reviews and modifications

43 | 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 Finnish 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+). Possible amendments are expected to relate to inter alia structural remedies for violations of articles 101 and 101 of the TFEU and the equivalent provision of the Competition Act and the rules concerning the hearing of natural persons by the FCCA. The deadline of the national implementation is 4 February 2021.

Germany

Thorsten Mäger and Florian von Schreitter
Hengeler Mueller

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Since 1958, the rules on cartels have been an essential part of the Act Against Restraints of Competition (GWB) in Germany.

The GWB was last amended in June 2017 (the ninth amendment to the GWB). The seventh amendment (2005) almost fully harmonised the German rules on cartels with those of the EU. The basic prohibition of cartels (section 1 GWB) covers the same anticompetitive conduct (horizontal and vertical restraints of competition) as its EU counterpart in article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 2 GWB contains an exemption to the prohibition on cartels that resembles article 101(3) TFEU. The ninth amendment provides for further alignment with EU law, as the standards for establishing liability for administrative fines on (several) companies of the same company group as well as universal legal and economic successors of such companies have effectively been harmonised.

Under EU Council Regulation No. 1/2003 on the implementation of articles 101 and 102 TFEU, these articles must be applied by the national competition authorities and the national courts adjudicating competition matters in addition to national law where the relevant conduct may affect trade between member states. In respect of cartels, the German and the EU rules differ merely insofar as the EU rules apply only to conduct that may affect trade between member states. In practice, it is no longer necessary to establish whether a cartel is cross-border (and is therefore subject to the EU rules) or only regional in scope (and thus subject only to national law).

As a result of the harmonisation of the rules on cartels, materially the same standards apply to cartels having an effect within Germany.

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?

Investigation and enforcement of cartel matters primarily lies with the Federal Cartel Office (FCO), an independent federal authority with its seat in Bonn. The decisions of the FCO are rendered by independent Decision Divisions, which decide in bodies composed of a chair and two associate members and whose decisions must not be influenced by other officials (including the FCO's president). The state cartel offices have additional responsibilities, albeit of limited relevance in practice (see question 13). If a decision by which the FCO imposes administrative fines is challenged before the courts (ie, the Higher Regional Court of Düsseldorf), the power to prosecute is transferred to the competent Attorney General. Criminal prosecutors also have investigative powers if the cartel infringement relates to a criminal case as well – for example, in the case of bid rigging (see questions 10, 13, 23 and 31). If a decision is not challenged in court, the FCO (its Decision Divisions) effectively serves as judge and jury.

Changes

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

The ninth amendment to the GWB came into force on 9 June 2017. It primarily served to implement the new European Cartel Damages Directive (Directive 2014/104/EU), but also contained certain additional changes. The law has, inter alia, established the following changes to the legal regime:

- privileged treatment of certain agreements between newspaper or magazine publishers that would otherwise fall under the ambit of section 1 GWB (section 30(2b) GWB);
- severely increased liability for administrative fines based on transposing the 'single economic entity' principle developed in European competition law; as part of this amendment:
  - a parent company with the ability to exercise control over subsidiaries within the corporate group can be held liable for competition law infringements committed by such subsidiaries (section 81(3a) GWB);
  - the universal legal successor of a corporation involved in an administrative cartel offence can be held liable for that offence in a broader manner than currently is the case (section 81(3b) GWB); and
  - the (mere) economic successor of a corporation involved in an administrative cartel offence can now be held liable for that offence, resulting in liability risks even for mere asset deals (section 81(3c) GWB); and
- several changes caused by the implementation of the European Cartel Damages Directive (Directive 2014/104/EU) that seek to strengthen and ensure private enforcement, including new rules for the litigation procedure such as a rebuttable presumption that a cartel caused damage (section 33a(2) GWB) and the obligation to disclose certain evidence (section 33g GWB), as well as specific substantive rules regarding, in particular, the passing-on defence (section 33c GWB) and certain rules on joint and several liability (section 33d GWB). Furthermore, the relevant statute of limitation has been changed significantly: limitation periods for cartel damages claims generally are triggered later than previously and have been considerably extended (section 33h GWB).

Substantive law

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

The principal national rules on cartels are found in sections 1 and 2 GWB. These rules basically reproduce articles 101(1) and 101(3) TFEU on a national level.

Section 1 GWB prohibits all agreements between competing corporations, decisions by associations of corporations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. This provision covers a broad range of restrictive agreements and concerted practices (a collusive meeting of minds without reaching an agreement for lack of will to create mutual obligations). It includes agreements directly or indirectly fixing prices or other terms and conditions, bid rigging, group boycotts, agreements providing for the control of production or distribution, the allocation of quotas, territories or customers, and the exchange of market data. Further, agreements providing for the establishment and operation of joint selling or purchasing organisations, or the creation of barriers to market entry are, in principle, covered by section 1 GWB.

Vertical restraints of competition are also covered, such as exclusive dealing and exclusive supply agreements, distribution agreements containing territorial exclusivity and selective distribution agreements. On 12 July 2017, the FCO published a guidance note on the prohibition of vertical price fixing in the food retail sector, which may also serve as a blueprint for the FCO's enforcement practice and priorities in other industries. Section 21 GWB contains specific rules relating to boycotts.

Agreements restricting competition are prohibited by section 1 GWB only if they have an appreciable effect on competition. In respect of agreements (and concerted practices) that may affect trade between member states, the application of German law must not lead to the prohibition of agreements that are legal under article 101 TFEU, so the Commission's de minimis notice is likely to be applied in Germany although there is no legal obligation to do so. On 13 March 2007, the FCO issued a de minimis notice that was similar (but not identical) to the Commission's de minimis notice. The FCO's de minimis notice sets out in which cases the FCO would, in principle, not initiate proceedings. In contrast, the notice provides no binding interpretation of the appreciability criteria. Agreements concluded between corporations belonging to the same group of corporations are not subject to section 1 GWB.

Agreements (and concerted practices) that fall within the scope of section 1 GWB are exempted from the prohibition contained therein if they meet the requirements under section 2 GWB. Section 2 exempts cartels from section 1 under the same standards as provided by article 101(3) TFEU. The regulations for the application of article 101(3) TFEU, which substantiate the requirements for exemption (the Block Exemption Regulations), apply accordingly under section 2 GWB. With a few exceptions (see question 5), all specific exemptions from the prohibition on cartels were abolished. There is no system for notifying cartels for exemption by regulatory decision. As under EU rules, cartels are exempted from the prohibition by law if they meet the statutory requirements. Moreover, the distinction of restraints by object and by effect is known in Germany as well.

All agreements (and concerted practices) prohibited by section 1 and not exempted by section 2 GWB are null and void. The cartel authorities may impose administrative fines on individuals and corporations violating section 1 or impose other sanctions to bring the infringement to an end (see question 18).

According to EU Council Regulation No. 1/2003, the FCO is also required to apply article 101 TFEU where an agreement or concerted practice may affect trade between member states. The Regulation prescribes that the parallel application of national competition law, including sections 1 and 2 GWB, must not lead to the prohibition of agreements or concerted practices that do not restrict competition within the meaning of article 101(1) TFEU, that fulfil the conditions of article 101(3) or that are covered by the Block Exemption Regulations. The FCO forfeits the competence to apply article 101 TFEU in Germany when the Commission commences proceedings (article 11(6) of EU Council Regulation No. 1/2003). When applying article 101 TFEU, the FCO will apply the German procedural rules. Sanctions for violations of European law include all sanctions that may be imposed for a breach of German law.

Finally, bid rigging also constitutes a criminal offence and may be punished by imprisonment of up to five years or the imposition of a criminal fine pursuant to section 298 of the Criminal Code. Certain competition law infringements may also be prosecuted as fraud pursuant to section 263 of the Criminal Code, which is generally also punishable by up to five years' imprisonment or a criminal fine, with more severe sanctions in a 'particularly serious case' of fraud (see question 17).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The GWB provides for specific rules for certain industries. According to section 28, the agricultural sector is partially exempted from the prohibition on cartels (section 1). Section 30(1) provides that the ban on resale price maintenance does not apply to the sale of newspapers and magazines. Pursuant to section 30(2a) (enacted in 2013), certain agreements between associations, newspaper and magazine wholesalers are exempted from the restrictions set forth in section 1. As mentioned in question 3, the ninth amendment of the GWB created even more leeway for newspaper and magazine publishers: according to section 30(2b) GWB, cooperation between such companies is exempt from section 1 GWB, to the extent it does not affect the editorial part of the involved companies' business and allows them to 'strengthen their economic basis for inter-media competition'. Finally, certain agreements by corporations in the field of public water supply are exempted from the prohibitions of section 1 according to sections 31, 31a and 31b GWB.

Further, there is a non-industry-specific exemption for cartels between competing small and medium-sized corporations. Under the specific circumstances set out in section 3 GWB, cartels among small and medium-sized corporations are held by law to meet the requirements for exemption under section 2 GWB. On 1 March 2007, the FCO issued an information leaflet on the possibilities to cooperate for small and medium-sized corporations. This leaflet provides some guidance regarding the application of section 3.

Application of the law

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

The prohibition set forth in section 1 GWB applies to private and public undertakings. The term 'undertaking' is construed broadly. It is generally agreed that all individuals, partnerships, corporations and cooperating parties engaged in business activities relating to the sale of goods or the performance of commercial services constitute undertakings. The legal form of operation is irrelevant. An intention to profit is not required. Professionals such as architects, lawyers, auditors and accountants, as well as scientific, artistic and athletic organisations, constitute undertakings to the extent they are engaged in business activities. Although the law applies to undertakings, individuals acting on behalf of the undertakings (directors, employees) can also be fined.

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 GWB applies to all restraints of competition that have an effect within Germany (the effects doctrine) (section 185(2) GWB). Foreign corporations are, therefore, subject to the GWB to the extent they participate in restrictive agreements or concerted practices having effects on the German market. The GWB may be applied to foreign corporations even though they have never been directly active in the German market, let alone maintained a German subsidiary, branch or other business establishment. However, the German authorities cannot execute investigative measures outside Germany and must rely on administrative assistance from foreign authorities in this respect.

Section 1 GWB applies if horizontal or vertical restraints on competition are likely to affect the German market. Actual effects are not required.

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. However, companies involved in export cartels may try to build a defence around the above-mentioned provision in section 185(2) GWB. If it can be demonstrated that an alleged export cartel is unlikely to affect Germany since it only concerns other countries and repercussions on any German market can be excluded (eg, owing to the fact that the cartel did not spill over onto price-setting in relation to German customers and allowed for re-imports to Germany), the application of section 185(2) GWB may effectively result in the inapplicability of the GWB and a lack of jurisdiction of the FCO. However, this would of course not preclude other competition authorities (in particular the European Commission) from taking over such a case.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Investigations by the cartel authorities may be started for various reasons, for example, because of complaints by a third party, whistleblowing by members of a cartel or their employees, reports in the media or because of cartel investigations in other jurisdictions concerning the same industry. Once a case has come to the attention of a cartel authority, it will normally collect further information, either informally or by using its formal powers of investigation, including searches and seizures and the collection of evidence by means of the testimony of witnesses and experts. If the cartel authority reaches the conclusion that there is evidence of an infringement of section 1 GWB, it will open formal proceedings. If it does so, it will usually inform the parties and (at a later point in time) serve a statement of objections on the parties. The parties are then allowed access to the file and may respond to the statement of objections, both in writing and orally.

The parties and individuals concerned must be afforded the opportunity to comment prior to a decision being taken.

They will, upon application, be summoned to a hearing. An investigation is completed by the issuance of a decision or the discontinuation of proceedings (the file may be closed without a formal decision).

There is no specific legal limitation on the time frame of an investigation. Rather, the time at the disposal of the cartel authorities depends on the specific circumstances of each individual case. The authorities need to implement certain procedural steps within a certain period in order to avoid the application of the statute of limitation for fines. In complex cases, cartel proceedings usually go on for several years, which may in the end also result in a decrease in administrative fines. In one ruling, the Higher Regional Court of Düsseldorf reduced the fines by 30 per cent owing to undue delay on the part of the authorities of 24 months.

Investigative powers of the authorities

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

The cartel authorities – and in criminal cases involving bid rigging, the criminal prosecutor – may in principle conduct any investigation and collect any evidence required to prove a violation of the antitrust laws.

The investigating authority is, upon issuance of a search warrant by a local court, in particular entitled to visit and search the business premises, cars or private homes of employees (dawn raids) and seize letters and other means of communication (including emails), electronic and non-electronic databases, computer hardware, calculations, documents on travel expenses and diaries, and it may hear witnesses and experts. The FCO is entitled to copy hard drives and pursue electronic searches of those copies at the FCO premises following a dawn raid. Lawyers to corporations under investigation do not have a right to be present when such post-dawn raid searches of IT systems are conducted.

Where a prior court order would cause a delay that could jeopardise the investigation, the cartel authorities may issue the warrants for searches and seizures by their own authority. Correspondence documents, such as posted letters, which are subject to the sanctity of the mail, are excluded from seizure by the cartel authority, but not by the criminal prosecutor in cases involving bid rigging. The cartel authorities do not have the authority to carry out wiretapping.

As there is no broad (US-style) attorney-client privilege, attorney–client correspondence in the hands of the corporation is exempt from seizure only if it specifically concerns representation in the cartel proceedings at hand. As underscored by a recent ruling of the Federal Constitutional Court, even documents located in the offices of external law firms are not fully protected from seizure. The extent to which attorney-client privilege should be strengthened in the future is currently subject to rather intense debate among German jurists.

The investigating authority may request a local court to administer the oath to a witness if it considers such an oath to be necessary to obtain evidence through testimony. Persons may refuse to answer questions if they have been accused of a violation of the antitrust laws, or if the answer would expose them or their family to the risk of criminal prosecution or proceedings under the Administrative Offences Act. Further, a person or corporation has certain fundamental rights of defence during an investigation, including the right to legal advice. Professional secrecy for lawyers is guaranteed by law.

According to section 81b GWB, the concerned corporation is required to provide to the cartel authority the information necessary (including the submission of documents) to determine the amount of the fine, if the imposition of a fine appears as a possible outcome of an investigation. This rule does not apply to individuals acting for the corporation, to the extent providing the information or documents would expose these persons to prosecution based on criminal or administrative offences.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

In Germany, two formal bilateral cooperation agreements are in force. The first agreement on cooperation between cartel authorities was concluded in 1976 between Germany and the United States. The agreement provides for an exchange of information between the FCO and the US Department of Justice and Federal Trade Commission including documents, memoranda, judicial pleadings and other documents with regard to restrictive trade practices having effects on trade in the other authority's jurisdiction. This cooperation extends to statements of civil servants of one cartel authority as witnesses in proceedings of the other cartel authority and to sending requests for information of one cartel authority to corporations established within the other's jurisdiction. The cartel authorities will also consult each other in proceedings relating to the same cartel activity having effects in both jurisdictions. It should be noted that the national laws on business secrets will prevail.

In 1984, Germany concluded a second cooperation agreement with France. This agreement provides for cooperation between the cartel authorities of both countries with regard to giving notice of the commencement of proceedings to the other cartel authority, the provision of information on restrictive practices and consultations if an investigation might impair the interests of the other country or if proceedings relate to the same cartel activity. The national cartel authority may refuse to provide information if the provision of such information would be contrary to the national laws on business secrets or the vital interests of the country.

In addition to the cooperation agreements, the European Convention on the Service Abroad of Documents Relating to Administrative Matters of 1977 provides for mutual assistance concerning the service of administrative letters in foreign jurisdictions (the contracting parties are Austria, Belgium, France, Germany, Italy, Luxembourg and Spain). In practice, however, these agreements are not very important.

In contrast, the close cooperation between the FCO and the European Commission is of great practical importance. Under EU Council Regulation No. 1/2003, the European Commission and all the competition authorities of the EU member states apply the community competition rules in close cooperation and within the framework of the European Competition Network (ECN). This includes, in particular, the (informal) exchange of information, mutual consultation, coordination of investigations, inspections on behalf of another competition authority and discussing the proposed course of action. When investigating a case under article 101 TFEU, the FCO is required to liaise with the European Commission and the competition authorities in other member states within the ECN. Within this network, the case will be allocated to a competition authority that is best placed to investigate the case. If the European Commission initiates proceedings in the same matter, the FCO loses its competence to apply article 101 TFEU to that case.

Interplay between jurisdictions

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

As a matter of principle, if certain cartels are investigated in other jurisdictions this may trigger similar investigations in Germany, provided that the cartel is active or has effects in Germany as well. In that regard, cross-border investigations may often stem from cooperation among European competition authorities, in particular the close cooperation facilitated by the ECN (see also question 11). As investigations by national cartel authorities frequently concern the effects of a cartel within different jurisdictions and markets, the problem of double jeopardy (ne bis in idem) will generally not arise (see also question 40).

With regard to parallel investigations by the German cartel authorities and the European Commission, the FCO can no longer investigate a case if the Commission has initiated its own investigations in that case (see questions 4 and 11). Under EU Council Regulation No. 1/2003, the FCO may no longer prohibit or sanction behaviour pursuant to German law if such behaviour is permissible under article 101 TFEU (see question 4).

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The FCO bears primary responsibility for the administration and enforcement of the GWB. The cartel offices of the German federal states have only limited responsibilities. In general, the FCO deals with all cartel matters extending beyond the territory of a single state of the Federal Republic of Germany.

The cartel authorities (the FCO and state cartel offices) investigate and adjudicate cartel matters at an administrative level. They have discretion as to whether to open an investigation, commence proceedings, issue orders or impose fines. To the extent the cartel involves criminal aspects (bid rigging) the cartel authorities must refer these aspects to the criminal prosecutor. Furthermore, the cartel matter is also referred to the criminal prosecutor (Attorney General) once a fining decision of the FCO is challenged in court (see question 2).

Private parties may institute separate proceedings in court against corporations that violate section 1 GWB (or article 101 TFEU) if they can demonstrate that they are affected by the breach of law (see question 24). The same applies in respect of violations of orders issued by the cartel authorities (section 33 GWB).

Burden of proof

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

In proceedings under the Administrative Offences Act (ie, all proceedings that are conducted to impose fines), the burden of proof lies with the cartel authorities as a matter of principle. The same holds true in criminal proceedings. Pursuant to section 261 of the Code of Criminal Procedure, applicable both in criminal and administrative proceedings, the level of proof is that of free judicial conviction. The judge is barred from finding the defendant guilty of a criminal or administrative offence if he or she has reasonable doubts as to the meeting of the statutory requirements (in dubio pro reo).

In other proceedings (such as proceedings conducted to impose behavioural or structural measures), the burden of proof for a violation of section 1 GWB is on the cartel authority or the party alleging the infringement, while the corporation must prove that the requirements of an exception to the prohibition under section 2 GWB are met.

Circumstantial evidence

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

Yes. In line with the practice of the European Commission and the Court of Justice of the European Union (ECJ), circumstantial evidence can be sufficient if the requirements regarding the burden of proof (see

question 14) can be met despite the absence of direct evidence of an infringement. The in dubio pro reo principle would generally call for a particularly close scrutiny of the pieces of circumstantial evidence in question and a particularly well-founded reasoning in a written decision as to why these pieces are suitable to deduce the existence of anticompetitive conduct. However, it is not excluded that the FCO may rely on such reasoning and that such reasoning would also hold in court, if, based on the number and nature of coincidences and indicia, there is no plausible alternative explanation other than the companies concerned being involved in an infringement of the competition rules.

Appeal process

16 | What is the appeal process?

With one exception relating to health insurance, the infringing parties may appeal decisions of the cartel authorities to the competent Higher Regional Court. Jurisdiction over appeals against decisions of the FCO lies with the Higher Regional Court of Düsseldorf. Rulings of the Higher Regional Court may in turn be appealed to the Federal Court of Justice. In administrative proceedings an appeal to the Federal Court of Justice is only admissible if the Higher Regional Court grants leave to appeal. The refusal to grant leave to appeal may be challenged by way of limited appeal. In any event both the FCO and the infringing parties may challenge the Higher Regional Court of Düsseldorf's decision.

Appeals against fines are to be filed within two weeks after the decision has been notified. In all other cases the appeal may be filed within one month after notification. The duration of appeals to the Higher Regional Court varies; it depends in particular on the number of witnesses that the court wishes to hear. The duration of cartel appeal proceedings before the Federal Court of Justice is likely to range between 12 and 18 months.

SANCTIONS

Criminal sanctions

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

Bid rigging is a criminal offence pursuant to section 298 of the Criminal Code. Apart from specific criminal rules concerning bid rigging, there are no criminal sanctions for cartel activities in Germany. Furthermore, cartels concerning single tender actions have in the past been successfully tried as fraud pursuant to section 263 of the Criminal Code. Both of these offences are punishable by up to five years of imprisonment or a criminal fine. In case of fraud, the sentence may be even more severe (ie, six months to 10 years of imprisonment), if the court finds the prosecuted individuals guilty of having committed a 'particularly serious case' of fraud. This is the case, for example, if the fraud has been committed in a 'commercial' manner, which is to say that the cartel induced fraud is based on repeated conduct aiming to secure a recurring source of income.

Within this framework, the sentences actually imposed by the courts vary so that no meaningful indication regarding the overall sentence duration or a comparison between recent and older cases can be provided. In any case, there are no criminal sanctions against the corporations involved. Only the responsible individuals would be the subject of criminal sanctions within the aforementioned framework (as German law still does not provide for the possibility to hold corporations liable under criminal law).

Civil and administrative sanctions

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

Anticompetitive contractual provisions prohibited by section 1 GWB and not exempted by section 2 GWB are null and void.

The cartel authorities may impose administrative fines for violations of section 1 GWB against individuals and corporations. The minimum fine is €5, the maximum fine is €1 million or, in excess of that, up to 10 per cent of the total turnover generated by the corporation and its affiliated corporations (aggregate group turnover) in the business year preceding the decision of the cartel authority. Notably, however, the 10 per cent maximum only pertains to corporations; the fines against individuals must not exceed the amount of €1 million and will be based on the individuals' income.

The cartel authorities may also issue orders requiring an infringement of section 1 GWB (or article 101 TFEU) to be brought to an end. Since 2013, section 32(2) GWB explicitly states that all necessary and proportionate measures, both behavioural and structural, may be imposed. A structural measure, however, can only be imposed if no equally effective behavioural measure is available, or if the available behavioural measures would interfere to a greater degree with the corporation's interests than the available structural measures. The cartel authorities may also decide to make binding on a corporation the commitments that the corporation offered to bring an infringement to an end. However, the cartel authority may be reluctant to accept commitments where it deems fines appropriate.

Fines are levied very frequently and have, considering all fines levied by the FCO, mostly been in the hundreds of millions range in recent years. In 2014, the FCO even levied fines in the aggregate of more than €1 billion (with more recent years seeing smaller, but still significant total amounts, ie, €208 million in 2015; €124.5 million in 2016; €66 million in 2017; and €376 million in 2018).

Guidelines for sanction levels

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

The FCO has revised its guidelines for the setting of fines in cartel proceedings on 25 June 2013. The revision was necessary as the Federal Court of Justice held in a judgment in February 2013 that the 10 per cent turnover threshold (see question 18) is, in fact, an upper limit, rather than a cap. According to the revised guidelines, fines are essentially calculated as follows.

The scope for setting a fine in a specific case is determined with due consideration of the potential for gain and for harm on the one hand and the total turnover of the corporation on the other. The FCO assumes a gain and harm potential of 10 per cent of the corporation's turnover achieved from the infringement during the infringement period. The relevant turnover achieved from the infringement is the domestic (ie, German) turnover achieved by the corporation from the sale of the products or services relating to the infringement and within the duration of the violation. In cases in which the infringement lasted less than 12 months, the FCO bases its calculation on a period of 12 months irrespective of the actual duration of the infringement.

Subsequently, a multiplication factor is applied to the established gain and harm potential to account for the size of the respective corporation. A factor of 2-3 is applied to corporations with an annual turnover of less than €100 million; a factor of 3-4 is applied to corporations with a turnover between €100 million and up to €1 billion; a factor of 4-5 is applied to corporations with a turnover between €1 billion and €10

billion; a factor of 5-6 is applied to corporations with a turnover of €10 billion up to €100 billion; and a factor greater than six is applied to corporations with a turnover of more than €100 billion. The FCO also considers aggravating and mitigating factors, in particular the scope of the markets affected by the infringement, the involved company's position on these markets, the economic relevance of the markets, or the role that the company had in the cartel (ringleader or follower).

Furthermore, the FCO reserves the right to skim off the economic benefit either in the fining proceedings or in separate proceedings (section 32 GWB, section 34 GWB).

Compliance programmes

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

Not by the FCO's current standards. That said, we would expect the authority's approach to change, as a recent decision by the Federal Court of Justice suggests that compliance programmes should indeed have a mitigating (ie, sanctions reducing) effect – irrespective of the time of their implementation but in particular with regards to compliance efforts that are implemented after the violation of the law was detected (and with a view to preventing such violation to happen again). While this decision concerned criminal law (tax fraud), the rationale applied by the court fundamentally concerns the same statutory provisions of German law that are relevant for competition law fining decisions and is sufficiently general to apply to competition law as well.

Director disqualification

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

No, they are not. In practice, however, at least direct involvement in cartel activity by a corporate director or officer may result in them resigning, temporarily vacating their position or changing positions inside the corporation. This may in particular be the case for corporations otherwise facing the risk of debarment. Drawing consequences for personnel involved in anticompetitive conduct will often be an effective means to document 'self-cleaning measures', allowing a corporation that has fallen foul of competition law rules to avoid debarment and have its name removed from the competition register (see question 22).

Debarment

22 | 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 available as a sanction to be imposed directly by the cartel authorities. Based on public procurement rules, however, cartel infringements will regularly render a bidding corporation devoid of its eligibility to participate in the procurement procedure. Following an amendment of the law introduced in 2016, cartel infringements are now specifically addressed by section 124(1) No. 4 GWB and are considered sufficient reason to debar a corporation from procurement measures. Effectively, this was also the case previously, but the new provision that serves to transpose an EU directive is far more clear-cut regarding cartel infringements. The debarment decision will then be made by the public entity responsible for the procurement decision. In terms of duration, debarment resulting from cartel involvement may last up to three years and up to five years if the conduct in question also falls foul of certain criminal law provisions (eg, if there was also fraud, bribery or money-laundering).

As of July 2017, the FCO is in charge of keeping a central competition register in which several types of criminal and administrative offences, including competition law infringements, are entered. This serves to provide public entities issuing a tender with the possibility to gain comprehensive insight as to the involvement of potential bidders in these types of violations of the law in every German federal state. In the case of a contract value of at least €30,000, public entities issuing a tender are even legally obliged to check the competition register prior to awarding the contract. This new system serves to harmonise the heterogeneous registers on which tender processes previously had to rely (with several German federal states keeping registers of their own and significant variations as to the number of infringements covered by the different registers).

Parallel proceedings

23 | 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 can be pursued in parallel in respect of the same conduct. In particular, in cases of bid rigging, public prosecutors (Attorney General) will prosecute the criminal law aspects to the extent it concerns the individuals involved in the infringement. In parallel, the FCO will conduct separate proceedings against the corporation which employed the individual(s). As a matter of practical feasibility in these cases, however, public prosecutors will often stay their investigations until the FCO has issued a decision of its own.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 | 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 that can demonstrate that they are affected by a violation of the prohibition on cartels under German or EU law may institute private suits to obtain injunctive relief or to recover damages. Claims are limited to the actual level of damages and necessary legal expenses. Standing to claim for damages is not limited to the immediate customers (or competitors) of a cartel participant. Generally, purchasers that acquired a product belonging to the same product market as the products concerned by a cartel have the ability to bring damages claims even if they have purchased the product from non-cartel members; such claimants must then demonstrate that there were indeed 'umbrella effects' caused by the cartel and resulting in parallel increases in the prices they paid.

Similarly, other market participants further downstream of the customers of the cartel participants may also successfully claim for damages suffered from the cartel behaviour. With respect to these indirect purchasers, the passing-on defence is permissible under German law, as is now expressly stipulated by section 33c GWB (and had, in principle, also been acknowledged before based on a ruling of the Federal Court of Justice). If an indirect purchaser claims compensation of damages, section 33c(2) GWB now presumes that price increases have been passed on to such indirect purchaser, unless there is evidence to the contrary (in which case, however, the defendant would also undermine the passing-on defence).

It should be noted that definitive decisions of cartel authorities (German courts) – including those in other member states of the EU

– on cartel violations may be introduced into civil proceedings as proof of the actual infringement (section 33b GWB). These decisions are binding on the court ruling on the damages claim (ie, the existence of an infringement as such cannot be challenged as part of the litigation).

Private damages actions have become increasingly frequent in recent years. In part, this is due to the activity of professional plaintiffs (see question 25). The claims made can reach into the hundreds of millions of euros and may easily exceed the fines imposed by the authorities. Furthermore, many cases are settled outside court, the parties often concluding non-disclosure agreements. Information on the damages ultimately recovered by a (potential) plaintiff therefore usually does not become public. Owing to that fact, it is currently still hard to identify a certain trend in terms of the amount of damages paid.

German law only provides for single, not double or triple damages.

Class actions

25 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 German law, there are no actual class actions with regards to competition law infringements. Despite much discussion about class actions in recent years, these rules were not revised by the ninth amendment to the GWB (see question 3). However, professional plaintiffs may 'acquire' damages claims against cartel offenders from those affected by the cartel and litigate these claims in court. Furthermore, several plaintiffs with similar claims may jointly sue in accordance with section 59 et seq of the Code of Civil Procedure.

According to section 34a(1) GWB, certain associations (including, since 2013, consumer protection associations) are entitled to demand that benefits derived from cartel behaviour be surrendered to the federal government; this mirrors the skim-off right of the FCO (see question 19).

COOPERATING PARTIES

Immunity

26 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 FCO's leniency programme provides that under certain circumstances immunity can be obtained. The FCO will grant immunity from a fine if a cartel participant is the first participant in a cartel to contact the FCO before the FCO has sufficient evidence to obtain a search warrant and by providing the FCO with verbal or written information and, where available, evidence that enables the FCO to obtain a search warrant. Further, the applicant must not have been the only ringleader of the cartel or coerced others to participate in the cartel and must cooperate fully and on a continuous basis with the FCO.

Where the FCO was or is in a position to obtain a search warrant, immunity can still be obtained if the applicant is the first to contact the FCO before it has sufficient evidence to prove the offence and provides the FCO with verbal or written information and, where available, evidence which enables the FCO to prove the offence. Further, the applicant must not have been the only ringleader of the cartel or caused others to participate in the cartel. Moreover, the applicant is required to cooperate fully and on a continuous basis with the FCO, provided, however, that no cartel participant has been granted immunity before the FCO was in a position to obtain its search warrant.

Subsequent cooperating parties

27 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, there is. The FCO's leniency programme also contains a set of rules for corporations seeking to cooperate with the authority in cartel cases but after an immunity application has been made. According to the programme, where immunity is no longer available, the FCO can reduce the fine by up to 50 per cent if the applicant provides the FCO with verbal or written information and, where available, evidence that makes a significant contribution to proving the offence and cooperates fully and on a continuous basis with the FCO. The amount of the reduction shall be based on (i) the value of the contributions to uncovering the illegal agreement and (ii) the sequence of the applications.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency programme gives preferential treatment to the first party to cooperate. There are no specific provisions for the second cooperating party (or subsequent cooperating parties). Rather, the fine may be reduced by up to 50 per cent for any cartel participant that provides substantial evidence of the cartel offence (irrespective of that cartel participant's 'rank' in the leniency programme). In that regard, the specific reduction will depend not only on the order of the applications for leniency but also (and essentially) on the value of the evidence provided. Accordingly, there have been cases in which the FCO has granted a higher reduction to, for example, 'number 3' rather than to 'number 2' since 'number 3' provided evidence of higher value. The FCO's leniency guidelines do not provide an 'immunity plus' or 'amnesty plus' option.

Approaching the authorities

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

A corporation that wishes to take advantage of the leniency programme should approach the FCO as early as possible to secure the possibility of non-imposition or reduction of fines. There are no strict deadlines for applying for leniency or immunity. The FCO usually grants a time period of eight weeks for perfecting a marker.

Cooperation

30 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 FCO expects the applicant cooperating under its leniency programme to provide verbal or written information and, when available, evidence. All leniency applicants are expected to cooperate fully and on a continuous basis.

If the applicant is first in and contacts the FCO before it has sufficient evidence to obtain a search warrant, the information or evidence provided by the applicant merely has to be sufficient to enable the FCO to obtain a search warrant. If, by contrast, the applicant is first in but contacts the FCO when it is already in a position to obtain a search

warrant, the information or evidence provided by the applicant has to enable the FCO to prove the offence. Cartel participants who are not eligible for immunity, but seek a reduction of their fine, need to provide information or evidence making a significant contribution to proving the offence (see questions 27 and 28).

Confidentiality

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

Regarding confidentiality, there is no distinction between the immunity applicant and subsequent cooperating parties. In its leniency programme, the FCO states that it will protect the identity of any leniency applicant and its business secrets until it serves a statement of objections on a cartel participant.

Also, it should be noted that during the administrative proceedings, the defence has access to the file (usually following the statement of objections) and the FCO will not delete any information from documents in its file with regard to this procedural right of the defence. Even though information on the identity of a leniency applicant may be provided to the FCO on an anonymous basis, it may happen that the contents of oral or written statements made by the leniency applicant give a hint as to its identity. In addition, the FCO in its decision against the other members of an illegal cartel may have to rely on the testimony of a leniency applicant and so may have to reveal the identity of the cooperating party. Also, the non-imposition or reduction in the amount of a fine relative to the fines imposed on competitors may indicate that a corporation has cooperated with the FCO.

Finally, in the press release following the issuance of the decision, the FCO will disclose a certain minimum amount of information pursuant to section 53(5) GWB (ie, information about the facts underlying the case, the type and duration of the infringement, the companies involved, the products or services affected as well as the advice that private parties may seek redress and that the FCO's definitive decision will be binding on the court in this case). In addition to that, the FCO will usually also disclose the identity of the party that has been granted full immunity. Notably, this pertains only to a situation where the proceedings have been concluded by a formal decision of the FCO. During the proceedings, the FCO is keen to avoid sensitive information becoming public and, in this regard, will adhere to the aforementioned rules.

Further, the FCO will decline applications of third parties to access the file as far as legally possible. This would, in particular, apply to applications by customers or other potentially injured parties that may apply for access to the file pursuant to section 406(e) of the Code of Criminal Procedure. Such applications must be declined insofar as there are prevailing interests of the accused. The FCO has taken the position that access needs to be granted to documents seized or taken during a dawn raid, whereas access to the file with respect to the content of leniency applications (and annexes thereto) infringes EU competition law and must be denied. The local court of Bonn did not share this view and requested that the ECJ give a ruling thereon according to article 267 TFEU. In 2011 the ECJ ruled (Case C-360/09 – Pfleiderer) that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected by EU law. The local court of Bonn has decided that the FCO is entitled to refuse disclosure of leniency statements. In view of these decisions an initial legislative proposal to explicitly limit the access to documents regarding leniency applications (section 81b of the draft eighth amendment to the GWB) was dropped in the legislative proceedings. While the ninth amendment to the GWB contains certain facilitations for access to the FCO's file for claimants in cartel damages litigation, there still is a provision allowing to deny access to leniency statements (section 33g(4) GWB).

It should be noted that in cases of bid rigging and fraud, the proceedings against natural persons can be taken over by the criminal prosecutor, who may initiate proceedings even against a cooperating person.

Settlements

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

The FCO is not obliged to initiate proceedings against a cartel participant, but rather has discretion in that respect. Furthermore, the FCO increasingly conducts settlement-type procedures and briefly outlined this process in an information leaflet published on 1 February 2016. As part of such procedure, cartel participants are usually asked to confirm the facts as perceived by the FCO. In return, the administrative decision imposing the fine will usually only include very basic reasons, thus also providing less factual background for potential follow-on damage claims based on such order. Moreover, the FCO usually reduces the fine by 10 per cent (see question 34). The settlement – which formally is a short version of a regular decision – may be challenged by the fined party (eg, with regard to the amount of the fine); the right to judicial review cannot be waived. If a corporation challenges a decision after a settlement, the FCO would usually withdraw the decision and issue a new decision without granting the above-mentioned reduction of the fine. In practice, however, corporations that have reached a settlement with the authority should rarely have an interest in doing so.

In case of investigations involving a public prosecutor, a plea bargain may be reached. Following a decision by the Federal Constitutional Court, however, such bargain is subject to certain strict requirements.

Corporate defendant and employees

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

It is for the immunity or leniency applicant to decide which legal entities and which current and former employees should be covered by the application. Usually, a corporate defendant will also extend its application to all current and former employees involved and, in any event, this is also the default position under the FCO's leniency programme, meaning a corporation would have to specifically carve out from its application one or several of its (former) employees. To the extent the employees are covered by the application, they will equally benefit from any immunity or reduction of fines granted (provided they immediately and unreservedly cooperate in the corporation's contribution to uncovering the cartel).

Dealing with the enforcement agency

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

Corporations wishing to take advantage of the leniency programme should contact the Special Unit for Combating Cartels (SKK) or, in cases where the FCO is already investigating the matter, the competent Decision Division within the FCO through a person authorised to represent the corporation. For practical purposes, this should be pursued by

a lawyer on behalf of the corporation. The first contact can then be made on a no-name or 'hypothetical' basis, which gives the corporation the opportunity to discuss important issues, such as confidentiality, before revealing its identity.

It is possible to discuss with the FCO the elements of cooperation (see question 32) with regard to a non-imposition or reduction of a fine (eg, the evidence the party can provide, how to obtain further evidence, the behaviour of that party at cartel meetings in the future so as not to reveal that it is cooperating). To secure the highest possible reduction of fines under the leniency programme, the corporation or, preferably, its counsel should contact the head of the SKK or the head of the competent Decision Division of the FCO as early as possible to set the marker (see question 29). This could be done over the telephone (in German or English).

If the FCO does not close the file with regard to the cooperating party pursuant to its leniency programme, the FCO will first issue a statement of objections on which the cooperating party may comment and the party will – in all likelihood – declare that it does not contest the FCO's findings. The FCO will then issue a non-contested decision in which it expressly states that the cooperating party does not contest the facts on which the decision is based. The reasons given in the decision will usually be limited to what is required by law as a minimum. In practice, the cooperating party may discuss the likely fine with the FCO and the reduction (in terms of a percentage) will be granted in view of its cooperation. In that regard, application for leniency and reaching a settlement with the authority usually go hand in hand, resulting in the FCO providing a 'discount' of up to 10 per cent if the corporation in question is not being granted immunity anyway (see question 32).

DEFENDING A CASE

Disclosure

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

As a general rule, the FCO will disclose information relating to its proceedings only scarcely – also to the defendant. The defendant will usually just be made aware of the fact that the FCO has opened formal proceedings and, later on, the defendant will be confronted with the FCO's statement of objections issued after the authority has, in its own view, sufficiently investigated the case (see also question 8). In the meantime, the defendant will usually receive no information at all and only be able to draw conclusions as to the status of the investigation based on specific requests for information by the FCO.

This 'information scarcity' is hardly outweighed by the right of access to file. The FCO can legally deny access to its file to the defendant as long as the cartel proceedings are ongoing. Only the defence counsel in such proceedings will be allowed access to the file (section 147 of the Code of Criminal Procedure). However, even the defence counsel will usually not gain unfettered access to the file before the FCO has issued a statement of objections to the defendant (see also question 31). Before that, the FCO will grant only limited access to the file, if any. This limited access would usually be granted to information that directly concerns the defendant (eg, minutes of oral hearings of the defendant itself). By contrast, minutes of oral hearings of other cartel participants would not be disclosed so as to not jeopardise the investigation.

Representing employees

36 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?

It is generally accepted that counsel can represent a corporation under investigation as well as one employee or manager of the corporation who was involved in the alleged breach of section 1 GWB. Counsel may, however, not represent two or more individuals in the same proceedings. Independent legal representation by employees will be in order whenever the aforementioned rules prohibit a lawyer from (also) representing an employee and if it should turn out that the interests of the individual and the company may not be the same. Generally, different members of the same law firm can represent different individuals and the corporation they belong to, respectively. Employees becoming involved in internal investigations, in particular such to prepare a leniency application, should, for reasons of fairness, generally be made aware of their right to seek independent legal representation for themselves (although whether or not such independent representation is actually sensible will always be dependent on the specifics of the individual case).

Multiple corporate defendants

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

No, and the FCO takes the view that this also applies to affiliated corporations. Generally, different members of one single law firm may, however, be able to each represent one corporate defendant.

Payment of penalties and legal costs

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

Yes, provided this does not concern future infringements (but only infringements which have already occurred).

Taxes

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

For practical purposes, it has to be assumed that fines and other penalties are not tax-deductible. Under German law, fines and other penalties can be tax-deductible to the extent the fines or penalties do not merely sanction the unlawful behaviour committed but recoup economic advantages gained by the unlawful behaviour. However, according to recent decisions of tax courts, fines imposed by the European Commission and the FCO do not contain such element of recoupment (unless the FCO opts to include such element and expressly states this in its fining decision). These decisions have drawn criticism in legal literature. Hence, the discussion on this topic is ongoing. Similarly, it does not appear settled if and to what extent cartel damages awards are tax-deductible for the corporation paying them.

International double jeopardy

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

Neither the sentencing criteria set forth in section 81(4) and (4a) GWB and section 17(3) of the Administrative Offences Act nor the FCO's guidelines for the setting of fines in cartel administrative offence proceedings

(see question 19) make explicit reference to penalties imposed in other jurisdictions. The fact that a corporation or an individual may have already been punished or fined in another jurisdiction does not prevent the German cartel authorities from conducting an investigation and levying fines. In calculating the amount of the fine, cartel authorities will not necessarily take into account a fine already imposed in another jurisdiction. However, as the setting of the fine is at the discretion of the authorities, they are not barred from taking this into consideration.

Similarly, overlapping liability for damages in other jurisdictions is not taken into account in private damage claims.

Getting the fine down

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

The prospect of success of a leniency approach should be analysed as soon as possible. Corporations that do not take advantage of the leniency programme should at least think about resolving the issue based on a settlement approach, and, if the decision is made to do so, cooperate to the fullest extent, in particular with regards to providing further evidence to corroborate the FCO's case (see question 32). Such 'high quality cooperation' is the best way to reduce a fine and may result in equal or even higher fine reductions as are given to early applicants - quality may outweigh timing.

The existence of a compliance programme may only (and at full discretion of the FCO) affect the level of the fine if it is introduced subsequent to the cartel infringement being uncovered. By contrast, the FCO generally does not consider pre-existing compliance programmes a mitigating factor when determining the fine. The authority takes the view that the infringement then proves the inefficiency of the compliance programme. It remains to be seen if the FCO will change its view in this regard, as a recent decision by the Federal Court of Justice suggests that compliance programmes should have a mitigating effect more broadly (ie, irrespective of the time of their implementation) (see question 20).

All that said, once the FCO has decided to bring the case, none of the aforementioned measures will result in a change of nature of the sanctions. In practice, corporations involved in actual cartel proceedings will always pay some fine, albeit the fine reductions can be substantial. A discontinuation of the proceedings may only result from defence efforts of the corporation in question which, by nature, exclude cooperation with the authority and the benefits set out above.

UPDATE AND TRENDS

Recent cases

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

The digital economy continues to be a major focus area where the FCO considers itself a frontrunner. Following previous scrutiny of best-price clauses in the hotel booking portal business, the FCO declared narrow best-price clauses to be anticompetitive as well. These clauses permit hotels to offer their rooms more cheaply on other hotel booking portals but still prescribe that the prices they display on their own websites may not be lower than on the hotel booking platform. That said, the Higher Regional Court of Düsseldorf this year annulled the FCO's decision.

A similar development took place with regards to the much discussed *Facebook* case. As the FCO is spearheading enforcement practice with regard to big data issues, it had launched an administrative proceeding against Facebook in March 2016. The proceeding, which took almost three years to conclude, was based on the notion that Facebook was abusing a dominant market position by amassing large amounts of user data in violation of data protection laws. In its decision of February 2019, the FCO confirmed that view and demanded that Facebook change certain practices with regards to the processing of the data Facebook collects. However, also in this case, the Higher Regional Court of Düsseldorf found that the FCO erred in law when adopting this decision and that Facebook's practices were not abusive from a competition law perspective, in particular as the court found them to lack market relevance.

Regime reviews and modifications

43 | 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 some discussion about the preferred changes to be brought by a tenth amendment to the GWB. The changes currently discussed by stakeholders range from procedural aspects (ie, the specifics of injunctive relief) to changes in German merger control, the possibility of collective redress, specific changes to the rules governing cartel damages claims and the implementation of the European ECN+ Directive that governs the rights of and cooperation between EU competition authorities. It remains to be seen to what extent these potential changes will affect the enforcement of the rules against cartels in Germany. The discussion is still very open and no specific date for a tenth amendment of the GWB has been set.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Thorsten Mäger
thorsten.maeger@hengeler.com

Florian von Schreitter
florian.vonschreitter@hengeler.com

40 Square de Meeûs
1000 Brussels
Belgium
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

Hong Kong

Natalie Yeung
Slaughter and May

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Section 6 of the Competition Ordinance 2012 (Cap 619 of the Laws of Hong Kong) (the Ordinance) prohibits cartel conduct in Hong Kong. The substantive provisions came into effect on 14 December 2015.

The Competition Commission (the Commission) and the Communications Authority (CA) issued six guidelines under the Ordinance on 27 July 2015 (the Guidelines). The Guidelines provide guidance on how the Commission and the CA intend to interpret and apply the provisions of the Ordinance. In addition, the Commission published three policy documents on enforcement, leniency and cooperation and settlement. The Commission also published guidance notes on specific issues, including the turnover-based exclusions in the Ordinance, the fees payable for making an application to the Commission, the investigation powers of the Commission and legal professional privilege, and model non-collusion clauses and non-collusive tendering certificate.

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 Ordinance established two bodies for enforcement roles:

- the Competition Commission, whose role is to investigate and prosecute suspected offenders; and
- the Competition Tribunal (the Tribunal), comprising judges of the Hong Kong Court of First Instance (CFI).

The Commission has a full range of powers to investigate suspected cartels, including powers to require production of documents and information, to require individuals to attend interviews before the Commission and, if armed with a court warrant, to enter and search premises.

The Commission currently consists of 15 members. The appointments took effect on 1 May 2018 for a period of two years. The chairperson of the Commission, Ms Anna Wu, was reappointed for another two years from 1 May 2018.

The current executive team of the Commission has been in place since a number of changes took place during 2016 and 2017. First, Mr Brent Snyder was appointed as Chief Executive Officer in summer 2017. Prior to this appointment, Mr Snyder was the Deputy Assistant Attorney General of the US Department of Justice (Head of criminal enforcement function). Second, Mr Jindrich Kloub was appointed as Executive Director (Operations) of the Commission in October 2017. Mr Kloub was previously an official at the Directorate-General for Competition of the European Commission from 2006 until 2017. Third, Mr Steven Parker was appointed as Executive Director (Legal Services) of the Commission in July 2017. Before his appointment to the Commission, Mr Parker was the Chief Litigation Counsel of the Hong Kong Monetary Authority. Fourth, Mr Rasul Butt was appointed as Senior Executive Director in July 2016. Mr Butt was previously the General Manager (Corporate Planning) at the Urban Renewal Authority in Hong Kong.

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the competition rules and private actions in respect of such infringements.

Mr Justice Godfrey Lam and Madam Justice Queeny Au-Yeung were reappointed for three-year terms as the president and deputy president respectively of the Tribunal with effect from 1 August 2019. Every judge of the CFI is also, by virtue of his or her appointment as such, a member of the Tribunal.

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the CA has concurrent jurisdiction with the Commission in respect of undertakings licensed in the telecommunications and broadcasting sectors.

Changes

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

There are currently no proposed changes to the regime, but a review of the Ordinance is being carried out by the government, particularly in relation to the carve-out for statutory bodies that is currently available.

Substantive law

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

Section 6 of the Ordinance states than an undertaking must not:

- make or give effect to an agreement;
- engage in a concerted practice; or
- as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong (the First Conduct Rule).

Section 2 of the Ordinance defines serious anticompetitive conduct as any conduct that consists of price fixing, market sharing, output restriction and bid rigging. Such conduct shall be subject to stricter enforcement action (for example, the de minimis exclusion in paragraph 5 of Schedule 1 to the Ordinance is not available for serious anticompetitive conduct).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

At present, there are no industry-specific infringements under the Ordinance in respect of antitrust conduct. On 8 August 2017, the Commission issued a Block Exemption Order in respect of vessel sharing agreements (a type of agreement between operators of liner shipping services on certain operational arrangements, such as slot sharing) in the liner shipping industry, excluding such agreements from the application of the First Conduct Rule by virtue of the efficiencies brought about by them. The exemption is subject to certain conditions and will continue in force until 8 August 2022.

There is no specific defence or exemption for government-sanctioned activity or regulated conduct, as such. However, there are two exclusions in paragraphs 2 and 3 of Schedule 1 to the Ordinance that may be relevant in this context, namely that the conduct rules do not apply if:

- the relevant conduct is required by a 'legal requirement', which is defined as a requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong (paragraph 2 of Schedule 1 to the Ordinance); or
- the undertaking has been entrusted by the government with the operation of services of a general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it (which is modelled on article 106(2) of the Treaty on the Functioning of the European Union).

The Guidelines indicate that these exclusions will be narrowly construed by the Commission.

Application of the law

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

The law applies to both individuals and corporations. The First Conduct Rule applies to 'undertakings'. An undertaking is defined under section 2 of the Ordinance as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity', and includes a natural person engaged in economic activity.

Individuals may also be liable for infringements of the First Conduct Rule. In particular, Part 6 of the Ordinance envisages that a 'person' (the definition of which appears to cover natural persons) who was 'involved' in the contravention of the First Conduct Rule (eg, by being knowingly concerned in or party to the contravention, or by aiding, abetting, counselling or procuring any other person to contravene the rule) may also be subject to a pecuniary penalty or other order imposed by the Tribunal. The Tribunal may also make a disqualification order against an individual, which prohibits that person for a period not exceeding five years from: being a director of a company; being a liquidator or provisional liquidator of a company; being a receiver or manager of a company's property; or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company.

On 6 September 2018, the Commission brought its first case against individuals allegedly involved in a contravention of the Ordinance. The case was brought against three decoration contractor companies and two individuals. The Commission alleged that the respondents engaged in cartel conduct, whereby they allocated customers and coordinated pricing in relation to the provision of renovation services at a public housing estate in Hong Kong. In addition to seeking pecuniary penalties against all the respondents (including the individuals), the Commission is also seeking a director disqualification order against one of the individuals allegedly involved in the conduct.

On 3 July 2019, the Commission brought a second case against individuals. This case was brought against six decoration contractor companies and three individuals. Similar to the first case, the Commission alleges that the respondents engaged in cartel conduct, whereby they allocated customers and coordinated pricing in relation to the provision of renovation services at a public housing estate in Hong Kong. The Commission is again seeking a director disqualification order against one of the individuals but no pecuniary penalty or declaration of contravention. This suggests that the director was not personally involved but the Commission is alleging he is unfit to be concerned in the management of the company on the ground that he had actual knowledge or reasonable grounds to suspect that the company was breaching the First Conduct Rule and took no steps to prevent it. In addition, the Commission is seeking pecuniary penalties against all six decoration contractors as well as two of the three 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 8 of the Ordinance states that the First Conduct Rule applies if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

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 or defence in the Ordinance for conduct that only affects customers or other parties outside the jurisdiction. However, the First Conduct Rule applies only if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong.

INVESTIGATIONS

Steps in an investigation

9 What are the typical steps in an investigation?

Section 39 of the Ordinance states that the Commission may commence a cartel investigation of its own volition;

- where it has received a complaint;
- where the court or the Tribunal has referred any conduct to it; or
- where the government has referred any conduct to it.

Section 40 of the Ordinance requires the Commission to issue guidelines on the procedures it will follow both in deciding whether to conduct an investigation and in conducting the investigation itself. The Commission's Guideline on Investigations as published on 27 July 2015 refers to a two-phase investigation process composed of:

- an initial assessment phase during which the Commission (relying solely on public information or information provided on a voluntary basis) considers whether it is reasonable to conduct an investigation and whether there is sufficient evidence for it to establish a reasonable cause to suspect that a contravention of the competition rules has occurred; and
- if the Commission has reasonable cause to suspect a contravention of the competition rules, an investigation phase during which the Commission may use its compulsory document and information-gathering powers.

Investigative powers of the authorities

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

Under Divisions II and III of Part 3 of the Ordinance, the Commission is granted a full range of investigative powers, including powers to require production of documents and information that it reasonably believes to be relevant to the investigation, to require individuals to attend interviews before the Commission and, if armed with a court warrant granted by a judge of the CFI, to enter and search premises (ie, conduct a dawn raid) and use reasonable force for gaining entry, to take possession of documents or computers found on the premises that are reasonably believed to contain relevant information for establishing a contravention of a competition rule. As mentioned above, the Commission issued a guideline on 27 July 2015 on the procedures it will follow when conducting an investigation.

In conducting its investigations, the Commission has continued to use its compulsory evidence-gathering powers under the Ordinance to request documents and information from companies and enter and search premises. In general, the Commission reports that businesses under investigation have shown a high degree of compliance with the Commission's evidence-gathering requests. Since the Ordinance came into effect in December 2015, the Commission has carried out a number of dawn raids across different investigations.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Ordinance does not contain express provisions on cooperation with regulatory authorities in other jurisdictions. However, the Commission has shown willingness to cooperate with other authorities – both within Hong Kong and in other jurisdictions – by signing memoranda of understanding as well as engaging in informal dialogue and sharing experiences on cases. As required by section 161 of the Ordinance, the Commission and the CA signed a memorandum of understanding on how the two bodies will cooperate and pursue enforcement actions, which envisages that they will, where necessary, exchange information (including confidential information) with a view to adopting a harmonised approach under the Ordinance.

The Commission has a secondment programme with certain overseas agencies, including the UK CMA. On 2 December 2016, the Commission signed a memorandum of understanding with the Competition Bureau of Canada with the purpose of enhancing cooperation, coordination and information sharing between the two agencies. In the spirit of such cooperation, Andrea McAuley from the Competition Bureau of Canada joined the Commission in February 2017 for a six-month secondment as part of an exchange programme under the memorandum of understanding.

Interplay between jurisdictions

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

The Commission has indicated that it will look to other jurisdictions for precedents, especially in the early days of enforcement. For example, in the *Nutanix* judgment, the Tribunal relied heavily on EU case law on the definition of 'concerted practice', which is not defined in the Ordinance. Although the courts of Hong Kong have indicated that decisions of the courts of other jurisdictions cannot be transplanted to Hong Kong without a careful examination of the social and legal context in which they were made, overseas jurisprudence will continue to have a significant influence on the Tribunal's decisions, particularly in relation to concepts borrowed from EU jurisprudence.

Furthermore, given the proximity of Hong Kong to China, we would expect the Ordinance to apply to Chinese companies in a significant way. There has been some high-level dialogue and communication between the Commission and the Chinese competition authorities since the Ordinance came into effect.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the First Conduct Rule and private actions in respect of such infringements. It is therefore the Tribunal that determines whether an infringement of the Ordinance has occurred.

Section 92 of the Ordinance allows the Commission to initiate enforcement action, if it considers it appropriate to do so, and apply to the Tribunal for a pecuniary penalty to be imposed on any person that it has reasonable cause to believe has infringed the First Conduct Rule or been involved in such an infringement.

Burden of proof

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

The burden of proof is on the Commission. Where proceedings are brought by the Commission seeking orders for pecuniary penalties, the Tribunal has held that this involves the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights, meaning that the applicable standard of proof required of the Commission is a criminal one – that is, beyond reasonable doubt.

Circumstantial evidence

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

The First Conduct Rule applies to concerted practices, which the Commission has defined in its Guideline on the First Conduct Rule as 'a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition'. The Guideline further provides that the Commission is likely to conclude that there exists a concerted practice with the object of harming competition (and thus an infringement of the First Conduct Rule) where competitively sensitive information, such as an undertaking's planned prices or planned pricing strategy, is exchanged between competitors in circumstances where:

- the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and
- the recipient does act or intends to act on the information.

Without a legitimate business reason for an information exchange of this kind, the Commission is likely to infer from the information exchange that the party providing the relevant information had the requisite expectation or intention to influence a competitor's conduct in the market. Similarly, in the absence of a legitimate business reason for taking receipt of the information exchanged or other evidence showing that the recipient did not act or intend to act on the information when determining its conduct in the market, the Commission is likely to infer that the recipient undertaking acted on or intended to act on the information exchanged.

In January 2016, the Hong Kong High Court handed down a judgment quashing a 2013 decision of the CA, which was made under the competition provisions in the Broadcasting Ordinance (see *Television Broadcasts Limited v Communications Authority and The Chief Executive in Council*, HCAL 176/2013). In upholding the CA's competition law analysis, Mr Justice Godfrey Lam (also the president of the Tribunal) clarified a number of legal principles, which are also relevant to future cases decided under the Ordinance. This included the principle that, in evaluating the evidence, the CA is entitled to draw 'sufficiently compelling' inferences from the relevant circumstantial evidence considered in its entirety.

In May 2018, the Hong Kong High Court handed down a judgment ordering an alleged antitrust contravention from an ongoing legal action to be transferred to the Tribunal (see *Taching Petroleum Company, Limited v Meyer Aluminium Limited*, HCA 1929/2017). Taching argued that Meyer had not provided any evidence of direct collusion, but relied only on circumstantial evidence. In the judgment, Madam Justice Queeny Au-Yeung accepted that parallel conduct cannot by itself be equated with concerted practice, but it may, depending on the circumstances, be evidence of such practice. The case is now being considered by the Tribunal.

Appeal process

16 | What is the appeal process?

Certain decisions made by the Commission may be reviewable by the Tribunal (section 84 of the Ordinance). This includes decisions or rescission of decisions by the Commission as to whether certain conduct is exempt from application of the First Conduct Rule (eg, block exemption order or an individual exemption decision), as well as decisions varying or releasing commitments relating to any competition rule. A person specified in section 85 of the Ordinance may apply to the Tribunal for leave to review a reviewable determination. Section 85 provides that an application for review may be made:

- in the case of a decision relating to the variation of a commitment or the release of a person from a commitment, by the person who made the commitment; or
- in the case of a decision relating to the termination of a leniency agreement, by a party to the agreement.

A person who does not fall into one of these categories may also apply to the Tribunal for a review of a reviewable determination if the Tribunal is satisfied that the person has a sufficient interest in the reviewable determination.

Appeals can be made as of right to the Court of Appeal against any decisions, determinations or orders by the Tribunal, including a decision as to the amount of any compensatory sanction or pecuniary penalty (section 154 of the Ordinance).

In respect of appeals against an interlocutory decision, determination or order by the Tribunal, leave of the Court of Appeal or the Tribunal will be required, unless any rules of the Tribunal specify that an appeal lies as of right against such decisions or orders (section 155 of the Ordinance).

Section 158 of the Ordinance envisages that the chief judge may make Tribunal rules to regulate and prescribe the practice and procedure (and any incidental matters) to be followed by the Tribunal. These rules were brought into full effect on 14 December 2015.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions in Hong Kong in respect of cartel infringements.

However, providing false or misleading information or obstruction of the Commission's investigations, such as failure to comply with a Commission requirement or destruction of evidence, may expose individuals or businesses to criminal sanctions under the Ordinance (sections 51–55 of the Ordinance).

Criminal offences may also be committed by a person who causes their employee to suffer certain conduct or damage (eg, discriminates against the employee or terminates the employment contract) because the employee had assisted the Commission in its investigation or proceedings (section 173 of the Ordinance).

Civil and administrative sanctions

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

The Ordinance gives the Tribunal the power to apply a full range of civil remedies for an infringement of the First Conduct Rule, including (among others):

- a declaration that a person has contravened a competition rule;
- financial penalties of up to 10 per cent of Hong Kong turnover of the relevant undertaking for a maximum of three years of infringement (at present, it is unclear whether this extends to group turnover);
- disgorgement orders (ie, to pay back the illegal profits made from the infringement);
- injunctions; and
- disqualification orders against directors.

A full list of orders that may be made by the Tribunal is set out in Schedule 3 to the Ordinance.

Guidelines for sanction levels

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

There are no formal sentencing guidelines yet. The Commission is reported to be considering issuing a document relating to the calculation of pecuniary penalties which the Commission will recommend to the Tribunal.

Section 93(2) of the Ordinance sets out certain factors to which the Tribunal must have regard in determining the amount of the pecuniary penalty. These are:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage, if any, caused by the conduct;

- the circumstance in which the conduct took place; and
- whether the person has previously been found by the Tribunal to have contravened the Ordinance.

The first hearing of the Tribunal on subject of pecuniary penalties is scheduled for 14 January 2020 in relation to *Competition Commission v. W. Hing Construction Company Limited and Others* (CTEA/2017).

Compliance programmes

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

The Commission's Enforcement Policy indicates that the Commission will take into consideration compliance efforts of persons under investigation where those persons can demonstrate that they have made a genuine effort to comply with the Ordinance. However, that is only one of the many factors that the Commission will take into account, other factors being the Commission's remedial goals, the severity of the conduct, cooperation and settlement, and efficacy in general.

Director disqualification

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

In two cartel cases before the Tribunal, the Commission is seeking director disqualification orders against individuals. Such an order, made by the Tribunal under section 101 of the Ordinance, would disqualify a person from being a director of a company or from otherwise being concerned in the affairs of a company (among other things) for up to five years.

Debarment

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

There is no such reference in the Ordinance.

Parallel proceedings

23 | 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?

Notwithstanding the finding of the Tribunal that pecuniary penalties sought by the Commission amount to a criminal charge against alleged cartelists, there are no other criminal sanctions in Hong Kong for cartel activity.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 | 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?

Follow-on private actions for damages are provided for by the Ordinance. A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action under the Ordinance (subject to appeal periods during which such follow-on actions may not be brought). It remains to be seen how the Tribunal will deal with pass on and double recovery issues.

Private enforcement actions may be brought before the Tribunal based on:

- a determination by the Tribunal, the CFI or the higher courts that a conduct rule has been infringed; or
- an admission of an infringement in a commitment offered to the Commission (sections 110 and 111 of the Ordinance).

At present, stand-alone private enforcement actions are not permitted. This does not prevent a party from arguing in a private legal action that a conduct rule has been infringed (eg, as a defence), as long as the alleged infringement is not the basis for a cause of action (see, for example, the *Taching Petroleum Company, Limited v Meyer Aluminium Limited* case, HCA 1929/2017, referred to in question 15).

Class actions

25 | 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?

At present, there is no class action procedure for competition claims or more generally in Hong Kong.

On 28 May 2012, the Law Reform Commission published a report proposing that a mechanism for class actions should be adopted in Hong Kong, with a view to expanding access to judicial relief. The report recommends that class actions be introduced on an incremental basis and initially be permitted only in relation to consumer cases, though the expectation is that class actions will eventually apply to all claims. The Hong Kong Department of Justice has since set up a cross-sector working group chaired by the Solicitor General in order to consider the proposals of the Law Reform Commission. As at 17 April 2019, the working group had held 25 meetings and its sub-committee had held 30 meetings to study the proposals in detail.

There is no concrete time frame for public consultation or implementation. The working group has been compiling a draft consultation document that proposes to cover a number of specific issues, including a close scrutiny of what will be meant by 'consumer' and 'consumer cases', the inclusion and exclusion of potential litigants from a class action, procedural features of such a class action regime, and the determination and distribution of class action awards.

COOPERATING PARTIES

Immunity

26 | 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?

Part IV of the Ordinance allows the Commission to make an agreement, on terms it considers appropriate, that it will not bring or continue proceedings for a pecuniary penalty in exchange for a person's cooperation in an investigation or in proceedings. While a leniency agreement is in force, the Commission must not bring or continue proceedings for a pecuniary penalty in breach of that leniency agreement, notwithstanding certain circumstances in which the Commission may terminate a leniency agreement.

Under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (the 'Leniency Policy'), published pursuant to section 80 of the Ordinance, the key elements of the programme are as follows:

- leniency is available only in respect of cartel conduct contravening the First Conduct Rule;

- only an undertaking (the definition of which is described in question 6) may apply for leniency under the policy;
- leniency is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency;
- if the undertaking meets the conditions for leniency, the Commission will enter into an agreement with the undertaking not to take proceedings against it for a pecuniary penalty in exchange for cooperation in the investigation of the cartel conduct;
- leniency ordinarily extends to any current officer or employee of the undertaking cooperating with the Commission, as well any former officer or employee and any current or former agents of the undertaking specifically named in the leniency agreement; and
- the undertaking receiving leniency will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting to its participation in the cartel on the basis of which the Tribunal may be asked jointly by the Commission and the applicant under rule 39 of the Competition Tribunal Rules (Cap 619D) (CTR) to make an order under section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in the cartel.

Under the Commission's Leniency Policy, leniency is available only for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. There is therefore a strong incentive for a cartel member to be the first undertaking to apply for leniency and the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

Subsequent cooperating parties

27 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 Leniency Policy applies only to the first undertaking reporting the cartel. However, it explicitly states that this does not preclude the Commission from entering into a leniency agreement with an undertaking with respect to an alleged contravention of a conduct rule which is not covered by the Leniency Policy. As such, the Commission may exercise its discretion with subsequent cooperating parties. In particular, the Leniency Policy states that the Commission will consider a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance. When seeking a pecuniary penalty or other order in relation to cartel conduct, the Commission may consider making joint submissions to the Tribunal with the cooperating undertaking.

In April 2019, the Commission introduced the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the Cooperation and Settlement Policy) in relation to cartel conduct. The policy provides that an undertaking engaged in cartel conduct may seek to cooperate with the Commission with a view to reaching a settled outcome to an investigation by way of consent order if leniency is not available. The undertaking should indicate its willingness to cooperate before the commencement of any Tribunal proceedings against it (although Commission may still consider offers to cooperate after this point). The Commission will enter into a cooperation agreement with the undertaking and jointly apply with the undertaking to the Tribunal for a consent order on the basis of a joint statement of agreed factual summary. In return for such cooperation, the Commission will agree to apply a cooperation discount of up to 50 per cent on the pecuniary penalty. Unlike the Leniency Policy, more than one undertaking can benefit from the Cooperation and Settlement Policy. The Commission will identify an applicable band of cooperation discount based on the order in which the undertakings express their interest to cooperate, as well as the nature, value and extent of cooperation provided.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

In the Cooperation and Settlement Policy, the Commission also introduced the 'Leniency Plus' system. Under this system, an undertaking cooperating with the Commission in relation to its participation in one cartel ('First Cartel') may have engaged in one or more completely separate cartels ('Second Cartel'). 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;
- 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

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

Neither the Ordinance, nor the Leniency Policy, envisages a specific deadline for applying for immunity. However, the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

A potential applicant for leniency, or their legal representative, may contact the Commission to ascertain if a marker is available for particular cartel conduct. Such enquiries may be made on an anonymous basis, although a marker will not be granted on the basis of anonymous enquiries. To obtain a marker and thereby preserve the undertaking's place in the queue, a caller must provide sufficient information to identify the conduct for which leniency is sought in order to enable the Commission to assess the applicant's place in the queue in relation to that specific cartel. This includes, at a minimum, providing the Commission with the identity of the undertaking applying for the marker, information on the nature of the cartel (such as the products and services involved), the main participants in the cartel conduct and the caller's contact details. The Commission is willing to grant the marker on the basis of an oral discussion.

Similarly, there are no specific deadlines for applications under the Cooperation and Settlement Policy. The policy is intended to encourage cooperation before the Commission commences proceedings before the Tribunal, but the Commission may still consider offers to cooperate after this point. The level of cooperation discount granted to the cooperating undertakings will be determined based on the order in which the undertakings express their interest to cooperate, as well as the nature, value and extent of cooperation provided.

Cooperation

30 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?

If a leniency applicant with the marker is invited by the Commission to apply for leniency, it will be asked to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and evidence in respect of the cartel conduct (a 'proffer'). The Commission will invite the undertaking to submit its application by completing its proffer within a specified period, ordinarily within 30 calendar days. A proffer may be made orally or in writing. Should the undertaking fail to complete its proffer within this time frame, or any extension to it as might be agreed by the Commission, the undertaking's marker will automatically lapse. In that circumstance the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

Undertakings in the marker queue who are not invited to apply for leniency will be informed that they are not currently eligible to apply for leniency under the Leniency Policy. Such undertakings may, however, consider cooperating with the Commission as mentioned in question 27.

The requirements for the Leniency Policy and Cooperation and Settlement Policy are similar in that they both apply only to cartel conduct and may be applied for only by an undertaking. On the other hand, while leniency is only available for the first undertaking that reports the cartel conduct to the Commission, there is no such limit under the Cooperation and Settlement Policy.

Confidentiality

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

Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission and section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority, such as where the disclosure is: in accordance with an order of the Tribunal or any other court or in accordance with a law; or in connection with judicial proceedings arising under the Ordinance. Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations. This states, among other things, that in deciding whether to disclose confidential information, the Commission will consider and have regard to the extent to which the disclosure is necessary for the purpose sought to be achieved and where the Commission may be required to produce confidential information in accordance with a court order, law or legal requirement, the Commission will endeavour to notify and consult the person who provided the confidential information prior to making such a disclosure.

Specifically, in the context of a leniency application and as set out in the Leniency Policy, the Commission will use its best endeavours to protect as appropriate:

- any confidential information provided to the Commission by a leniency applicant for the purpose of making a leniency application or pursuant to a leniency agreement; and
- the Commission's records of the leniency application process, including the leniency agreement (collectively, leniency material).

It is the Commission's stated policy not to release leniency material (whether or not it is confidential information under section 123 of the Ordinance) and to firmly resist, on public interest or other applicable grounds, requests for leniency material, including the fact that leniency has been sought or is being sought, where such requests are made. In March 2018, the Tribunal handed down a judgment in the *Nutanix* case in relation to document disclosure in the case of an unsuccessful leniency applicant, ruling that leniency documents in these circumstances are covered by informer privilege and without prejudice privilege and need not be disclosed. In the case of successful leniency applications, on which the Tribunal did not need to rule as no leniency was granted in this case, the Commission's position was that there is a need to withhold from disclosure without prejudice communications pursuant to which the application is made, such as the application statement or proffer. The Commission raised no objection to the production of any pre-existing documents that were provided during the course of the leniency process.

Settlements

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

The Commission has the discretion to accept a party's commitment to take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible infringement of the First Conduct Rule (pursuant to section 60 of the Ordinance). If the Commission accepts the commitment, it may not commence or continue an investigation or bring proceedings in the Tribunal, in relation to any alleged contravention, if such an investigation or proceedings relate to matters addressed by the commitment. Any admission contained in the commitment can form the basis of a follow-on action (see question 24). The Commission's Guideline on Investigations states that the Commission may accept commitments under section 60 of the Ordinance at any stage.

Further, in relation to cartel activity, the Commission has the discretion to issue an 'infringement notice' instead of bringing proceedings in the Tribunal, provided the undertaking makes a commitment to comply with the requirements of the notice. These requirements may include:

- refraining from specified conduct, or to take any specified action that the Commission considers appropriate; and
- admitting to an infringement of the conduct rule.

The original intention was to allow the Commission to impose a financial penalty with the infringement notice; however, this was subsequently removed from the Ordinance as a result of feedback from small and medium enterprises that this could potentially be an unreasonable burden on them.

Even where parties wish to resolve the Commission's concerns, there may be cases where the Commission considers these can only be addressed satisfactorily by an order made by the Tribunal. Subject to the Tribunal's determination, a consent order may provide for a declaration that a person has contravened a competition rule, the imposition of a pecuniary penalty, a director disqualification order or any other order that may be made by the Tribunal under the Ordinance.

Corporate defendant and employees

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

Section 80 of the Ordinance provides that leniency can be granted to an individual (as well as to corporations or partnerships) in return for that individual's cooperation with the Commission's investigation or proceedings under the Ordinance.

In particular, leniency granted to a corporate defendant will also cover any director, manager, company secretary (or governing body of the undertaking), employee or agent.

According to the Commission's Cooperation and Settlement Policy which caters for undertakings engaged in cartel conduct that do not benefit from leniency, in return for cooperation, the Commission may agree not to bring any proceedings against any current and former officers, employees, partners and agents of the undertaking as long as the relevant individual provides complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing enforcement proceedings in relation to that conduct.

Dealing with the enforcement agency

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

In relation to an immunity applicant, the template Leniency Agreement (set out in the Commission's Leniency Policy) sets out certain conditions with which the leniency applicant must comply. These include an obligation to maintain continuous and complete cooperation with the Commission throughout the investigation and any ensuing proceedings, and to ensure full and truthful disclosure to the Commission. The Commission is likely to ask for compliance with similar conditions in relation to subsequent cooperating parties. Failure to comply with the conditions imposed by the Commission could jeopardise immunity, in the case of immunity applicants, and the benefits of cooperation (eg reduced recommended fines, immunity for individuals), in the case of subsequent cooperating parties. The Commission encourages parties who are subject to an investigation to engage with the Commission early and often to ensure a productive dialogue is established and maintained.

For a cooperating undertaking engaged in cartel conduct, the Commission has set out a four-stage cooperation procedure, involving the undertaking first indicating its willingness to cooperate, then proceeding to fully cooperate with the Commission by providing documents and information and agreeing the factual summary. The Commission will enter into a Cooperation Agreement with the undertaking, and will eventually issue a final letter confirming the conditions of the Cooperation Agreement have been fulfilled. Such a letter will be issued conditional upon the undertaking having ensured continued compliance up to an appropriate time.

DEFENDING A CASE

Disclosure

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

According to the Commission's Guideline on Investigations, prior to commencing proceedings in the Tribunal, in circumstances where a Warning Notice has not already been issued, the Commission will usually contact relevant parties to advise them of its concerns and to provide the parties with an opportunity to address those concerns.

If proceedings are commenced in the Tribunal, the Commission must make its case in a notice of application, which is published by the registrar of the Tribunal and states, among other things: the nature of the application; the determination to which the application relates; the particulars of the relief sought; and the grounds for the application. The Commission will issue a press release as soon as practicable after commencing proceedings. For example: the first case was brought before the Tribunal on 23 March 2017, with a Commission press release issued on the same day; the second case was brought before the Tribunal on 14 August 2017, with a Commission press release issued on the same day; the third case was brought before the Tribunal on 6 September 2018, with a Commission press release being issued on the same day; and the fourth case was brought before the Tribunal on 3 July 2019, with a Commission press release issued on the same day.

In terms of further discovery, the Competition Tribunal Rules (at rule 24) provide that a party may apply to the Tribunal for an order for discovery and production of a document relating to the proceedings from a person for inspection. The application may be determined by the Tribunal with or without a hearing. The Tribunal may make or refuse to make an order for discovery and production of a document having regard to all the circumstances of the case, including: the need to secure the furtherance of the purposes of the Ordinance as a whole; whether the information contained in the document sought to be discovered or produced is confidential; the balance between the interests of the parties and other persons; and the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the proceedings.

In March 2018, the Tribunal handed down a judgment in the *Nutanix* case in relation to document disclosure. One respondent in the case, SiS International Limited, had asked the Tribunal to order the Commission to disclose certain documents claimed by the Commission to be protected under privilege or public interest immunity. The documents over which the Commission claimed privilege or public interest immunity included:

- without prejudice correspondence and records of without prejudice communication between the Commission and respondents in relation to the Commission's Leniency Policy. These contained correspondence and records of communications with leniency applicants;
- affirmations (together with exhibits), and drafts thereof, for the purpose of applying for search warrants;
- the complainant's original complaint form submitted to the Commission;
- correspondence, reports, and other documents passing between the Commission and its solicitors for the purpose of the case;
- all without prejudice correspondence and records of without prejudice communications between the Commission and any respondent where an agreement had not been reached; and
- all confidential internal reports, minutes and correspondence relating to the Commission's investigation and the proceedings.

The Commission opposed disclosure on various grounds including public interest immunity, without prejudice privilege, and lack of relevance. The Tribunal ruled partly in favour of SiS and held, among other things, that:

- leniency documents are covered by informer privilege and without prejudice privilege;
- the original complaint form would ordinarily be protected by informer privilege, but was not in this case because the identity of the complainant was known to the parties; and
- internal documents relating to the Commission's investigation need to be judged by context. It is likely that two narrower types of documents (ie, reports to and minutes of the Commission concerning the results of the investigation and the enforcement steps to be

taken, and certain internal communications and notes relating to the execution of the search warrants showing the methods, procedures and tactics of the Commission) could in principle be covered by public interest immunity, but immunity would have to be justified in each case.

The Commission was ordered to produce a list of relevant documents, along with its claims for public interest immunity or privilege in respect of those documents.

Representing employees

36 | 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?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority.

Multiple corporate defendants

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

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

Payment of penalties and legal costs

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

Section 168 of the Ordinance prohibits a corporation from indemnifying its officers, employees or agents against liability for paying:

- a pecuniary penalty imposed under the Ordinance; or
- costs incurred in defending an action in which the person is convicted of contempt, convicted of an offence under the Ordinance or ordered to pay a pecuniary penalty.

However, according to section 170, section 168 does not prohibit a corporation from providing funds to an officer, employee or agent to meet expenditure incurred or to be incurred in defending proceedings for a pecuniary penalty if it is done on the following terms:

- the funds are to be repaid in the event of the person being ordered by the Tribunal to pay the pecuniary penalty; and
- they are to be repaid no later than the date when the decision of the Tribunal becomes final (this means either the decision is not appealed against or when the appeal is finally disposed of).

Taxes

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

Not yet applicable in the absence of any fines (and the Ordinance is silent on this issue).

International double jeopardy

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

Not yet applicable.

Getting the fine down

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

The Commission may be willing to take into account steps taken by the undertaking to conduct a detailed internal audit throughout its businesses and to cooperate with the Commission in its investigation. The Commission's Enforcement Policy notes that it will take into consideration (in assessing the appropriate enforcement response) the compliance efforts of persons under investigation where they can demonstrate they have made a genuine effort to comply with the Ordinance. However, the Ordinance and the Guidelines are silent on whether the existence of a compliance programme affects the level of the fine. As part of its review of the Leniency Policy, the Commission may consider whether to credit compliance programmes in determining the level of recommended fine.

As soon as the undertaking becomes aware of possible participation in cartel activity, it should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to fully assess its exposure, not only in the Hong Kong but in all jurisdictions in which the cartel is operating.

UPDATE AND TRENDS

Recent cases

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

On 17 May 2019, two judgments were handed down by the Tribunal in relation to Hong Kong's first two competition cases involving bid rigging, market sharing and price fixing.

Competition Commission v Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited (trading as Innovix Distribution) and Tech-21 Systems Limited (CTEA1/2017)

The case was brought against five information technology companies over alleged bid rigging in a tender process. The Tribunal found four of the companies (namely Nutanix, BT, Innovix and Tech-21) liable for contravening the First Conduct Rule by engaging in bid rigging concerning a tender. Nutanix and BT were found to have made an agreement to procure the submission of four 'dummy bids', and it was found that Nutanix entered into separate bilateral and trilateral agreements with the other respondents to help BT win the bid. Each of the agreements falls within the definition of 'bid rigging' and constituted 'serious anticompetitive conduct' for which no warning notice needed to be issued pursuant to the Ordinance.

On the other hand, the application against one of the companies (namely SiS) was dismissed. The Tribunal found that the SiS employee's conduct was not attributable to SiS because he was a junior employee whose general duties did not include submission of tenders or even provision of any binding quotation, and he had no authority to bind SiS in relation to any commercial commitment. Furthermore, SiS's business

did not include sales to end users; it only sold to resellers. It was not within the job description of anyone in SiS to be to be tendering in that market – lawfully or otherwise. The Commission also failed to show that the relevant SiS employee's superiors were aware of his arrangements with the representative of Nutanix.

Separately, the Tribunal found that the applicable standard of proof required of the Commission is the criminal standard of proof beyond reasonable doubt as the proceedings, seeking orders for pecuniary penalties, involved the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights.

A decision on the penalties that will be applied in this case is still pending.

Competition Commission v W Hing Construction Company Limited and Others (CTEA2/2017)

The case was bought against 10 construction and engineering companies for engaging in market-sharing and price-fixing conduct regarding decoration works on a public housing estate. The Tribunal found all 10 companies liable for contravening the First Conduct Rule by engaging in market sharing and price fixing in relation to the provision of renovation services at a public rental housing estate in Hong Kong. The respondents were found to have engaged in market allocation and price fixing in relation to the supply of services which constituted 'serious anticompetitive conduct' under the Ordinance. The respondents failed to demonstrate that any of the limbs of the efficiencies exclusion (contained in section 1 of Schedule 1 to the Ordinance) were satisfied.

Two of the respondents also failed to convince the Tribunal that they were not liable on the ground that the sub-contractors who carried out the works were separate undertakings. The Tribunal concluded that each relevant respondent and their respective sub-contractor formed a single economic unit, and therefore constituted a single undertaking.

Separately, the Tribunal followed the *Nutanix* case in holding the standard of proof to be beyond reasonable doubt.

A decision on the penalties that will be applied in this case is still pending.

Regime reviews and modifications

43 | 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 proposed changes to the regime, but a review of the Ordinance is being carried out by the government, particularly in relation to the carve-out for statutory bodies that is currently available.

SLAUGHTER AND MAY

Natalie Yeung
natalie.yeung@slaughterandmay.com

47th Floor, Jardine House
One Connaught Place
Central
Hong Kong
Tel: +852 2521 0551
Fax: +852 2845 2125
www.slaughterandmay.com

India

Subodh P Deo and Anima Shukla
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 (DG) 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 enforcement agency – that is, 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.

Efficiency-enhancing joint ventures are an exception to the presumptive rule under the Act.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific infringements – the Act applies universally to all sectors and industries.

However, sovereign functions being carried out by the central government that are relatable to atomic energy, currency, defence and space are exempt from the purview of the Act. Further, as per the decisional practice of the CCI, only those activities of the government that are carried out as 'enterprises' fall within the ambit of the Act but not its regulatory or policy formulation functions.

The Act also exempts intellectual property right holders from the purview of section 3 of the Act (prohibition on anticompetitive agreements) in exercise 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: (i) the Copyright Act 1957; (ii) the Patents Act 1970; (iii) the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999; (iv) the Geographical Indications of Goods (Registration and Protection) Act 1999; (v) the Designs Act 2000; (vi) the Semi-conductor Integrated Circuits Layout-Design Act 2000.

The Act also 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 for fixing of prices, limitation of capacity or sales and allocation of markets or customers comes to its notice.

In matters of jurisdictional overlaps on questions of competition with other sector regulators, such as with 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.

As regards exercise of jurisdiction in cases of overlap of jurisdiction with one of the sectoral regulators, namely, 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 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. As per the decisional practice of the CCI since then, it is observed that in cases where a sectoral regulator is seized of a matter, the CCI awaits the decision of the sectoral regulator before initiating its own inquiry into the matter.

Application of the law

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

The law applies to 'enterprise' or 'association of enterprises' or 'person' or 'association of persons'.

'Enterprise' has been defined as:

> *a person or a department of the government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the government relatable to the sovereign functions of the government including all activities carried on by the departments of the central government dealing with atomic energy, currency, defence and space.*

'Person' has been defined as:

> *(i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); (vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to co-operative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses.*

Thus, the law extends to all covered under these two definitions.

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 as the Act vests the CCI with the power 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 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. Under the Act, a conduct is prohibited if it causes an 'appreciable adverse effect on competition in India'. Accordingly, a defence that the impugned conduct does not cause an AAEC in India, but only affects customers or other parties outside India, is valid.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The 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 DG 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 DG 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 DG to carry out an investigation. The DG is generally asked to complete the investigation within 150 days of receipt of the order. However, it is routine for the DG to seek extensions, which the CCI regularly grants. In most cases, an investigation is completed in 18 to 24 months but it could take a longer or even shorter time depending on the complexity of the case. Although there are no formal milestones in an investigation, the DG typically sends multiple notices to the parties from time to time, seeking exhaustive information from the charged parties, third parties and the informant. The DG 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

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

The DG, which is the investigative authority under the Act, has 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 DG may conduct search and seizure operations but only after obtaining a warrant from the chief metropolitan magistrate in Delhi.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 (www.cci.gov.in), it has entered into an memorandum of understanding with agencies of the following jurisdictions:

- Brazil;
- Russia;
- China;
- South Africa;
- Canada;
- the European Commission;
- Australia; and
- the United States.

Interplay between jurisdictions

12 | 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 jurisdictions that have significant interplay with the CCI in cross-border cases is not in the public domain.

The CCI has thus far issued only one decision involving cross-border cartel cases. In the said case, numbered as 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 observed from the public version of the order dated 9 August 2019 that the CCI has prepared two versions of the order, namely, non-confidential qua parties version and public version, keeping in mind the confidentiality requests made by the parties and the provisions of section 57 of the Act. It is noticed from the public version of the order that based on leniency application filed by NSK Ltd Japan, the CCI commenced its inquiry in the matter vide its order dated 17 September 2014. During the investigation before the DG, JTEKT Corporation, Japan also filed leniency application. However, this inquiry only covered the period from 2005 to 25 July 2011. CCI's order dated 9 August 2019 states that this was because, on 25 July 2011, the Japanese Fair Trade Commission conducted an onsite inspection of four Japanese companies including NSK and JTEKT, in connection with alleged cartelisation in another product. There are no further details in this regard in the CCI's order. Thus, the information regarding the effect of cross-border cases on investigation, prosecution and penalising of cartel activity in India is very scant. That said, it may be pertinent to state that the CCI draws more heavily from the competition law jurisprudence developed in the EU rather than the US.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Cartel proceedings are adjudicated /determined by the CCI after considering the investigation report submitted by the DG in the matter and the written submissions of the charged parties on the findings of the DG in the investigation report to determine the quantum of penalty leviable. Further, the charged parties are also accorded opportunity to make oral submissions before the CCI.

Burden of proof

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

The initial burden to prove that there is an 'agreement' among competitors to fix prices or limit output or share markets or indulge in bid rigging is on the DG. Once the existence of such an 'agreement' is established, a presumption in law is made that it has caused an AAEC. The burden to rebut such a presumption of AAEC is then upon the charged parties.

The level of proof required is 'balance of probabilities'.

Circumstantial evidence

15 | 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, etc have been relied upon to infer and determine the existence of cartels, even when no direct evidence was found.

Appeal process

16 | What is the appeal process?

Any party aggrieved by any direction, decision or order of the CCI, passed under certain sections as 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. While an order of the CCI directing initiation of an investigation by the DG 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 appellate tribunal is headed by a chairperson and such other judicial and technical members as the central government may deem fit. The present chairperson of NCLAT is a former judge of the Supreme Court. He is assisted by eight other members, most of whom are former judges of the High Court. On receipt of an appeal, the appellate tribunal may, after giving the parties to the appeal, an opportunity of being heard, 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, and also exercise of discretion by the tribunal.

The appellate tribunal 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. Its proceedings are deemed to be judicial proceedings and it enjoys the powers of a civil court. Its orders are enforceable in the same way as a decree made by a civil court in a suit pending before it.

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.

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 employed by the NCLAT and the Supreme Court is 'balance of probabilities'.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activities.

Civil and administrative sanctions

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

Apart from a cease and desist order, the CCI may impose a monetary penalty of up to three times of the relevant profit for each year of the continuance of the cartel or 10 per cent of the relevant turnover for each year of continuance of the cartel, whichever is higher on an enterprise engaged in cartel activity.

Guidelines for sanction levels

19 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, in various orders, the CCI has stated that penalties must be commensurate with the seriousness of infringement and must also act as a deterrent. Keeping these two principles in mind, the CCI weighs the aggravating and mitigating factors, in the facts and circumstances of each case, to calculate a penalty but there is little clarity as to how exactly these factors interplay and impact the calculation of the specific penalties. However, the CCI accords an opportunity to the parties charged and considers their written and oral submissions on the quantum of penalties. Penalties are imposed on the basis of the relevant turnover or the relevant profit, as the case may be, of an enterprise. Individuals/officials of enterprises are also imposed penalties up to 10 per cent of their average income of the preceding years as reflected in their respective income tax returns.

Compliance programmes

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

Existence of a compliance programme has been taken as a mitigating factor by the CCI in several cases when it came to reduction of penalties. The magnitude of reduction has varied on a case-by-case basis, as the reduction is based on CCI's discretion.

Director disqualification

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

There is no such provision under the Act. Thus, individuals involved in cartel activity have not been prohibited from serving as corporate directors or officers. Pertinently, in exercise of its powers to 'pass such other order or issue such other directions as it may deem fit', the CCI has issued directions (page 31 of the order in Case No. 28 of 2014) to a trade association not to associate two of its key officials (ie, the President and the General Secretary respectively of the Association) with its affairs including administration, management and governance in any manner for a period of two years. However, the appellate tribunal (para 37 in Appeal number 5 of 2016) has held that the CCI 'does not have the jurisdiction, power or authority to pass an order that has the effect of directly or indirectly curtailing the tenure of the duly elected office bearers or deprive them of their right to exercise powers and discharge the functions of the elected offices/posts under the particular statutes'.

Debarment

22 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

23 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 question is not relevant as the Act provides for only civil sanctions.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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. As there has not been a single damages claim decided by the appellate tribunal, it would not be appropriate to offer any further comment in this regard.

Class actions

25 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

26 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, read with 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 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 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 DG'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 information provided; and
- the full facts and circumstances of the case.

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.

Subsequent cooperating parties

27 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?

See question 26.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 26. There is no provision for an 'immunity plus' or 'amnesty plus' option

Approaching the authorities

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

See question 26.

Cooperation

30 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 furnish full, true and vital information regarding the existence of a cartel before the report of investigation has been submitted by the DG 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 DG or the CCI. There are no differences in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency.

Confidentiality

31 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 thereby are treated as confidential. 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 DG 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 DG may disclose such information, documents and evidence to such party after recording the reasons in writing and taking prior approval from the CCI.

The CCI issues only a public version of its final order to protect and maintain the confidentiality of the leniency applicants.

Settlements

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

Settlements, plea bargains or other negotiated resolutions are not available under the Act.

Corporate defendant and employees

33 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

34 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

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

While the CCI and the DG 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

36 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

37 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

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

There is no prohibition in this regard under the Act and a corporation may pay the legal penalties imposed on its employees as well as their legal costs.

Taxes

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

40 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. 07 and 30 of 2012 (against Google LLC for abusing its dominant position), it has not taken into account any penalties imposed 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, it is stated that there has been no damages decision under the Act thus far in India. Thus, there is no clarity as to 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.

Getting the fine down

41 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

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

Some of the key developments in the cartel cases have been as follows:

Cartelisation in the supply of electric power steering systems

Based on a lesser penalty application filed by NSK, the CCI initiated suo moto proceedings against NSK and JTEKT, along with their Indian subsidiaries, namely, Rane NSK Steering Systems Ltd (RNSS) and JTEKT Sona Automotive India Limited (JSAI) for their alleged anticompetitive conduct in the market for supply of EPS systems to the various automotive original equipment manufacturers (OEMs), having AAEC in India. Direct sales of EPS systems in India are made by NSK and JTKET only through their respective Indian subsidiaries. During the pendency of the investigation, JTEKT also filed its lesser penalty application before the CCI. It was found that upon receipt of global 'request for information'

(RFI)/ 'requests for quotation' (RFQ) from three automobile OEMs for supply of EPS systems, the employees and executives of the aforesaid parties contacted each other and coordinated their prices, allocated market on the basis of geographical regions (India being one such market) and on the basis of type of vehicles/platform/product, thereby rigging the bidding process of the three automobile OEMs. Pertinently, the CCI's inquiry, which commenced on 17 September 2014, covered the period only from 2005 to 25 July 2011, in view of the fact that Japanese Fair Trade Commission had conducted an onsite inspection of four Japanese companies, including NSK and JTEKT, in connection with alleged cartelisation in another product.

In passing its final orders, the CCI has adopted global best practices on maintaining confidentiality of information received in the course of its enquiry as it has not disclosed the details of the REI/REQ and the names of the products for which the EPS systems were required. Further, the CCI has also not disclosed the names of the three automobile companies nor their tender details in the order. The CCI has also not disclosed the names and designations of the employees of the leniency applicants. In this case the CCI also passed two versions of the order, namely, public version and non-confidential qua parties' version. Having determined whether the relevant turnover or the relevant profit was higher, the CCI decided to impose upon NSK/RNSS, penalty at 4 per cent of the relevant turnover of RNSS for each year of the continuance of the agreement, and thereafter gave it benefit of reduction in penalty of 100 per cent for its role and assistance in the matter. As regards JTEKT/JSAI, the CCI imposed a penalty at one times of the relevant profit of JSAI for each year of the continuance of the agreement, which was then reduced by 50 per cent as it was the second leniency applicant. The key managerial persons of the parties were granted benefit of similar reductions, as granted to their respective companies, upon the penalty calculated at 10 per cent of the average of their incomes for the last three preceding financial years.

In Re: Alleged cartelisation in supply of Liquified Petroleum Gas Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd

Based on an anonymous letter dated 25 April 2013, alleging bid rigging in tenders issued by Hindustan Petroleum Corporation Ltd (HPCL), the CCI ordered an investigation that was concluded by the DG on 6 October 2016. In this case, the CCI found the bidders had withdrawn their bids simultaneously without any proper justification. Further, the format of such withdrawal letters and wordings were similar as they were found to have been discussed among themselves and exchanged through emails. The CCI also noted that even the IP addresses of the charged parties for submission of the bids tender were identical or the same. Thereafter, after considering the nature of contravention as well as the mitigating factors stated by the charged parties, the CCI decided to impose penalties on the 51 parties at the rate of one per cent of their respective average relevant turnovers for the financial years 2013–14, 2014–15 and 2015–16 and at the rate of one per cent of the respective average relevant income of the 42 key officials of these parties.

In the presence of direct evidence of bid rigging, the CCI decided to impose penalties on the charged parties notwithstanding the fact that its finding in an earlier case of bid rigging by LPG suppliers (*Rajasthan Cylinders Case*, discussed below) was quashed by the Supreme Court on the ground inter alia that the market for LPG cylinders was an oligopsony and that the charged parties had given adequate justification for their parallel prices despite varying costs.

Madhya Pradesh Chemists and Distributors Federation v Madhya Pradesh Chemists and Druggist Association and others

In yet another case of alleged anticompetitive practices indulged in by trade associations controlling the entire drug distribution system, the CCI imposed penalties not only upon the trade associations involved in mandating the practice of obtaining a No Objection Certificate from them before appointment of stockists selected by the pharmaceutical companies to do business with them but also upon two pharmaceutical companies for cooperating with the trade association in their alleged anticompetitive practices, which was stifling competition in the market by limiting access of consumers to various pharmaceutical products and controlling supply of drugs in the market. Even though the trade associations and the pharmaceutical companies are neither situated horizontally nor vertically, the CCI imposed penalties on two of the leading pharmaceutical companies by stating that it was incumbent upon the companies to have reported the anticompetitive conduct of the trade association before the CCI, despite acknowledging the fact that the pharmaceutical companies cooperated with the trade associations to ensure that there was no disruption in supply of medicines. The CCI imposed a penalty of 10 per cent of their average incomes on the trade associations and at the rate of 1 per cent of their turnover on the pharmaceutical companies.

Zinc Dry Cell Battery Cartel cases

On 25 May 2016, Panasonic Energy India Co Ltd, a subsidiary of Panasonic Corporation, Japan filed a leniency application before the CCI disclosing the existence of cartel among all the major manufacturers of zinc dry cell batteries operating in the Indian market, viz Panasonic India, Eveready Industries India Ltd and Indo National Limited (Nippo) for fixing and increasing the prices of zinc dry cell batteries. The CCI directed investigation and eventually came to a finding that those manufacturers were guilty of cartel conduct.

Interestingly, Panasonic Corporation, Japan filed two separate leniency applications on 7 September 2016, on behalf of itself, the enterprise controlled by it – that is, Panasonic Energy India Co Limited – and their respective directors, officers and employees, disclosing that, in addition to the existence of cartel between the major manufacturers of zinc dry cell battery manufacturers, there existed two other 'bilateral ancillary cartels', between Panasonic Energy India Co Ltd and Geep Industries (India) Private Limited and the other between Panasonic Energy India Co Limited and Godrej and Boyce Manufacturing Co. Limited respectively. Pertinently, both Geep and Godrej were re-sellers of zinc dry cell batteries, which they sourced from Panasonic for re-sale in the market under their own brand names.

Making its detailed discussion in the *Godrej* case, the CCI vide its decision dated 15 January 2019, rejected the contention of *Godrej* that it could not be prosecuted as a member of the cartel as Panasonic and Godrej had a buyer-seller relationship, on the following grounds:

- the CCI held that even though Godrej sourced zinc dry cell batteries exclusively from Panasonic, they were competitors from the demand side perspective (ie, consumers) as Godrej used to re-sell the batteries under its own brand name;
- the CCI also held that the product supply agreement (PSA), executed between Panasonic and Godrej, was on principle-by-principle basis and was a duly negotiated agreement which stipulated that neither party will take steps detrimental to each other's market interests with respect to the market prices of zinc dry cell batteries. Thus, the CCI rejected the contention of Godrej that if it had not agreed to the market parity arrangement mandated by Panasonic, then it would have resulted in deadlock and denial of entry of Godrej in the market;
- Godrej used to complain to Panasonic whenever the prices of zinc dry cell batteries offered by Panasonic were lower than that of Godrej and asked Panasonic to increase its prices, and was thus a beneficiary of such cartel;
- the CCI held that if it is taken that it was merely a recipient of information on pricing of a 'larger cartel' from Panasonic, which was not sought by it and such disclosure of commercially sensitive information by Panasonic was of unilateral nature, it cannot

escape liability because it was fully aware of the existence of cartel between Panasonic, Eveready and Nippo and it chose to maintain price co-ordination in line with their prices;
- the CCI also refused to accept the defence of Godrej that it was in no position to inflict any supply constraints or cause any AAEC in the market, on the ground that AAEC is presumed and that DG has recommended that there was AAEC; and
- the CCI further held that such anticompetitive arrangement between Panasonic and Godrej led to an increase in the prices of zinc dry cell batteries to a very high level causing loss to consumers, foreclosed competition in the market as consumer choice was compromised and did not result in accrual of any benefits to the consumers or promotion of any technical, scientific or economic development.

The decisions in the zinc dry cell battery cases are unique and of an unprecedented nature as the parties had a buyer-seller relationship as well as competitor relationship. When a producer elects to market its goods through distributors, including independent distributors, the latter are not, in an economic sense, competitors of the producer even though the producer also markets some of its goods itself; rather the distributors are fundamentally 'agents' of the producer, employed because the producer has determined that it can supply its goods to consumers more efficiently by using distributors than it can by marketing them entirely by itself.

Be as it may, the CCI has held that Panasonic was in competition with its independent dealers/distributors re-selling its own product and has characterised such hybrid relationships as horizontal, and not vertical for reasons adduced above, thereby subjecting it to the presumptive rule of having caused AAEC, and not as a case of resale price maintenance, a vertical restraint that is subject to the rule of reason.

Cadila Healthcare Limited and Anr v Competition Commission of India & Ors

In the case of *Cadila Healthcare Limited and Anr v Competition Commission of India & Ors.* (LPA No. 160/2018), the division bench of the Delhi High Court, vide its order dated 12 September 2018, has clarified, based on the ratio of the Excel Crop Care order of the Hon'ble Supreme Court of India, that the 'subject matter' of DG investigation included not only the one alleged and specified under prima facie of the order of the CCI warranting DG's investigation but also 'other allied and unenumerated ones, involving others (ie, third parties)', as the scope of inquiry is the tendency of market behaviour of the kind frowned upon in the Act. It further observed that when an information is led before the CCI, it has material to form only a prima facie order but if the investigation process is restricted in the manner projected by the appellants, it would defeat the very purpose of the Act, which is to prevent AAEC. Thus, the court rejected the contention of the appellant that a specific order by CCI applying its mind into the role played by it was essential before the DG could proceed with the inquiry against it.

Further, citing the order of the Supreme Court in the *Aneeta Hada* case, as also of the Delhi High Court in the *Pran Mehra* case and the order of the CCI in the case of *Ministry of Agriculture v M/s Mayhco Monsanto Biotech Ltd*, the court also rejected the contention of the appellant that without first recording complicity or otherwise of the enterprise or company, its directors or employees and officials cannot be issued notice for contravention of the Act. The court observed that separate proceedings in respect of the company and of its key officials would both be inefficacious and inexpedient and that such a procedure is not contemplated by the Act. It, however, made it clear that its only when the enterprise or company can be prosecuted that its directors or employees and officials could be vicariously or otherwise held liable for the offence, subject to proof thereof.

Rajasthan Cylinders and Containers Ltd v Union of India and Another

In the case of *Rajasthan Cylinders and Containers Ltd v Union of India and Another* (C.A. No. 3546/2014), the Supreme Court appears to have raised the standard of proof required to establish an 'agreement' under the Competition Act. In this case, the Supreme Court vide its order dated 1 November 2018 has set aside the order of the appellate tribunal, whereby the appellate tribunal had upheld the order of the CCI finding 45 manufacturers of liquified petroleum gas (LPG) cylinders guilty of bid rigging/collusion in the tenders floated by Indian Oil Corporation Limited (IOCL), one of the three government-owned companies authorised to procure the same.

The finding of bid rigging by the CCI was upheld by the appellate tribunal on the basis of various circumstantial evidences, namely, constant need for LPG cylinders (identical product) and repetitive bidding, presence of only three buyers of gas cylinders (the three government-owned companies) operating in the entire market, small number of suppliers in the market, very few entrants, the existence of an active trade association in which almost all the bidders, except seven companies, were members, parties quoting identical bids despite there being variation in their individual costs, few of the manufacturers of gas cylinders participating in a meeting before the submission of bids.

The Supreme Court disagreed. Pertinently, the appellants had argued that the market of LPG cylinders was under the tight control and regulation of the government. It was also submitted that the market was characterised by conditions of monopsony (where buyers have control over input prices) /oligopsony (where there are only few buyers), which precluded the possibility of cartel. It was further contended that the very nature of the industry could not be used to infer collusion, as collusion was a state of mind and intent. The appellants also submitted that there was no AAEC. Thus, it was argued that as there was virtually no scope of competitive forces to operate in the market, there could not be any anticompetitive conduct under the Act.

The court rejected the contention of the appellants that there was no competition in the market and as such the CCI had no jurisdiction to carry out the investigation. It held that the scope and ambit of the Act was very wide and the purpose of the Act was not only to sanction anticompetitive conduct but also to promote and sustain competition in the market. It also opined that the Act was also intended to ensure freedom of trade and protect consumers. As regards the issue of competition, the court also noted that there were 60 suppliers in the market, who would like to quote the lowest prices to get the order, but there were only three buyers. On the issue of collusion, the court ruled that the standard of proof required is one of 'probability' and thus when there are indicators that there was practical cooperation between parties who knowingly substitute the risk of competition, the same would amount to anticompetitive practices. The court further noted that there was a meeting of the bidders under the aegis of their trade association just before the submission of the tenders, the parties had submitted identical bids despite varying costs, the products are identical and there are small number of suppliers with few entrants.

However, the court ruled that there was no possibility of horizontal agreement among the bidders in view of the ground realities prevailing in the market, namely:
- that there were only three buyers, and if LPG cylinders of any of the appellant was not bought by these buyers then such appellants would not be able to sell to any other entity;
- the limited number of buyers in the market may deter new entrants;
- ultimately, all bidders supply at the same rate, which is fixed by the buyers after negotiating with the lowest bidder; the only difference being the volume/quantity ordered for supply on the lowest bidders being higher;

- since there are not many manufacturers and supplies of LPG cylinders are needed on regular basis, the government companies ensure that all those manufacturers whose bids are technically viable are given some order for supply so as to keep all the parties afloat, which explains why all the 50 parties obtained order along with 12 new entrants;
- the supply and price of LPG cylinders is controlled by the government under the provisions of the Essential Commodities Act;
- the market was transparent and opening of previous tenders of any of these government companies, coupled with tight price control, becomes the guiding factor for subsequent tenders ruling out possibility of much price variation; and
- in the meeting prior to the opening of the bid, only 19 parties had attended which shows that the reason for quoting similar prices was not the meeting but something else – which is the market condition leading to the situation of oligopsony that prevailed because of limited number of buyers and influence of buyers in the fixation of prices.

In view of this, the court ruled that on a holistic view, the appellants were able to discharge the onus, on the basis of aforesaid indicators, that parallel behaviour was not the result of any concerted practice.

Regime reviews and modifications

43 | 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 on 1 October 2018 to review the existing competition law framework and make recommendations to further strengthen the framework to, inter alia, meet new economy challenges. The key recommendations of the Competition Law Review Committee are as follows:

Regarding the structure and composition of the CCI

- Introduction of a governing board to oversee advocacy and quasi-legislative functions, leaving adjudicatory functions to the whole-time members;
- integration of the DG's office with the CCI to bring about administrative efficiencies in the direction and scope of investigation, accompanied by functional autonomy for the DG and meaningful internal division of investigation and adjudication functions; and
- opening regional offices of the CCI for carrying out non-adjudicatory functions such as investigation, advocacy, etc.

Regarding the appellate body

Setting up of a dedicated bench of the NCLAT to expeditiously hear and dispose of competition appeals.

Introduction of settlement and commitment mechanisms

Incorporation of 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.

Regarding combinations

- Introduction of 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;

SAIKRISHNA & ASSOCIATES
ADVOCATES

Subodh P Deo
subodh@saikrishnaassociates.com

Anima Shukla
anima@saikrishnaassociates.com

8th Floor, VJ Business Tower
Plot No A-6, Sector 125, Noida
Uttar Pradesh 201301
India
Tel: +91 12 0463 3900
www.saikrishnaassociates.com

- 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
- introduction of 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.

On 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 anti-competitive agreements due to shift in traditional market realities.

Penalties

CCI must be mandated to issue guidelines on the imposition of penalty.

Definitions

The definitions of: (i) 'cartels' should include buyers' cartel; (ii) 'consumer' should include government departments or agencies; and (iii) 'turnover' (used for the purpose of determining combinations) to exclude intra-group sales, indirect taxes and trade discounts.

Leniency

- To provide for 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 reduction will be over and above any other penalty reductions that such applicant may receive under the normal lesser penalty application framework; and
- to 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-determination of an appeal by the Supreme Court instead of NCLAT.

Indonesia

HMBC Rikrik Rizkiyana, Farid Fauzi Nasution, Albert Boy Situmorang and Anastasia PR Daniyati
Assegaf Hamzah & Partners

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (the Indonesian Competition Law (ICL)) is the primary law regulating business competition in Indonesia. Chapters 3 and 4 of the ICL regulate restrictive agreements and restrictive conducts, which effectively prohibit any collusion, whether it relates to the price, the production or the market, or whether it relates to competition in the market or competition for the market (bid rigging).

In addition, there are other provisions regulating restrictive agreements and conducts, namely article 382-bis of the Indonesian Criminal Code prohibiting unfair competition and article 1365 of the Indonesian Civil Code, which prohibits any person from committing an unlawful act causing damage to another party.

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 is only one authority responsible for the enforcement of the ICL, namely Komisi Pengawas Persaingan Usaha (KPPU or the Indonesian Competition Commission), established in 2000. The KPPU may initiate investigations and examine; evaluate alleged violations; hear and decide a case; impose administrative sanctions; and provide advice on government policy relating to monopolistic practices and unfair business competition. For the purpose of the investigation, the KPPU has the power to summon undertakings, witnesses or experts to obtain, examine and evaluate documents or other instruments of evidence.

In September 2017, the Indonesian Constitutional Court, through its decision No 85/PUU-XIV/2016 on the request of judicial review on the current ICL (ICC Decision 85/2016) affirmed that the KPPU is a state auxiliary organ. Consequently, it has no authority to investigate any criminal sanctions, since criminal investigations are dealt with by the national police and public prosecutor. Further, criminal sanctions are decided by the court and are beyond the KPPU's authority.

Changes

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

The petitioner, among other things, challenged the KPPU's investigative authority, whether it is administrative or criminal in nature. The court holds that the phrase 'investigation' under the ICL shall be interpreted as certain action to collect evidence for the examination and not be construed as investigation under the criminal justice system.

In 2019, the KPPU issued KPPU Regulation No. 1 of 2019 on Case Handling Procedure (KPPU Regulation 1/2019) that drastically affects the cartel enforcement. One of the most notable changes brought by KPPU Regulation 1/2019 is the introduction of behavioural remedy in the KPPU examination process. This behavioural remedy allows a defendant to plead guilty at the beginning of a hearing process and agree to change its behaviour in order to stop the case. The KPPU may approve a behavioural remedy proposal only if all the reported parties in the case agreed to change their behaviour that allegedly violates the ICL, by taking into account:

- the type of the alleged violation;
- the duration of the alleged violation; and
- the damages resulted from the alleged violation.

Once KPPU accepted the behavioural remedy proposal, the reported parties are required to sign an integrity pact that contains their guilty plea and commitment to cease the practice that allegedly violates the ICL. The KPPU will then monitor the implementation of such integrity pact for a certain period.

Significant changes to the appeal process against the decision of the KPPU was also introduced in August 2019 through the enactment of Supreme Court Regulation No. 3 of 2019 on the Appeal Procedure Against the Decision of KPPU (SC Regulation 3/2019). Below are the key changes under SC Regulation 3/2019:

Electronic filing

Under the Regulation, appeal against a KPPU decision can now be submitted online. This mechanism is in line with the new Supreme Court regulation on electronic litigation.

Change to the deadline to file an appeal

The Appellant has 14 business days to file an appeal to a district court, and the 14-day period will be calculated as of:

- the date of the hearing decision, if attended by the appellant; or
- the date of the notification of the KPPU decision if the appellant did not attend the hearing.

Shorter period for consolidation of appeals

This deadline has now been shortened under the new Regulation, which provides that the Supreme Court must appoint the district court within seven working days after receiving the KPPU's written request.

Additional examination

Under the previous regulation, the panel of judges, which are the adjudicating judges in the district court, can instruct the KPPU to hold an additional examination if deemed necessary. In practice, the appellant can also propose such an additional examination to the panel of judges.

The new Regulation, however, does not mention this. This can mean that additional examinations will no longer be allowed under the new Regulation. It remains to be seen how this provision will be applied in district courts.

Legal measure against Supreme Court decisions

Article 15 of the new Regulation stipulates that both the appellant and the KPPU can only file an appeal to the Supreme Court as the last legal measure against a district court's decision. This is in contrast to the previous regulation, which was silent on this issue. In practice, the Supreme Court accepts civil reviews as an extraordinary legal measure applicable to be submitted against Supreme Court decisions.

In general, there are two types of legal measures in the Indonesian legal system, namely: (i) Ordinary Legal Measure; and (ii) Extraordinary Legal Measure. Ordinary Legal Measure can be taken against a non-legally binding decision. In the context of competition law, ordinary legal measures includes: (i) the proceeding in the district court, in which the district court examine the appeal against the KPPU decision; and (ii) the proceeding in the Supreme Court, in which the Supreme Court examines the appeal against a district court's appeal decision. Further, Extraordinary Legal Measure is the only applicable legal measure to be taken against a legally binding decision. This includes the civil review process in which the Supreme Court examines the Supreme Court's appeal decision.

The legal basis for civil review as an Extraordinary Legal Measure is provided under separate laws regarding the Supreme Court and judicial power. Therefore, even with the affirmation that an appeal to the Supreme Court is the last legal measure against a district court's decision, it is still unclear whether civil reviews will still be applicable under the new Regulation.

Substantive law

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

The prohibition of cartels under the ICL covers horizontal restricted agreements or cartels in the forms of the prohibition of:

- price fixing;
- production arrangements;
- market allocation;
- group boycotts;
- bid rigging; and
- other arrangements, conspiracy or concerted practices that may restrict competition on the market or may cause harm to consumers.

The cartel substantive test is covered in Chapters 3 and 4 of the ICL taking the 'per se illegal' or 'rule of reason' approach in each article. The first approach refers to provisions that do not include the phrase 'which may result in monopolistic practices or unfair business competition'. In this approach, the KPPU does not necessarily have to analyse the impact of an agreement on the market as it is considered sufficient only to establish the existence of the prohibited agreement, which is similar to the application of the 'per se illegality' rule as applied in other jurisdictions. This approach applies to price fixing and boycotts.

On the other hand, the provisions comprising the above-mentioned phrase adopt the second approach, rule of reason. Here, the provisions qualify the agreement as violating the ICL only after the KPPU has conducted an in-depth assessment concluding that such an agreement has an adverse impact on the market or on the competition. This latter assessment applies to market allocation, bid rigging and other arrangements, conspiracy or concerted practices. In implementing the ICL, the KPPU has issued several guidelines that relate to a cartel:

Commission Regulation	Approach
Commission Regulation No. 2/2010 on Bid Rigging	Rule of reason
Commission Regulation No. 4/2010 on Restrictions on Output and Marketing	Rule of reason
Commission Regulation No. 4/2011 on Price Fixing	Per se illegal

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There is no industry-specific infringement or defence or exemption or immunity applicable under the current ICL, except for small businesses and certain forms of cooperatives. These exceptions or exemptions can be found in article 50 of the ICL, which includes agreements or activities: (i) intended to implement any applicable laws and regulations; (ii) related to intellectual property rights, such as licence, patent, trademark, industrial product design, integrated electronic circuit, trade secret, and agreement related to the franchise; (iii) related to the application of technical standards of goods or services that do not inhibit or impede competition; (iv) related to the agency agreements that do not stipulate any resale price maintenance; (v) research cooperation agreements intended to improve the standard of life of the society at large; (vi) related to the international agreements that have been ratified by the Indonesian government; (vii) related to exports of goods or services that do not disrupt domestic needs or supply; (viii) made by and between small business undertakings; and (ix) made by and between cooperatives aimed specifically to serving their members.

It is important to note, however, the ground-breaking precedent on the *Garlic* case (2013) in its relation to the application of point (i) above, in which case the KPPU decided that the government, the Minister of Trade and the Directorate General of International Trade of the Ministry of Trade had violated article 24 on conspiracy to impede the production and market of garlic, regardless of the fact that they acted within their statutory power and did not engage in business or commercial activities. In the *Garlic* case, the Ministry of Trade used its discretion to ease up the importation licence and quota requirements for the 19 reported undertakings to import garlic to Indonesia after the garlic scarcity caused a significant increase in price at the end-consumer level. Despite the fact that the scarcity was the result of the previous government's policy on agriculture and that the price sharply decreased after the discretion applied by the Ministry of Trade, the KPPU was of the opinion that the severe scarcity and the ever-increasing price of garlic constituted a conspiracy in which the Minister of Trade and the Directorate General were involved.

Similarly to the *Garlic* case, in the *Chicken* case (2016), the KPPU decided that 12 breeders had conducted a cartel because they attended and signed a document of meeting with the Directorate General of Animal Husbandry and Animal Health of the Ministry of Agriculture of Republic of Indonesia that was considered by the KPPU as an agreement to jointly exterminate their day-old chicks thus causing an increase in chicken prices on the market. Despite the fact that the joint extermination was instructed along with a threat of sanctions from the government, the KPPU believed that the extermination was done independently by each breeder without making any agreement.

The lowest level regulation that can be categorised as the exemption in article 50 of the ICL is a ministerial-level regulation. This view

refers to KPPU decision No. 01/KPPU-M/2018 regarding the alleged violation of article 29 of the ICL related to failure to notify shares acquisition of PT Axioo International Indonesia by PT Erajaya Swasembada Tbk (*Erajaya* case) (2018). Under the *Erajaya* case, the KPPU discharged PT Erajaya Swasembada Tbk from all charges considering the transaction was conducted in order to comply with the requirement of the Ministry of Trade Regulation. Despite the fact that the *Erajaya* case was not a cartel precedent, it shows the undertakings how KPPU implementing regulations that are exempt from the ICL.

Business will see that the current KPPU commissioners are willing to widen the laws and regulation's scope of the exemption. However, there is still no express limitation in the ICL on this. The precedent in the *Garlic* and the *Chicken* cases serves as indication that the KPPU will not apply point (i) above as an absolute exception or exemption. Thus, it is advisable for undertakings to maintain awareness even if they are running their business based on the government's and the public's interests.

Application of the law

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

The nature of the law applies to individuals as well as to corporations. The ICL refers to an undertaking as any individual or business enterprise, whether incorporated or otherwise, that is established and domiciled or conducts activities within the territory of the Republic of Indonesia, whether individually or jointly through an agreement, in the form of various operations in the economic sector.

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 ICL generally applies to any conduct occurring outside Indonesia if one or more of the defendants is established and is domiciled or has directly or indirectly subsidiary in Indonesia. If either condition is met, the KPPU may pursue the case when it considers that its action to enforce the ICL would be effective, for example, by enforcing its decision against local subsidiaries or affiliates of the foreign companies.

Further on this issue, there has been a KPPU precedent applying the extraterritorial doctrine in its investigation over violation of the ICL. This doctrine was raised in KPPU Decision No. 7/2007 regarding the cross-ownership of Temasek and other cases. Referring to the same case decision, the KPPU further stated that according to the national and international law, the competition law might be enforced extraterritorially as long as the requirements in effect doctrine, implementation doctrine, or the single economic entity doctrine are satisfied.

Although not from cartel precedents, the KPPU consistently applies this doctrine in its merger control. The merger control legislation (Government Regulation No. 57 of 2010 on the Mergers, Consolidations and Acquisitions of Shares that May Result in Monopolistic Practices or Unfair Business Competition, and Commission Regulation No. 2 of 2013 on the Guidelines of Mergers, Consolidations and Acquisition) clearly stipulates that the KPPU has jurisdiction to control any merger affecting competitive conditions in the Indonesian (domestic) market by taking into account the effectiveness of such enforcement. To date, there have been numerous foreign mergers notified to the KPPU, including Bayer/Monsanto, Mitsui/Maersk Tankers, Nissan/Mitsubishi, Nokia Corporation/Alcatel Lucent, Foxconn Technology/Sharp Corporation, and Airbus Prosky SAS/Navtech Inc. Those transactions took place outside the Indonesian jurisdiction, yet since they affected the domestic market, the KPPU used its powers to assess the transactions.

Export cartels

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

The tendency of KPPU is only to have concerns over the Indonesian market. Therefore, the geographical market covered by the KPPU will not go beyond Indonesian jurisdiction.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Overall, there are three stages in KPPU case-handling procedures: the pre-investigation; investigation; and formal examination or a formal hearing according to KPPU Regulation 1/2019.

A pre-investigation by the KPPU can be triggered on its own initiative or by a complaint filed by undertakings, consumers, other entities or by other government agencies. In the pre-investigation stage, the KPPU examining investigators will assess whether the complaint report is complete, clear, and falls within the KPPU's jurisdiction If the KPPU finds any reasonable finding that there has been a violation during the pre-investigation stage, it will start a formal investigation. This formal investigation aims to gather sufficient evidence, clarity, and completeness of the alleged violation, and whether the investigation can be further proceeded to the examination stage, in which the hearing will take place.

Once the evidence and information is deemed to fulfil the requirements, the KPPU will proceed to the formal examination process consisting of two phases: preliminary examination, which will last for a maximum 30 working days; and further examination, which will last for 60 working days and can be extended for a maximum of 30 working days. The KPPU must make its decision within 30 working days after the formal examination is completed. Note that there is a brief bridging phase between the investigation and the formal examination, namely a filing phase, this is the phase of transforming the investigation report to be an allegation report. During the formal examination, the KPPU will generally summon the defendants to present before a hearing in which the KPPU investigatory team or the plaintiffs will present the case or indictment. Afterwards, the KPPU will allow the defendants an opportunity to prepare and submit their response to the allegation. During the further examination, both the KPPU investigator or plaintiffs and the defendants will be given an opportunity to present their witnesses and submit evidence. Since April 2010, hearings in the KPPU have been open to the public. The behavioural remedy is available during the preliminary examination only.

Investigative powers of the authorities

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

Among its powers, the KPPU has the authority to receive complaints, summon parties and witnesses, make conclusions from investigations and hearings, request statements or clarification from related government institutions, determine and stipulate the existence of losses on undertakings or society, and impose administrative sanctions. Currently, however, the KPPU has no power to conduct searches and seizures, dawn raids or other commanding investigative powers. The investigative powers are set out in broad wording such as 'conduct research', 'conduct investigations', 'obtain, examine and/or evaluate' letters, documents or other instruments of evidence. Note that the KPPU has no power to conduct searches and seizures, dawn raids or other commanding investigative powers.

The KPPU Regulation 1/2019 further elaborates the task and authority of the KPPU, through its various function, in a case proceeding below:

- In the pre-investigation and investigation stages, the KPPU investigators handling the case is called the KPPU examining investigators and they are authorised to:
  - summon the claimant, reported parties, witnesses, experts;
  - perform an on-site investigation;
  - obtain letters and/or documents related to the case;
  - gather data/information related to assets and sales values of the reported parties; and
  - assess the statements, letters, and/or documents and on-site investigation as well.
- In the filing, preliminary and further examination stages, the KPPU investigators handling the case is called the KPPU prosecuting investigators and they are authorised to:
  - review the investigation result report made by the KPPU examining investigators to be further reflected in an allegation report;
  - read the allegation report;
  - propose any evidences, witnesses, experts in the hearing;
  - examine the authenticity of letters and/or documents in the hearing;
  - prove the allegation in a hearing, which may involve the summoning of factual witnesses and experts and other related parties that are considered to have knowledge of the violation, and receive evidence; and
  - submit a conclusion of the examination process.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The latest memorandum of understanding (MoU) for cooperation was signed at the end of August 2018 between the Competition & Consumer Commission of Singapore (CCCS) and the KPPU. Based on the signed MoU, the CCCS and the KPPU are cooperating on competition enforcement and policy. The KPPU also has a common MoU with the Japan Fair Trade Commission (JFTC) and an agreement with the Korea Fair Trade Commission (KFTC), the foundation of KPPU cooperation with Japan and South Korea respectively. A bilateral discussion between the KPPU and Australian Competition and Consumer Commission (ACCC) has been initiated and reached a common interest to form a cooperation initiative.

The inter-agency cooperation is not limited to any bilateral agreement or MoU between the KPPU and other foreign authorities, but sporadic cooperation with other competition authorities also takes place on an ad hoc basis. The most visible cooperation is the frequent workshops held by the KPPU in cooperation with various commissions and international bodies, such as with ACCC, JFTC, the Federal Trade Commission (FTC) and the Japan International Cooperation Agency.

Interplay between jurisdictions

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

To date, the KPPU has not conducted any multi-jurisdictional investigations, although there have been cases investigated by the KPPU that involved undertakings domiciled in neighbouring countries.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

A proceeding for cartel is the same as for other violations (eg, abuse of dominant position or merger control failure). All proceedings are heard and determined by a panel that consists of at least three commissioners of the KPPU, called the Commission Assembly that has the following responsibilities in the preliminary and further examination stages:

- to determine the preliminary examination schedule;
- to open and lead the hearing;
- to provide the opportunity to the defendant(ies) to engage in behavioural remedy during the preliminary examination stage;
- to prepare the preliminary examination result report;
- to summon the defendant, factual witnesses and experts, and other related parties that are considered to have knowledge of the violation;
- to submit evidence and conclusion;
- to perform an on-site examination;
- to decide the decision of a case; and
- to impose any administrative sanctions against the undertaking.

A registrar, which usually consists of a few individuals, and a secretary will assist the Commission Assembly in dealing with administrative matters for the hearing.

Burden of proof

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

In principle, the burden of proof rests on the party claiming a breach of the ICL, which is the KPPU if the case is initiated by the KPPU or if it is initiated by a complaint from the third party without seeking any damages. Alternatively, it rests on the plaintiffs if the complainants do seek compensatory damages.

Circumstantial evidence

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

In several cartel cases, undertakings were found guilty based on circumstantial evidence in proceedings brought by the KPPU. In the *Skutik* case, the KPPU established cartel infringement by proving communication and economic evidence. Although there is controversy on the use of circumstantial evidence, the recent Supreme Court decision in the *Tyre* case affirms the validity of using such evidence.

The KPPU settled this circumstantial debate in their KPPU Regulation 1/2019 by acknowledging the use of circumstantial evidence.

Appeal process

16 | What is the appeal process?

See question 3. There is a change of deadline to file an appeal against the KPPU's decision to the district court. Under SC Regulation 3/2019, a defendant may file an appeal against the KPPU's decision to the district court within 14 business days as of:

- the date of the hearing of the KPPU's decision, if the defendant attended the hearing; or
- the date of the notification of the KPPU's decision, if the defendant did not attend the hearing.

The district court has 30 working days to decide on the appeal. Both the KPPU and the defendants may appeal against a district court decision to the supreme court. If the KPPU or the defendants do not accept the district court decision, the supreme court has 30 days to make a decision.

SANCTIONS

Criminal sanctions

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

See question 2. The KPPU is a state auxiliary body, thus has no authority to investigate a criminal case. The criminal sanctions can only be imposed under two conditions:

- when an undertaking or individual obstructs a KPPU investigation or examination; and
- when a defendant does not comply with a final and binding decision.

In either case, a criminal investigation may be initiated, and the undertaking or individual may be subject to fines and imprisonment. In the case of a criminal investigation, the Criminal Procedural Law will apply, and the investigation will be conducted by a police investigator and the prosecution will be carried out by the public prosecutor. The criminal judge will decide the case.

As regulated under article 48 of the ICL, penalties that may be imposed in a criminal proceeding to a company or an individual are as follows:

- for market allocation and cartel, a fine between 25 billion rupiahs up to 100 billion rupiahs, or a maximum of six-month imprisonment;
- for price fixing, a fine between 5 billion rupiahs up to 25 billion rupiahs, or a maximum of five-month imprisonment; and
- for obstruction of an investigation, a fine between 1 billion rupiahs up to 5 billion rupiahs, or a maximum of three-month imprisonment.

There has been a final and binding decision that ordered the defendants to pay damages to the reporting undertaking owing to use of the competitor's confidential information for the benefit of the defendant at the expense of the reporting undertaking. However, the damages have not yet been paid yet. To date, the KPPU has not executed any legal action against such final and binding decision. There has been no precedent on criminal case sanctions.

Civil and administrative sanctions

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

Article 1365 of the Indonesian Civil Code sets that a party who commits an illegal act that causes damages to another party must provide compensation. However, as damages must have been proven, a civil lawsuit can only be filed after the KPPU's decision stipulating a breach of the ICL has acquired permanent legal force. The types of damages that may be subject to indemnity under a civil procedure, however, is limited to material and immaterial losses. The indemnity for material losses includes money, while the indemnity for immaterial losses varies from restitution to the stipulation of the illegal act.

The ICL only provides the KPPU with an administrative power in adjudicating a competition case, where the KPPU is entitled to:

- annul an agreement, whether completely or partially;
- impose a minimum fine of 1 billion rupiahs up to a maximum of 25 billion rupiahs on each undertaking; and
- order an undertaking to compensate for the damages arising from their anticompetitive or unfair practice.

In rare cases, the KPPU may also order the defendants to lower the prices of their products or refrain from or commit to performing certain activities or practices. For example, in one cartel case that involved two producers of anti-hypertension medicines, the KPPU ordered the defendants to lower the selling prices of their products by 65 per cent and 60 per cent respectively and to reduce the marketing costs of the products by 60 per cent. Subsequently, the Supreme Court has upheld the decision of the district court that overturned the KPPU's decision on this case.

Guidelines for sanction levels

19 | 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?

KPPU Regulation No. 4 of 2009 on Guideline to Implement Article 47 of Law No. 5 of 1999 (Sanction Guideline) sets that the basic sanction is proportionate to sales in the concerned market in the year before the violation occurred. In a bid-rigging case, the basis of the sanction is the price of the bid winner. The proportion level is determined by considering the following factors:

- the size of the company;
- the type of the violation;
- the combined market shares of the defendants;
- the geographical scope of the violation; and
- whether the anticompetitive agreement has been effectively executed or implemented.

There will be an additional portion to the basic amount of the fine if the KPPU finds that the defendant is a recidivist or does not cooperate during the investigation, or is the ringleader. The final fines imposed on an undertaking in any circumstances may not exceed IDR25 billion or 10 per cent of the total turnover of the current year of the examination. Under the ICL, if the undertaking's 10 per cent turnover exceeds 25 billion rupiahs, the end fines shall be 25 billion rupiahs. The *Tyre* cartel case (2014) replicating such approach of which KPPU was of opinion that each undertaking's 10 per cent turnover way exceeding 25 billion rupiahs thus each undertaking was fined 25 billion rupiahs.

In the *Liquefied Petroleum Gas* (LPG) cartel case (2014) involving 17 undertakings, the KPPU increased the fines against 10 of 17 defendants by 20 per cent for denying their involvement in a cartel, yet then reduced the fines by 10 per cent owing to their cooperation and good deed. One of the defendants' fine was increased by 20 per cent for not attending the hearing, by 10 per cent for not providing any document, and by 20 per cent owing to denial of the violation. Still from the same cartel case, six defendants' fine was reduced by 10 per cent owing to their cooperativeness and good behaviour and by another 80 per cent for admitting the violation.

Comparing both precedents, unlike in LPG cartel case, in the *Tyre* cartel the KPPU disregarded any reduction or additional factors of the fine since it was already sufficient for KPPU to determine the 25 billion rupiahs fine for each undertaking merely because the 10 per cent total turnover of each undertaking exceeded 25 billion rupiahs. Nevertheless, from both precedents, it appears that the KPPU appreciates any type of cooperation but discourages anything against such. This guideline, however, is not binding on the court in handling the appeal process.

Compliance programmes

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

There is no mention of a compliance programme as a reason for fine reduction.

Director disqualification

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

There is no provision in ICL prohibiting any individual involved in cartel activity from serving as corporate directors or officers.

Debarment

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

Bid-rigging sanctions are not automatically followed by imposing debarment from any tender (eg, KPPU Decision No. 18/L/2014 regarding procurement of high-density polyethylene floating fish nets in Pokja Area 7 of Government Procurement Service Unit of Riau Islands (2012) and KPPU Decision No. 19/L/2014 regarding procurement of revitalisation work of a youth centre in West Nusa Tenggara (2011)). Yet in some cases, a one- to two-year debarment, be it from tenders held by a single government institution in a certain area only or from those held by any government institution across Indonesia, can also be found. The most recent precedent is the prohibition of several undertakings in the construction service from participating in any government procurement for two years owing to their horizontal bid rigging in the procurement of construction work of the Regent Building in South Labuhanbatu Regency, North Sumatera (2015), which violated article 22 of the ICL on bid rigging.

Parallel proceedings

23 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?

With reference to the applicable regulations and types of sanction that can be imposed, the liability arising from cartel may be in the form of administrative, civil and criminal liabilities (for administrative, civil and criminal,and administrative liabilities (see questions 17 and 18), take note on the possible time of each proceeding). Criminal sanctions can be pursued in respect of the same conduct if the defendants do not comply with the final and binding decision (ie, do not refrain from the anticompetitive behaviour even though the decision has been final and binding) or if the defendant committed any obstruction of justice during the investigation or examination. There is no precedent with regard to the enforcement of criminal investigation or sanctions.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 1(3) of KPPU Regulation 1/2019 defines the reporting party as any individual who submits the report to the KPPU on any possible alleged violation of the ICL, either with or without a damage compensation request. However, unlike previous regulation that quite extensively stipulated the case-handling procedure for a report with damage request, the KPPU Regulation 1/2019 does not address this specifically. Thus, it remains to be seen how the KPPU may interpret and act against the report with compensation claim request. Nevertheless, once the KPPU's decision is final and binding, it is possible for any party that claims to suffer any damage from such anticompetitive conduct or agreement to file a damage claim request to the relevant district court. This kind of law suit, however, is stipulated under a different law from ICL.

Class actions

25 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 ICL does not mention class action. Theoretically, however, any party, in a civil proceeding, can submit a class action petition to the relevant first instance or district court by using the final and binding KPPU decision as one of the legal bases for seeking damages.

COOPERATING PARTIES

Immunity

26 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?

There is no immunity programme under the current ICL. Nevertheless, in the *Minahasa Road Tender* case (2014), the KPPU clearly adopted the leniency programme by mirroring a similar act performed by the FTC and the JFTC by giving incentives for whistle-blowers in the form of total cancellation of the fine or fine reduction. The KPPU, in this case, reduced the fine with an additional 50 per cent for PT Ericko Grant Dinarto as the defendant for being the whistle-blower in addition to the 10 per cent fine reduction for cooperativeness during the examination. The 10 per cent fine reduction was also applied to the other three undertakings as reported parties in this case.

Subsequent cooperating parties

27 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?

As explained in question 26, there is no formal leniency programme under the current ICL.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Not applicable.

Approaching the authorities

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

Not applicable.

Cooperation

30 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?

Not applicable.

Confidentiality

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

Under the ICL, the identity of a reporting party who makes a report on an alleged violation of the ICL shall be kept confidential by the KPPU. Regarding the information disclosed to the KPPU, under the ICL, it is required to maintain the confidentiality of information obtained from undertakings that are considered as 'company's confidential information'. In certain cases, the KPPU has extended the definition of this term to also include trade secrets. Furthermore, the KPPU Regulation 1/2019 has stipulated that, on request, the KPPU may declare and treat particular documents that fall within certain criteria as confidential and will not disclose them during examination.

Settlements

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

Not applicable.

Corporate defendant and employees

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

Not applicable.

Dealing with the enforcement agency

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

Not applicable.

DEFENDING A CASE

Disclosure

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

According to the KPPU Regulation 1/2019, the Commission Assembly of an ongoing case shall provide the opportunity for each defendant to view and obtain a copy of all submitted or acquired dossier of the case (information and evidence, including affidavits and minutes of investigations and examinations, during the investigation and examination phases). This process may be conducted in a separate session for each defendant. However, the Commission Council shall exempt the dossier disclosure of the case submitted by the defendant that is considered confidential. The defendant may submit such confidentiality status of the dossier to the Commission Council and the Commission Council shall further determine whether it shall grant such a proposal.

Representing employees

36 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, counsel may represent employees as well as the corporation under investigation so long as there is no conflict of interest for such representation. When it becomes obvious that there would be a different interest between the employee and the company, it is advisable to seek independent legal advice.

Multiple corporate defendants

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

Yes, counsel may represent multiple corporate defendants so long as there is no conflict of interest in such representation.

Payment of penalties and legal costs

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

There is no provision under the ICL that prohibits a company from paying the legal costs or penalties imposed on its employees.

Taxes

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

The ICL does not specify whether pecuniary penalties or private damages awards are tax-deductible.

International double jeopardy

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

There has been no precedent to date on this issue. However, prior to conducting any international investigation or any investigation that includes foreign undertakings as a part of the investigation, the KPPU shall calculate the effectiveness of such investigation. It is also important to note that the KPPU is more concerned about the impact on Indonesia's market (eg, whether or not such alleged agreements have an adverse effect on the market). Thus the application of international double jeopardy would depend heavily on the KPPU's policy at the time the investigation took place and the specific case and its possible impact on the Indonesian market.

Getting the fine down

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

As mentioned in question 19, the total amount of fines may be lower than the basic level if the defendant:

- stops the violation immediately after the KPPU has opened an investigation;
- proves that the violation has been unintentionally committed or made under pressure;

- proves that the involvement is minimal;
- acts cooperatively during the investigation or examination;
- argues that the conduct is to implement the applicable laws and regulations or is based on approval from the competent government authorities; and
- makes a clear statement of his or her willingness to change his or her future practice so as to comply with the ICL.

UPDATE AND TRENDS

Recent cases

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

One of the major developments in cartel enforcement in the past year was brought by the Supreme Court decision on the civil review in the *Chicken* case. The civil review itself is a breakthrough since it was the first-ever civil review request filed by the KPPU. Further to civil review conducted by the KPPU, in July 2019, the Supreme Court upheld the district court decision. The Supreme Court considered that written and verbal instruction from a high-ranking official in the Directorate General of Livestock can be considered as a government policy. Thus, the Supreme Court viewed that actions made by undertakings pertaining to instruction from government officials are exempt from the provisions in the ICL.

Regime reviews and modifications

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

During this year, the ICL has been in the process of being amended. However, the amendment is now suspended owing to the inauguration of the new Indonesian House of Representatives.

ASSEGAF HAMZAH & PARTNERS

HMBC Rikrik Rizkiyana
rikrik.rizkiyana@ahp.id

Farid Fauzi Nasution
farid.nasution@ahp.id

Albert Boy Situmorang
albert.situmorang@ahp.id

Anastasia PR Daniyati
anastasia.pritahayu@ahp.id

Capital Place, Level 36 & 37
Jalan Jenderal Gatot Subroto Kav. 18
Jakarta 12710
Indonesia
Tel: +62 21 2555 7800
Fax: +62 21 2555 7899
www.ahp.co.id

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, while the Public Prosecutors' Office is in charge of criminal procedures after the JFTC files an accusation.

The JFTC is the investigator and prosecutor with regard to offences under the Antimonopoly Law. The JFTC consists of a chair and four commissioners. The General-Secretariat, headed by the secretary-general, is attached to the JFTC for the operation of its business, and consists of the Secretariat, the Investigation Bureau and the Economic Affairs Bureau (including the Trade Practices Department). In general, the Investigation Bureau is in charge of investigations and issuance of orders under the Antimonopoly Law.

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 the regime of cartel regulations will be changed when the amendment becomes effective. The effective date will be determined by the government ordinance and the date shall be within 18 months of 26 June 2019 when the amendment was promulgated. See question 43 for more information on the amendment.

Apart from the foregoing, no fundamental legislative amendment to the substantive law under the Antimonopoly Law or changes in the JFTC's enforcement thereunder with regard to cartels have been made since 2011, unlike those made in recent years to strengthen the power of the JFTC.

Having said that, amendment to the Antimonopoly Law abolishing the JFTC's administrative proceedings became effective as of 1 April 2015. Under the current Antimonopoly Law, JFTC orders are directly subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedure laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The substantial evidence rule which is applicable to actions for quashing JFTC decisions before the Tokyo High Court and in which the court is bound by the JFTC's findings was abolished. Namely, the Tokyo District Court is not bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws. See question 16 regarding the current system with regard to the appeal process of JFTC orders.

Furthermore, the commitment procedure, the system to resolve alleged violations of Antimonopoly Law voluntarily by consent of a defendant company, 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 prohibits only conduct that substantially restrains competition in the relevant market, the JFTC seems to have enforced the Antimonopoly Law as though the law prescribes that such cartels are illegal per se, and the JFTC has not accepted the arguments of defendant companies.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There is no industry-specific conduct that constitutes an unreasonable restraint of trade (cartels) under the Antimonopoly Law.

Certain activities by small businesses, such as cooperatives qualified under the applicable laws, are exempted from the application of the Antimonopoly Law under article 24. Certain other joint activities among competitors are exempted from the application of the Antimonopoly Law by the provisions of other individual business laws over particular industries (such as the Road Traffic Act, the Maritime Traffic Act, the Insurances Act and the Air Aviation Act). In the foreign trade area, certain export cartels that meet the requirements provided in the Export and Import Act are also permitted to some extent.

The JFTC made public its understanding that unless the Antimonopoly Law or individual laws contain a relevant provision for exemption from the Antimonopoly Law, the Antimonopoly Law may be applied to any form of conduct that meets the conditions that would establish it as a violation of the Antimonopoly Law, even if it arose as a result of an approval, a recommendation, an instruction or administrative guidance by government agencies.

Application of the law

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

The Antimonopoly Law applies to the conduct of 'entrepreneurs', which includes both corporations and individuals. The trade association is also subject to the prohibition under the Antimonopoly Law.

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 JFTC's jurisdiction. However, the JFTC considers that it has jurisdiction over conduct that has an effect on the Japanese market, irrespective of where such activities are carried out. Therefore, the JFTC may have jurisdiction over cartel cases involving the Japanese market. With regard to the procedures to be followed under the Antimonopoly Law, the JFTC may use the public service for its inquiries or orders to defendant corporations outside Japan that do not have a presence in Japan. The provisions therefor 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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

When the JFTC discovers an alleged violation of the Antimonopoly Law in the form of an unreasonable restraint of trade by any means (such as through a complaint by a third party, information from an employee of the suspected corporation or an application under the leniency programme), the JFTC first conducts a feasibility study for the investigation, and then determines whether it will conduct an investigation and, if it determines to investigate, whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law.

Investigative powers of the authorities

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

Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Antimonopoly Law as part of the compulsory investigation of criminal offences.

The JFTC has made public that it will initiate a criminal investigation under the Antimonopoly Law where there is a considerable reason to suspect a malicious and material violation of the Antimonopoly Law, including cases involving price fixing, restriction of supply, market division and bid rigging, or where there is an entrepreneur or industry that is repeatedly violating the Antimonopoly Law or an entrepreneur that is not complying with a cease-and-desist order and it is difficult to correct such conduct using the JFTC's administrative measures under the Antimonopoly Law. Where, as the result of the investigation, the JFTC is convinced that a criminal offence has taken place, it will file a criminal accusation with the Public Prosecutors' Office.

Administrative investigation by the JFTC

The JFTC may, on a compulsory basis, if necessary, during the conducting of an investigation of a case:

- order persons involved in a case or any other relevant person to appear at a designated time and place to testify or to produce documentary evidence;
- order experts to appear and give expert testimony;
- order persons to submit account books, documents or other material, and retain these materials (ie, production orders); and
- enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of business operation and property, account books, documents and other material (ie, dawn raid).

The JFTC may also conduct investigations on a voluntary basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid-rigging case. Having said that, a dawn raid requires the consent and presence of the manager of a corporation, who may approve the JFTC's entry onto the premises on behalf of the corporation, with regard to entry onto the premises of the suspected company

for the dawn raid. The presence of a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct the dawn raid.

The JFTC removes originals of documents and materials held at the offices of companies during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntary basis. The Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of such materials, unless doing so would impede the investigation.

It is usual for the JFTC to question employees with regard to the subject matter of the investigation at the same time as the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of a review of materials and collection of information from other persons, to request such persons to respond to questions. The questioning is usually conducted by the JFTC on a voluntary basis with the consent of an individual to be questioned.

Further, the JFTC usually issues a report order requesting certain information, such as the types of product and the sales thereof, and a production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that information, documents or both be submitted on a voluntary basis.

The Antimonopoly Law provides the criminal penalties (ie, imprisonment for up to one year or a fine of up to ¥3 million) for any individual that refuses, obstructs or evades inspection as provided in the Antimonopoly Law. Corporations can also be subject to a fine of up to ¥3 million.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes. The legal basis of the cooperation is as follows.

In 1999, Japan and the US signed an Agreement Concerning Co-operation on Anticompetitive Activities, providing for coordination and cooperation with respect to antitrust enforcement activities. Under the Agreement, the competition authorities of each country are mutually bound to give notification of enforcement activities that may affect the other's interests.

Japan also entered into similar agreements with the European Commission in 2003 and with Canada in 2005.

Moreover, Japan signed economic partnership agreements with various countries, such as Chile, Malaysia, Mexico, the Philippines, Singapore and Thailand.

The JFTC has concluded memoranda on cooperation with competition authorities such as the Philippines (August 2013), Vietnam (August 2013), Brazil (April 2014) and Korea (July 2014).

The JFTC may exchange information with other competition authorities to some extent. See question 12.

Interplay between jurisdictions

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

If the JFTC, as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Antimonopoly Law and that criminal sanctions are appropriate, it files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Antimonopoly Law will be imposed on the corporation and individuals through the criminal procedures under the applicable laws in the same manner as for other criminal cases.

If the JFTC conducts an administrative investigation and issues a cease-and-desist order or a payment order for the administrative surcharge, or both, a defendant corporation that has an objection against such administrative orders may file a complaint, within six months after the service of the order, with the Tokyo District Court to quash such JFTC order, and the Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court and then, an appeal against a judgment rendered by the Tokyo High Court to the Supreme Court can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled. It is an issue whether the JFTC, having issued an order, has standing (ie, to file an action to quash its own order). In judicial proceedings to quash JFTC orders, the JFTC or a plaintiff must prove that the alleged facts are 'highly probable'.

Prior to the amendment to the Antimonopoly Law which became effective as of 1 April 2015, complaints to quash JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC and the decisions rendered through the administrative proceedings can be appealed to the Tokyo High Court and then to the Supreme Court. JFTC orders, the relevant advance notice of which was rendered prior to 1 April 2015, shall still be subject to the administrative proceedings of JFTC pursuant to the Antimonopoly Law before the amendment.

Complaints to quash JFTC orders are examined by a panel of three or five court judges.

Under the proceedings before the aforementioned 2015 amendment, the Antimonopoly Law adopted the 'substantial evidence rule' in which the judicial court is bound by the JFTC's findings of fact made through the administrative proceedings as long as they are supported by substantial evidence and a defendant company may not submit new evidence to the judicial court proceedings in principle. Since the substantial evidence rule was abolished by the amendment 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

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

In a criminal case, the criminal procedures for a cartel are same as those for other crimes, and the burden of proof lies with the public prosecutors, who must prove the fact that constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), or civil proceedings involving claims for injunctions or damages, or both, a relatively relaxed standard of proof will apply. In these proceedings, the party with the burden of proof must prove that the alleged facts are 'highly probable'.

Circumstantial evidence

15 | 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

16 | What is the appeal process?

See question 13.

SANCTIONS

Criminal sanctions

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

For an unreasonable restraint of trade, the Antimonopoly Law stipulates criminal penalties including a fine of up to ¥500 million for a corporation; and servitude (labour in a prison) for up to five years, a fine of up to ¥5 million, or both for an individual (such as an employee in charge of a cartel).

Although criminal penalties have been continuously imposed from the 1990s, ever since the price-fixing case involving the petroleum business in 1984, the number of criminal cases has been small. In February 2016, the JFTC filed a criminal accusation on bid rigging concerning the construction to restore roads after the East Japan Earthquake. In March 2018, the JFTC filed a criminal accusation on bid rigging among Japanese major construction companies concerning the construction of a maglev railway between Tokyo and Nagoya.

The JFTC made public its reasons for filing an accusation in the given case, which included the effects of the given cartel on the national economy and knowledge of the participants to the bid rigging and to the violation of the Antimonopoly Law. To our knowledge, the judicial court, regarding individuals, has decided on suspended sentences where decisions involved imprisonment. We do not have statistics for sentences regarding criminal cases involving cartel cases.

Civil and administrative sanctions

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

Administrative sanctions – JFTC enforcement

If a violation of the Antimonopoly Law is supported by evidence, the JFTC may order the entrepreneur that committed the violation to cease and desist from such act and to take any other measures necessary to eliminate such act. The statutory limitation for the JFTC to issue cease-and-desist orders under the current Antimonopoly Law is five years after the conduct ceased. Under the 2019 Amendment, 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.

The rate of administrative surcharge under the current Antimonopoly Law is as follows:

- Principal
  - manufacturers, etc: 10 per cent;
  - retailers: 3 per cent; and
  - wholesalers: 2 per cent.
- Small and medium-sized corporations
  - manufacturers, etc: 4 per cent;
  - retailers: 1.2 per cent; and
  - wholesalers: 1 per cent.

After the 2019 Amendment becomes effective, the rate of administrative surcharge under the current Antimonopoly Law will be as follows:

- principal: 10 per cent; and
- small and medium-sized corporations: 4 per cent (the scope of Small and medium-sized corporations will be limited.)

An administrative surcharge at a rate of 150 per cent of the respective rate set out above is imposed on those entrepreneurs, in general, that have repeated conduct in violation of the Antimonopoly Law and that have been subject to an administrative surcharge payment order within the past 10 years. On the other hand, the administrative surcharge rate shall be decreased by 20 per cent in certain circumstances (such as withdrawal from the cartel at an early stage) under the current Antimonopoly Law, which will be abolished under the 2019 Amendment.

An adjustment will be made through the system that, if both an administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates is increased by 50 per cent if a corporation planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law; requested another corporation to act in violation of the Antimonopoly Law; or prevented other corporations from ceasing such conduct. Further, if the corporation that played a leading role in the conduct constituting an unreasonable restraint of trade is a corporation that has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the Antimonopoly Law provides that the administrative surcharge be calculated at a rate double that of the applicable surcharge. Under the 2019 Amendment, such rate for bid leader will be applied to the defendant company which obstructs the JFTC investigations (eg, concealment and the disguise the evidence) by the defendant. See question 43 for more details.

The number of defendant companies to which the JFTC has imposed administrative surcharge orders was 128 in the 2014 fiscal year, 31 in the 2015 fiscal year, 32 in the 2016 fiscal year, 32 in the 2017

fiscal year and 18 in the 2018 fiscal year. The total amount of administrative surcharge paid in each year was approximately ¥17 billion, ¥8.5 billion, ¥9.1 billion, ¥1.9 billion and ¥0.3 billion respectively.

Private actions – private enforcement

Although private enforcement of the Antimonopoly Law through civil damage suits by private plaintiffs is not as common in Japan as it is in the United States, a party (such as a competitor or a customer) that suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on the provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (strict liability) has been filed, the court is required, without delay, to request the opinion of the JFTC regarding the amount of damages caused by such violations.

Note that a legally interested person such as a plaintiff may review and reproduce the case records of administrative proceedings by the JFTC and those of the judicial court proceedings where the validity of JFTC's orders are challenged by entrepreneurs. Further, the JFTC made a public announcement in 1991 that it will provide plaintiffs with access to certain investigation records that the JFTC collects during its investigation through a request by the court if a damage suit is filed in the court, except for certain information such as trade secrets and privacy information. Through these procedures, documents protected by attorney–client privilege in other jurisdictions may be produced during judicial review in Japan.

Civil actions for an injunction under article 24 of the Antimonopoly Law are not available for the unreasonable restraint of trade.

Guidelines for sanction levels

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

No sentencing guidelines are publicly available for Antimonopoly Law violations or for other crimes. The criminal penalties (servitude and fines) seem to be determined based on the scale (including size of the business and market, number and levels of participants) or effects (effects of the conduct to the business and market), the duration and maliciousness of the conduct (including whether the participant was ringleader or not) in violation of the Antimonopoly Law, similar to other criminal cases involving the violation of economic illegal conduct.

Compliance programmes

20 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 at this moment and the 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

21 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 corporate director if they are sentenced to imprisonment or severer penalty and have not completed the execution of the sentence or the sentence still applies to them (excluding individuals for whom the execution of the sentence is suspended).

Debarment

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

Each government agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, the business of many corporations subject to investigation by the JFTC on the suspension of a cartel, or to which the JFTC's orders were rendered, was suspended, and such corporations were restricted from participating in bids presided over by the government agencies. The time period for the suspension seems to differ for the government agencies.

Parallel proceedings

23 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 made a public announcement that it will not file a criminal accusation against the corporation and an officer or employee of the 'first in' who has been fully cooperative with the JFTC during its 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 the officer or employee thereof are exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

Having said that, civil actions may be brought by a plaintiff to the court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed and whether administrative or criminal investigations are ongoing.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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

Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (ie, strict liability) has been filed, the court may, without delay, request the opinion of the JFTC regarding the amount of damages caused by such violations. Note that no compensation for punitive damages or triple damages is allowed. An indirect purchaser may file an action. However, the damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff alleging the defendant's violation of the Antimonopoly Law bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- 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 is within the scope of the damages.

In a suit for indemnification of damages or a counterclaim under the provisions of article 25, the Antimonopoly Law does not allow the defendant to deny its negligence or wilfulness for the violation of the Antimonopoly Law.

See question 18 for more information about private damage claims.

Class actions

25 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.

COOPERATING PARTIES

Immunity

26 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 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 JFTC, and ceases such violation before the initiation of an investigation, immunity from or a reduction in the administrative surcharge payment shall be applied to such entrepreneurs as follows:
  - first applicant filed before the initiation of an investigation – total immunity;
  - second applicant filed before the initiation of an investigation – 50 per cent deducted;
  - third through fifth applicant filed before the initiation of an investigation – 30 per cent deducted; and
  - any applicant up to three applicants filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if the total number of applicants (including those before the dawn raid) is five or less. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

The corporation first in is totally exempt from the administrative surcharge. The JFTC made a public announcement that it will not file a criminal accusation against the first-in corporation, officer or employee thereof to cooperate. Because the JFTC has the exclusive right to file a criminal accusation with regard to the violation of the Antimonopoly Law, and the Public Prosecutors' Office is highly likely to respect such a decision by the JFTC, in practice, this means that the first-in corporation and the officer or employee thereof is exempted from criminal sanctions. The suspension of transactions, which is customarily ordered by the relevant public offices (such as the ministries and local government authorities) with which the suspected corporation has business may be shortened. Having said that, the corporation cannot be discharged of civil liability.

After the 2019 Amendment, the JFTC determines the rate of reduction taking account of the degree of the cooperation by the applicants, while the current leniency program 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 will be changed as follows:

Timing of application	Orders of application	Ratio of immunity/ reduction due to the application orders	Ratio of reduction due to the degree of cooperation with JFTC investigation
Before dawn raid	1st	100 per cent	N/A
	2nd	20 per cent	Up to 40 per cent
	3rd through 5th	10 per cent	
	6th or after	5 per cent	
After dawn raid	Up to three companies (*)	10 per cent	Up to 20 per cent
	Other than above	5 per cent	

* This rate applies to the applicants if the total number of applicants (including those before the dawn raid) is five or less.

Subsequent cooperating parties

27 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 leniency application is required to be made for each of the goods/services that are the target of the cartels, and orders of the application is therefore determined for each of such goods/services. No changes will be made in this basic approach after the 2019 Amendment.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if the total number of applicants (including those before the dawn raid) is five or less. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group. The number of leniency applicants allowed under the 2019 Amendment, see question 26.

No immunity from the criminal accusation is available for the second and subsequent applicants under the current Antimonopoly Law and the 2019 Amendment.

See questions 26 and 43 for a leniency after the 2019 Amendment.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

A leniency programme is available for subsequent parties after the first to report, as described in question 26.

The administrative surcharge is reduced by 50 per cent. While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' may be exempted from or have the administrative surcharge reduced by 100 per cent if it applies as first in for leniency for another cartel case. There is no exemption from criminal and civil liability for the second in. No amnesty-plus is available under the Antimonopoly Law.

Approaching the authorities

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

No deadline is provided under the Antimonopoly Law with regard to an application (ie, marker) with Form 1. However, the Antimonopoly Law limits the number of the applicants who may enjoy the immunity or decrease in the amount of administrative surcharges; the applicant must file as soon as possible before another applicant files an application.

With regard to the submission of detailed information and admission of conduct in violation of the Antimonopoly Law (Form 2) and evidence, the JFTC sets the deadline, usually two weeks. All or at least a substantial part of the information must be submitted to the JFTC in order for leniency to be granted.

Cooperation

30 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 the leniency (ie, all of the relevant information must be disclosed and all of the evidence available to the applicant must be produced for the JFTC). If the JFTC requires statements, oral statements by individuals are permitted. The level of cooperation is the same for all applicants (eg, the first and subsequent applicants). However, if the information or evidence is inconsistent, the JFTC will further investigate the case before granting leniency to applicants.

Cooperation with the JFTC regarding its investigation, other than those for leniency, has no legal effects.

After the 2019 Amendment, the degree of the cooperation with the JFTC investigation will be an important factor for the JFTC to determine the reduction of the administrative surcharge.

Confidentiality

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

While the Antimonopoly Law provides the confidential obligation under the Antimonopoly Law for the JFTC officials in general, there are no specific provisions with regard to the confidentiality for leniency applicants under the Antimonopoly Law.

The JFTC made a public announcement that the JFTC shall disclose the names of the applicants to which administrative surcharge is exempted or reduced and the exemption or reduced ratio thereof under the leniency program if the JFTC issues an administrative surcharge payment order for the case involving such an applicant on or after 1 June 2016. Before 31 May 2016, only when the applicants so desired the JFTC would make such information public so that the applicants may request to shorten the period for the suspension of the transactions with the relevant ministries and local governments.

The JFTC requests the applicants to keep the application and contact with the JFTC therefor in strict confidentiality, so that the JFTC may successfully investigate the case.

The JFTC allows applications with an oral explanation in certain circumstances, while an application must be filed in written form (see question 34). However, it can be difficult to go through the entire process of the leniency application with no written materials.

Settlements

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

In June 2018, the amendment to the Criminal Procedure Law introduced the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law. The system allows for a public prosecutor to enter into a plea bargaining agreement with a suspect or a defendant (an individual or corporate entity) to drop or reduce criminal charges or agree to predetermined punishment if such suspect or defendant provides certain evidence or testimony in relation to certain types of crimes, including cartels and bid riggings, of other individuals or corporate entities. Defence lawyers are required to be involved in negotiations on the terms of a plea bargaining agreement and the defence lawyers' consent to the terms of agreement must be obtained.

Apart from the foregoing, no plea bargains, settlements or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are permitted. Note that the amendment to the Antimonopoly Law 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, and if such plan is approved, the JFTC determines not to render a cease-and-desist order and administrative surcharge payment order against the petitioner; however, such commitment procedure is not apply to cartel conducts (see question 3).

Corporate defendant and employees

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

The administrative surcharge that is exempted or reduced is imposed on an entrepreneur, mainly a corporate defendant. While individuals who are first in line may be exempted from a criminal accusation, there is no such treatment for later applicants. The Antimonopoly Law does not distinguish between former employees and current employees; however, the JFTC will usually investigate the current employees of defendant corporations.

Dealing with the enforcement agency

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

The Leniency Rules make anonymous prior consultation available. A corporation contacting the JFTC for leniency will be informed of the expected order (marker) of the leniency application if it reports to the JFTC in order to apply for the leniency programme. The leniency applicant is required to file the relevant form with the JFTC by facsimile to prevent the JFTC from receiving more than one written report at the same time. The products or services that are subject to the violation, and the types of conduct in violation of the Antimonopoly Law, are required to be set forth in the form. The JFTC will inform the applicant of the priority of the first party (marker) and the deadline for submission of evidence and materials. The applicant will be required to submit the evidence and materials before the designated deadline using another form. If the JFTC so determines, certain parts of the material may be provided to the JFTC orally. Before an investigation begins, the JFTC will give priority to the corporation that submitted its initial report to request its application for the leniency programme by fax earlier than other entrepreneurs.

DEFENDING A CASE

Disclosure

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

The JFTC is required to provide a defendant company an opportunity to submit its opinion against the JFTC's allegations before the JFTC issues a cease and desist order or administrative surcharge payment order. The defendant company may, during such procedures, request the JFTC to allow the defendant company to review and/or make photocopies of the evidence that supports the JFTC's fact findings (eg, the notebook and diaries seized during the dawn raid and statements signed by the officers and others in the questioning sessions) before the closure of such process under the Antimonopoly Law and applicable rules.

Representing employees

36 | 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

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

Yes, legally speaking, unless a conflict of interest exists. However, after the leniency programme was introduced by the 2006 Amendment, it seems that multiple representation of suspected companies will raise an ethical issue.

Payment of penalties and legal costs

38 | 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

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

No. Neither criminal fines nor administrative surcharges are tax-deductible. Income tax is not imposed on the compensation awarded to plaintiff due to the conduct in violation of the Antimonopoly Law.

International double jeopardy

40 | 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

41 | 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, after the 2019 Amendment, fully cooperate with the JFTC investigation.

UPDATE AND TRENDS

Recent cases

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

There are no remarkable cases in cartels and bid-riggings area. In the fiscal year 2018, there were only domestic and small typical price cartel and bid-rigging cases.

Regime reviews and modifications

43 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 amendment to the Antimonopoly Law (2019 Amendment) that will become effective in 2019 or 2020 (ie, within 18 months of 26 June 2019) will change the regime of cartel regulations. The effective date of the 2019 Amendment has not been made public yet. Major changes in 2019 Amendment are changes in Leniency programme, calculation of administrative sanctions and the amount of the criminal penalty on obstruction of the JFTC investigation (www.jftc.go.jp/en/pressreleases/yearly-2019/June/190619071.pdf).

Leniency programme

Under the current Antimonopoly Law, the leniency programme provides the immunity and reduction only in accordance with the orders of application. After the 2019 Amendment, however, the JFTC will determine the reduction rate, taking account of both the orders of application and the degree of the cooperation by the applicants with the JFTC investigation. Moreover, the limitation of the number of applicants who may enjoy the benefit of leniency programme under the current Antimonopoly Law will be abolished.

The rate of reduction will be changed as follows:

Timing of application	Orders of application	Ratio of immunity/ reduction due to the application orders	Ratio of reduction due to the degree of cooperation with JFTC investigation
Before dawn raid	1st	100 per cent	N/A
	2nd	20 per cent	Up to 40 per cent
	3rd through 5th	10 per cent	
	6th or after	5 per cent	
After dawn raid	Up to three companies (*)	10 per cent	Up to 20 per cent
	Other than above	5 per cent	

This rate applies to the applicants if the total number of applicants (including those before the dawn raid) is five or less.
Source: JFTC Web with some revisions

Calculation of administrative surcharge

The calculation method (ie, 'sales for the goods/services of cartel' x 'cartel period' – 'immunity/reduction under the leniency programme') is the same as that under the current Antimonopoly Law. However, there are a number of changes in the basics of the calculation method such as the following so that the JFTC substantially increase the amount of the administrative surcharge to strengthen the enforcement of the Antimonopoly Law.

First, with regard to the 'cartel period', statutory limitation will be seven years (from five years under the current Antimonopoly Law) and the duration of the cartel period will be up to the most recent 10 years before the JFTC's dawn raid (from three years under the current Antimonopoly Law).

Second, with regard to the changes in 'sales for the goods/services of cartel', the unjust gains owing to the infringements (eg, the financial gains as a reward for not supplying the goods/services subject to cartels, and the sales of a subsidiary that belongs to the same group as the defendant company and received the instructions or information from the defendant company will be added as the 'sales for the goods/services of cartel'.

Third, with regard to the rates for calculation, a number of changes are to be made, for example, 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 will be abolished, the higher rate for bid leader will be applied to the defendant company that obstructs the JFTC investigations (eg, concealment and the disguise of the evidence by the defendant).

Increase the criminal penalty on the obstruction of the JFTC investigation

An individual who obstructs the investigation will be subject to the criminal penalty of ¥3 million (changed from ¥0.2 million) and the criminal penalty of ¥200 million will be newly introduced for the company to which such an individual belongs.

Protection of communication between licensed lawyers and clients

The JFTC introduced a new system where the JFTC investigators shall not access confidential communication between the licensed lawyers and client regarding legal advice on unreasonable restraint of trade (cartels), if certain conditions are met. This is not the same as but is similar to the client–attorney privilege in the US and EU – that is, the JFTC officers who are independent from the given investigation will review and determine whether the JFTC investigators should be prohibited from the access. No amendment to the Antimonopoly Law is made therefore, but the JFTC will make the guidelines public. (See www.jftc.go.jp/en/pressreleases/yearly-2019/June/190619072.pdf.)

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

Kenya

Anne Kiunuhe and Njeri Wagacha
Anjarwalla & Khanna

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Kenya

The relevant legislation in relation to cartels is:

- the Competition Act 2010 (CA) enacted by the Kenyan parliament;
- the East African Community Competition Act 2006, enacted by the East African Community (EAC); and
- the Common Market for Eastern and Southern Africa (COMESA), under the provisions of the COMESA Competition Commission (CCC) Regulations (the COMESA Regulations).

The EAC comprises the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania and the Republic of Uganda. COMESA currently comprises 21 member states including Kenya. Tunisia and Somalia are the most recent states to be admitted to the COMESA regional bloc. All of the EAC partner states (except for Tanzania) are also members of COMESA.

In addition, Kenya is a member of the African Continental Free Trade Area (AfCFTA) which entered into force on 30 May 2019. Article 4(c) of the AfCFTA Agreement states that member states shall 'cooperate on competition', as well as other areas such as investment and intellectual property rights. These issues are to be negotiated in Phase II and the draft legal texts are to be ready for adoption by the January 2021. The Protocol on Competition (along with other Phase II legal instruments) will enter into force 30 days after the deposit of the 22nd instrument of ratification (according to article 23(3)) and will be an integral part of the AfCFTA Agreement.

COMESA

On 2 April 2019, the CCC approved the COMESA Guidelines on Restrictive Business Practices, 2019 (the COMESA RBP Guidelines) prepared in accordance with the COMESA Regulations that came into force on the same date.

In April 2016, the Competition Authority of Kenya (CAK) and the CCC signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction.

The EAC

The EAC competition regime is in force and the EAC Competition Authority has commenced some nominal operations but has not started receiving or processing applications in respect of mergers, restrictive trade practices (RTPs) or cartels. This year, the EAC has been holding meetings with experts to validate the Draft EAC Competition Authority Outreach and Advocacy Strategy for the years 2019–2025.

For the purposes of this chapter, we have focused only on the CA and, where relevant, the COMESA Regulations.

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?

Kenya

Cartel investigations are conducted by the CAK, which then takes on the role of prosecuting cases of alleged infringement and imposing pecuniary penalties and awards of damages in cases where the parties agree to settle. There are also criminal sanctions under the CA. If the CAK decided to pursue criminal sanctions, the matter is referred to the Office of the Director of Public Prosecutions for criminal prosecution.

Any person who is aggrieved by the CAK's decision following an investigation may appeal to the Competition Tribunal and thereafter may file a second appeal to the High Court. The Competition Tribunal has started receiving appeal applications but has only handled one matter so far.

COMESA

For cartel investigations in the COMESA region (including Kenyan entities), the CCC has investigative powers (in addition, the CAK would have parallel jurisdiction). The CCC can also request the authorities of member states to undertake investigations on its behalf. However, where an undertaking fails to comply with the CCC's decision, the CCC may request the assistance of the competition regulator in the member state where an undertaking is located to enforce its decision. In Kenya, therefore, the CCC would rely on the CAK to enforce its decision in relation to a cartel.

Changes

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

Kenya

The CA was amended in December 2016 to, among other things, give the CAK greater information-gathering powers by providing that every person, undertaking, trade association or body is obliged to provide information requested by the CAK in relation to an investigation or possible investigation. The amended CA also allows the CAK to impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question where any of the undertakings is found to be in breach of the provisions of the CA on restrictive trade practices. This is in addition to the then existing sanctions of a fine of 10 million Kenya shillings and/or imprisonment of up to five years.

In March 2018, the CAK published various draft rules and guidelines for stakeholder review and comments. The draft rules and guidelines which (if adopted) have an impact on cartels include:

- the Competition (General) Rules, 2018 (the Draft Competition Rules);
- the Block Exemption Guidelines; and
- the Search and Seizure Guidelines.

The Draft Competition Rules set out the process of conducting of investigations into RTP, the criteria for determination of exemptions, settlement in respect of RTPs and consumer infringements; and determination of penalties and remedies. The Draft Competition Rules also propose the introduction of forms for lodging complaints. The Block Exemption Guidelines propose the introduction of a block exemptions regime in Kenya allowing for the exemption from competition assessment of a category of agreements, decisions and practices by or between undertakings from application of prohibitions under section 21 and 22 of the CA. However, the Block Exemption Guidelines propose covering only certain franchise agreements, stadia branding rights, media content generation and one-off sporting and promotional events. The Search and Seizure Guidelines set out the procedure for conducting dawn raids for the purposes of ensuring they are conducted in a transparent and consistent manner.

As the draft rules and guidelines have not yet been passed and are subject to change, we have not considered them in this chapter.

COMESA

The CCC is still developing its regime on restrictive business practices. On 2 April 2019, the Board of the CCC adopted the COMESA RBP Guidelines that deal with the implementation of article 16 of the COMESA Regulations, which, in turn, applies to agreements between undertakings, decisions of associations of undertakings and concerted practices. The preamble of the COMESA RBP Guidelines explains that they were prepared with the aim of providing clarity and predictability as regards the general analytical framework of the CCC in determining cases of vertical and horizontal agreements.

Substantive law

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

Kenya

Section 21 of the CA and the Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the CA (RTP Guidelines) contains the substantive law on cartels in Kenya. Section 21 prohibits RTPs, which are agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings that have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya.

RTPs can be among parties either in a horizontal or vertical relationship. Types of agreements listed in the CA that would apply to cartels include:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- dividing markets by allocating customers, suppliers, areas or specific types of goods or services;
- collusive tendering; or
- otherwise preventing, distorting or restricting competition.

The RTP Guidelines expand on RTPs to include information-sharing between competitors (save where the information is for technical, safety or education purposes) to also constitute a horizontal restriction.

Certain practices by trade associations and their members constitute horizontal restrictions. These include the unjustifiable exclusion of a competitor, potential competitor from a trade association; or trade association, sharing pricing information or making pricing recommendations to its members. The members of trade associations are jointly liable for the decisions of the associations. However, the CAK may, in some circumstances, require evidence of actual knowledge of and participation in a prohibited activity before inferring that an individual member was in agreement with other members to engage in the prohibited activity.

The RTP Guidelines provide for a hard-core restriction on cartels and therefore these are per se illegal. Whereas, in some instances, RTPs may apply for exemption, no exemption and no analysis as to the object or effect of a cartel may be adduced and their mere existence is a breach of the CA.

COMESA

Article 16 of the COMESA Regulations prohibits any agreement between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition within COMESA. Specifically, article 19 makes it an offence for undertakings engaged in rival or potentially rival activities to engage in:

- agreements that fix prices, hinder or prevent the sale or supply or purchase of goods or services; limit or restrict the terms and conditions of sale or supply or purchase between persons; limit or restrict the terms and conditions of sale; or supply or purchase between persons engaged in the sale of purchased goods or services;
- collusive tendering and bid rigging;
- market or customer allocation agreements;
- allocation by quota as to sales and production;
- collective action to enforce arrangements;
- concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- collective denials of access to an arrangement or association which is crucial to competition.

The COMESA RBP Guidelines provide that the practices listed under article 19 of the COMESA Regulations shall be treated as per se offences that cannot benefit from an exemption under article 16(4) of the COMESA Regulations and are difficult to justify on the basis of efficiency. Therefore, cartel conduct is presumed by the CCC to have anticompetitive effects that outweigh any pro-competitive effects.

Further, the COMESA RBP Guidelines provide for safe harbor provisions to clarify the business practices that would not be covered by the COMESA Regulations because of failing to meet specified market share thresholds. The following will not be considered as appreciably restricting competition between member states:

- agreements between undertakings whose aggregate market share does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets; and
- agreements between undertakings whose aggregate market share does not, during two successive years, exceed 10 per cent by more than 2 percentage points.

However, restrictive practices by object (which includes cartel conduct) are prohibited regardless of the aggregate market shares held by the parties involved.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

Kenya

There are no industry-specific infringements, defences or exemptions under the CA and no defence or exemption for government-sanctioned activity or regulated conduct.

In general, however, any person, undertaking or association may apply to the CAK for an exemption from the provisions dealing with RTPs and the CAK may, upon considering the application, grant an exemption to the agreement or practice. Trade associations and professional associations are also required to apply to the CAK for an exemption if their association rules have provisions that would prevent, distort or lessen competition.

The CAK may grant an exemption if it is satisfied that there are 'exceptional and compelling reasons of public policy', and in granting the exemption, the CA requires the CAK to take into account whether the practice would be likely to result in or contribute to:

- maintaining or promoting exports;
- improving or preventing decline in the production or distribution of goods or the provision of services;
- promoting technical or economic progress or stability in any industry; or
- obtaining a benefit for the public which outweighs or would outweigh the lessening competition that would result from the agreement, decision or concerted practices.

The RTP Guidelines in addition provide that the following categories of conduct may be entitled to an exemption:

- certain intellectual property arrangements; and
- certain professional or trade association agreements.

COMESA

There are no sector-specific offences, block exemptions or exemptions for government-sanctioned activity under the COMESA Regulations. However, any person, undertaking or association may apply to the CCC for an exemption from the provisions dealing with RTPs and the CCC may deem the restrictions to be inapplicable to such agreement if:

- the parties can prove that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and that does not:
  - impose restrictions that are not indispensable to the attainment of this objective; or
  - afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question; or
- the CCC determines that there are public benefits that outweigh the anticompetitive effect.

The COMESA RBP Guidelines provide that these exemption conditions are cumulative and that any conduct amounting to a restrictive business practice is void unless all the four cumulative requirements set out above are met. The burden of proving that these exemption requirements have been met lies with the undertaking concerned.

Application of the law

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

Kenya

The law applies to both individuals and corporations. Section 5 of the CA provides that the CA applies to all persons including the government, state corporations and local authorities insofar as they engage in trade. A person is defined to include a corporate entity.

COMESA

Article 3 of the COMESA Regulations provides that the COMESA Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the common market. A person is defined under article 1 to include both a natural or legal person.

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?

Kenya

Yes. The regime applies to conduct that takes place outside the jurisdiction if it has an effect in Kenya. Section 6 of the CA applies to conduct by either:

- a citizen or person resident in Kenya;
- a body incorporated or carrying out business in Kenya;
- any person in relation to the supply or acquisition of goods and services by that person in to or within Kenya; or
- any acquisition of shares or other assets outside Kenya resulting in a change of control of a business or an asset of a business in Kenya.

However, the above provisions need to be read in conjunction with section 21 of the CA, which states that the RTP must have the object or effect of distorting, lessening or preventing competition 'in Kenya'. Therefore, conduct taking place outside Kenya, for example, indirect sales into Kenya, may be captured by the CA's provisions on RTPs if the conduct is aimed at, or has the effect of distorting, lessening or preventing competition in the country.

COMESA

Yes, the regime applies to conduct that takes place outside the jurisdiction if it has an effect in the COMESA region. Article 3(2) of the COMESA Regulations provides that the regime is only applicable to conduct that has an appreciable effect on trade between member states and that restricts competition in the common market. Therefore, conduct whose effects are outside the common market is not within the jurisdiction of the CCC.

The COMESA RBP Guidelines clarify further what would amount to having an effect on trade 'between member states' by indicating that an undertaking's business practice must have an impact on cross-border activity involving at least two member states. Further, it is not required that the business practice affects trade between the whole of one member state or the whole of another member state.

Export cartels

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

Kenya

Yes, there will be a defence available if the conduct does not have as its object or effect the distorting, lessening or preventing of competition

in Kenya. However, if the conduct taking place outside Kenya affects parties in Kenya, it will be regulated by the CAK.

COMESA

Yes, there will be a defence available if the conduct does not have an appreciable effect in the COMESA region. However, if the conduct affects trade within member states, it will be regulated by the CCC.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Kenya

Investigation

Under section 31 of the CA, the CAK, can carry out an investigation either on its own initiative or upon receipt of information or a complaint. The CAK may request that the company or person under investigation produces records, documents and any other information that the CAK may request; or appears before the CAK to give evidence or produce a document. It may also enter and search premises and seize any data or anything that has a bearing on the investigation.

Proposed decision

The CAK will then write to the entity or person, advise it of its proposed decision and offer it the opportunity to make representations to the CAK either orally or in writing.

Final decision

After considering the representations made, the CAK will then make a final decision.

Settlement

The CAK may at any time during or after an investigation enter into an agreement of settlement with the entity or person concerned.

COMESA

Investigation

Under the COMESA Regulations, any person or consumer may request that the CCC conducts an investigation where there is activity that would restrict competition in COMESA.

Proposed decision

Where the CCC decides to investigate, it notifies the interested parties of the investigation and is required to complete the investigation within 180 days from the date of the request (this time period can be extended by notification to the parties). If the CCC decides that there has been a breach of regulations, it will notify the respondent party and will allow the party an opportunity to defend itself.

Final decision

Within 10 days of the hearing of the defence by the parties involved, the CCC is required to notify the interested parties of its determination. Based on this determination, the CCC may decide that the party in breach should cease its conduct, pay a fine of an amount determined by it or take whatever action it deems necessary to diminish or remove the effect of the illegal conduct.

Investigative powers of the authorities

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

General investigatory powers	Competition Act (CAK)		COMESA (CCC)	
Investigatory power	Civil/ administrative	Criminal	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes	Yes*	Yes	No
Carry out compulsory interviews with individuals	Yes	Yes*	Yes	No
Carry out an unannounced search of business premises	Yes	Yes*	Yes	Yes
Carry out an unannounced search of residential premises	Yes	Yes*	Yes	No
Right to 'image' computer hard drives using forensic IT tools	Yes	Yes*	Yes	No
Right to retain original documents	Yes	Yes*	No**	No
Right to require an explanation of documents or information supplied	Yes	Yes*	Yes	No
Right to secure premises overnight (eg, by seal)	No	Not applicable	No	No

* In Kenya, in theory, there is a criminal element attached to cartel behaviour under the CA. However, this is an untested area of competition law and any successful criminal sanctions would have to be enforced in line with the Evidence Act (Chapter 80 of the Laws of Kenya), the Penal Code (Chapter 63 of the Laws of Kenya), the Fair Administration of Actions Act and the Constitution of Kenya 2010.

** In COMESA, the CCC can request the authorities of member states to undertake investigations on its behalf.

The CAK does not require prior approval of the courts to conduct its investigative powers. The High Court of Kenya affirmed this in the case of *Mea Limited v Competition Authority of Kenya and another* [2016] eKLR.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Kenya

The CAK and the CCC, in April 2016, signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction. The CAK has also signed a memorandum

of understanding with the Competition Commission of South Africa in which both regulators have agreed to exchange information on competition issues.

COMESA

Rule 40 and 43 of the COMESA Competition Rules provide that the CCC may transmit to the competent authorities of the member states copies of the most important documents in relation to a restrictive business practice and request such authority to undertake an investigation. The officials of the CCC may assist the officials of such authority in carrying out their duties.

Interplay between jurisdictions

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

Kenya's jurisdiction has interplay with COMESA and the EAC that arises from Kenya's membership of these two regional organisations.

The CAK and CCC have agreed to assist each other in their enforcement activities, to the extent compatible with their competition laws and within the reasonably available resources through:

- locating and securing evidence and voluntary compliance with requests for information from undertakings or natural persons within the respective jurisdiction;
- conducting investigations;
- assisting the requesting party with relevant information that may be in the possession of the other party; or
- assisting the other party with information that may come to the attention of the other party.

Either the CAK or the CCC may request the other to commence enforcement activities in relation to anticompetitive effects that have an impact on the territory of the other.

This cooperation between CAK and CCC is likely to create efficiency in the investigation and enforcement of the regime on cartels in both jurisdictions.

Risk could also be triggered as investigations may be carried out in other jurisdictions.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Kenya

Following the steps outlined in question 9, the CA may do any of the following:

- declare the conduct to constitute an infringement of the prohibitions of the CA;
- restrain the undertaking from engaging in that conduct;
- direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

A party may also enter a settlement agreement with the CA any time after an investigation, which may include an award of damages to a complainant or the imposition of a pecuniary penalty.

COMESA

The COMESA Competition Rules provide that the initial determination of the CCC is made by an initial committee of three commissioners, after which parties may appeal to the full Board of Commissioners. The decisions that the initial committee may reach include ordering cessation of the prohibited conduct, imposing a fine or ordering any other action it deems necessary to remove or reduce the conduct.

Burden of proof

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

Kenya

The CAK bears the burden of proving that undertakings have engaged in cartel conduct by entering an agreement whose object or effect is to distort or restrict competition.

The RTP Guidelines state that there is a hard-core restriction on cartels but do not set out the standard of proof that the CAK must meet before establishing that a cartel exists.

COMESA

The COMESA RBP Guidelines provide that the burden of proof first lies with the CCC or the person alleging that an agreement is restrictive to establish that the object of an agreement entered into between parties is to restrict competition. After discharging this burden, the onus is on the parties to the agreement to defend it and to establish that it has a positive effect on economic progress or it satisfies the relevant conditions to warrant an exemption.

Where it is found that the object of the agreement is not to restrict competition, the burden of proving that the effect of the agreement is to restrict competition is on the person making this allegation.

Where an exemption is sought under article 16(4), the burden of submitting claims to prove that a business practice satisfies the four cumulative conditions lies with the undertakings claiming justifications.

The standard of proof is on a balance of probabilities.

Circumstantial evidence

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

Kenya

Yes, the RTP Guidelines provide that the CAK may rely on circumstantial evidence when making a decision as to whether an agreement has been reached between the undertakings in question. There need not be a formal agreement in place between undertakings to warrant the CAK reaching this determination and that the provisions of the CA have been infringed.

COMESA

The COMESA regime does not mention circumstantial evidence.

Appeal process

16 | What is the appeal process?

Kenya

The CA provides that a person aggrieved by a determination of the CAK may appeal in writing to the Competition Tribunal within 30 days of the decision. We understand the Competition Tribunal has started receiving appeal applications. The appeal process as detailed in the Competition Tribunal (Procedure) Rules, 2017 is summarised below:

Filing of pleadings

Appeal to the Competition Tribunal is by way of a Notice of Appeal and Memorandum of Appeal filed together with documents supporting the person's appeal.

Service and response

Upon filing the Memorandum of Appeal, the filing party is required to serve the respondent with a notice of appearance to allow the respondent to file a reply to the appeal.

Case management conference

Once the respondent's reply is filed, the Competition Tribunal sets a date for pretrial conference and directions during which the parties to the appeal deal with issues such as clarification of matters in dispute, appointment of experts and creation of a timetable for the hearing.

Hearing and determination

On the hearing date(s) the appellant has the right to begin the appeal. Either party may call witnesses or expert witnesses to make their appeal. The Competition Tribunal may issue summons to compel witnesses to attend proceedings. The Competition Tribunal may grant any interim or final orders as it deems fit.

Urgent appeals

Where a person wishes to get interim relief pending the hearing of an appeal, the person can file a Memorandum of Appeal together with a Notice of Motion under a certificate of urgency. In such circumstances, the Competition Tribunal is convened as soon as possible to give directions on the hearing of the appeal. Appeals from the Competition Tribunal lie in the High Court of Kenya.

COMESA

The COMESA Competition Rules provide that if the respondent party is dissatisfied with the initial determination (made by an initial committee of three commissioners), it can appeal to the full Board of Commissioners within 30 days from the date of receipt of notification of the initial committee's decision. The Board of Commissioners has powers to cancel, reduce or increase the fine imposed by the initial committee.

SANCTIONS

Criminal sanctions

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

Kenya

The CA provides for imprisonment for a term not exceeding five years and a fine not exceeding 10 million Kenya shillings as the criminal penalties for engaging in cartel activity. Individuals or directors of undertakings involved in cartel conduct may be subject to an imprisonment term if found guilty of the offence. We are not aware of any instances where criminal sanctions have been imposed on any person or undertaking in respect of cartel conduct. As we are not aware of any criminal sanctions imposed by the CAK to date, we are not able to compare the CAK's previous decisions or sanctions.

COMESA

The COMESA Regulations only provide for civil and administrative sanctions.

Civil and administrative sanctions

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

Kenya

Section 36 of the CA lists the actions that the CAK can take following an investigation. These are to:

- declare the conduct that is the subject matter of the CAK's investigation of an infringement;
- restrain the company or individual from engaging in that conduct;
- direct any action to be taken by the company or individual to remedy or reverse the infringement;
- impose a financial penalty up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

In its annual report for 2015–2016, the CAK set out the fines imposed on companies found to have engaged in price fixing. These companies paid fines ranging from 100,000 to 5 million Kenya shillings. The imposition of fines is the most common form of sanction that has been imposed by the CAK to date.

COMESA

The CCC can require an undertaking to cease its conduct, pay a fine or take any other action it deems necessary to remove or reduce the conduct. The fines can be up to a maximum of 10 per cent of the COMESA turnover of the undertaking in breach. We are not aware of any penalties imposed by the CCC in relation to cartel conduct, so we are not able to comment on the frequency of fines or to make a comparison.

Guidelines for sanction levels

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

Kenya

The RTP Guidelines do not cover the principles and formulas that may be used by the CAK to determine the amount of administrative fines payable after an investigation. The CA only sets the upper limit of the administrative fines payable as up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings found to have infringed the provisions of the CA. In 2018, the CAK published the Fining and Settlement Guidelines (the Fining Guidelines) setting out the CA's principles for the determination of administrative penalties. The Fining Guidelines provide that the CAK will consider the turnover affected by the prohibited conduct as the base amount for determining its penalty and will adjust the base amount for aggravating and mitigating factors which are considered on a case-to-case basis. The Fining Guidelines consider the following as the key aggravating factors: the gravity of the contravention (with cartels being considered the most egregious); the duration of the conduct (three years and above get the highest score); and the coverage or spread of the conduct and recidivism. As for the applicable mitigating factors, the Fining Guidelines consider the following: co-operation; first-time offender; justifications on efficiency and consumer benefits; and acting in the public interest.

Further, the Fining Guidelines indicate that the CAK will consider the ability of an undertaking to pay a penalty and, in exceptional circumstances and at its discretion, will allow payments in instalments.

As for criminal sanctions, Kenya's Sentencing Policy Guidelines (the Sentencing Guidelines) are informative for judicial officers deciding

any criminal case. The Sentencing Guidelines provide the principles that should guide the court when deciding whether to impose a custodial or non-custodial sentence, including the gravity of the offence, criminal history and character of the offender. When considering the appropriate term of imprisonment, the Sentencing Guidelines require the court to consider the mitigating or aggravating circumstances of the case.

COMESA

The COMESA Competition Rules require the CCC to consider the gravity and duration of infringement by the parties in question prior to imposing a fine. Parties are entitled to make oral submissions, including submissions in relation to the quantum of the fine.

Compliance programmes

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

Kenya

The RTP Guidelines do not specify whether having an existing compliance programme at the time of infringement would reduce the sanctions.

COMESA

The COMESA Competition Rules do not specify whether having an existing compliance programme at the time of infringement would reduce the sanctions.

Director disqualification

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

Prohibition of directors from serving as corporate directors or officers is not listed as one of the sanctions available for individuals involved in cartel conduct in Kenya under the CA or in the COMESA Regulations.

Debarment

22 | 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 listed as one of the sanctions available for cartel conduct in Kenya under the CA or in the COMESA Regulations.

Parallel proceedings

23 | 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?

Kenya

Parallel proceedings may be pursued in respect of the same cartel conduct. Criminal proceedings can only be undertaken by the Public Prosecutor while administrative sanctions are a preserve of the CAK. Persons affected by cartel conduct may pursue damages from civil courts.

COMESA

Since the COMESA Regulations do not contain criminal sanctions, there can be no parallel criminal and administrative proceedings. However, the COMESA Regulations do not prohibit individuals affected by cartel conduct to institute civil proceedings in their member states in order to obtain damages or any other redress.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 | 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?

Kenya

The CA does not cover private damage claims.

Directly and indirectly affected parties (including purchasers of affected product) may rely on the Constitution of Kenya (the Constitution) to institute claims where cartel conduct causes a denial of, a violation or infringement of, or a threat to rights in the Constitution, including consumer rights such as the protection of economic interests.

It is unclear whether courts would permit passing-on and double recovery in respect of such claims.

It is also unclear what level of damages would be awarded if these claims were successful, as the competition laws of Kenya are silent on this. As Kenya is a common law jurisdiction, decisions of courts in the Commonwealth countries are of persuasive value to Kenyan courts and therefore a decision in a common law jurisdiction such as in the United Kingdom would be persuasive in Kenya.

Courts have the discretion to determine whether to award costs and, if so, the quantum of costs in civil matters.

COMESA

The COMESA competition regime is silent on whether private damage claims are available for direct and indirect purchasers. In this respect we are not able to determine how passing-on and double recovery issues are dealt with and what level of damages (eg, single, double, treble) and cost awards can be recovered or how recent damages awards compare with previous cases.

Class actions

25 | 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?

Kenya

The Constitution permits class actions, but the CA does not cover this.

A person acting as a member of or in the interest of class of persons can institute a class action in the High Court of Kenya by way of a petition for the denial of, the violation or infringement of, or the threat to a right in the Bill of Rights of the Constitution.

A person would have to establish that cartel conduct caused the denial of, the violation or infringement of, or the threat to a right guaranteed in the Constitution.

COMESA

The COMESA competition regime is silent on whether class actions are permissible.

COOPERATING PARTIES

Immunity

26 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?

Kenya

Yes. In May 2017, the CAK published the Leniency Programme Guidelines (the Leniency Guidelines) that provide for a leniency programme (the Leniency Programme) and govern the processing and granting of leniency to parties that report cartel conduct.

According to the Leniency Guidelines, the CAK accepts applications for leniency in the following circumstances:

- when it has no knowledge of the contravention;
- when it has knowledge of a contravention but lacks sufficient information to proceed with investigation; or
- when it has commenced an investigation but requires additional evidence to penalise offenders.

Parties that report cartel conduct are offered a full or a partial reduction of the administrative financial penalty imposed by the CAK depending on when they report. It is envisaged that the incentive will encourage parties engaged in cartel conduct to provide evidence and, in effect, improve compliance with the CA.

The importance of being the first applicant for leniency or 'the first through the door', is that the applicant is granted 100 per cent reduction in the administrative financial penalty, which is also termed 'immunity'.

The full or partial leniency in the Leniency Programme does not absolve an applicant for leniency from criminal liability under the CA. The Director of Public Prosecutions may still prosecute the applicant for offences under the CA.

COMESA

COMESA does not currently have a leniency programme or the option of offering immunity.

Subsequent cooperating parties

27 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 Leniency Programme extends to subsequent applicants for leniency.

Subsequent applicants for leniency may benefit from a partial reduction of the administrative financial penalty imposed by the CAK as follows:

- second through the door may be granted up to 50 per cent reduction in any penalty;
- third through the door may be granted up to 30 per cent reduction in any penalty; and
- any subsequent applicant that significantly contributes to an investigation may be granted up to 20 per cent reduction in any penalty.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

As set out in question 27, cooperating at an earlier stage affects the level of any administrative financial penalty imposed by the CAK.

The Leniency Guidelines do not provide for an 'immunity plus' or an 'amnesty plus' option.

Approaching the authorities

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

The Leniency Guidelines do not specify when an application for leniency should be initiated though, generally, the application would be expected to be made before or during an investigation into cartel conduct by the CAK and offer evidence that would be crucial in prosecuting offenders. Markers are available and they allow for an applicant to provide initial information on cartel conduct to the CAK while gathering further information in relation to a cartel and in the interim being offered a place in line for the leniency for a certain period.

The Leniency Guidelines set out the timelines below for the leniency application process.

Step*	No timeline
Submission of a marker application to the CAK	No timeline
Submission of the relevant documentation and information orally or in writing to the CAK	Within 28 days from the date the marker application is submitted
An applicant seeking the extension of its marker by the CAK due to unavoidable circumstances	After expiry of the 28 days
Initial meeting between the applicant and the CAK after the marker application has been finalised	No timeline
Decision on whether applicant's case qualifies for leniency	Within 14 days after date of initial meeting
Communication from the CAK to the applicant in writing on whether the applicant qualifies for leniency	Within 14 days of the decision being made
Further meeting with the CAK to discuss and grant conditional leniency to the applicant pending any further investigation and determination by the CAK	No timeline
Execution of the conditional leniency agreement between the CAK and the applicant which should also cover the directors and employees of the applicant	No timeline
The CAK engaging the Director of Public Prosecutions with regards to the criminal aspects of the cartel conduct	No timeline
Investigation, analysis and verification by the CAK with the applicant being obliged to co-operate as a serious breach of this obligation may lead to revocation of the conditional leniency agreement	No timeline
Subsequent meetings convened by the CA	No timeline
Final meeting with the CAK to be given the leniency certificate or execute the leniency contract	After all conditions in the Leniency Guidelines have been met and the CAK has completed its investigation

* In the various steps, the applicant should always claim confidentiality for any confidential information or documentation provided to the CAK.

Cooperation

30 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 for leniency is expected to ensure total cooperation with the CAK throughout the investigation and until a determination by the CAK. The applicant should:

- provide full, timely and truthful information and documents in its possession or under to control;
- keep the application process confidential and not to reveal it to other members of the cartel; and
- immediately stop the cartel conduct.

These requirements also apply to subsequent applicants for leniency in respect of the same matter.

Confidentiality

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

The Leniency Guidelines provide that the identity of an applicant remains confidential throughout the investigation and when a decision is made by the CAK. In addition, an applicant may pursuant to the CA claim confidentiality in respect of the whole or part of the materials disclosed to the CAK during an investigation.

The same level of confidentiality extends to subsequent applicants for leniency.

The Leniency Programme does not envisage any proceedings where confidential information may be disclosed to third parties.

Despite the CAK's obligation not to disclose confidential information, the CA provides that it may disclose this information in the following circumstances, where:

- the disclosure is to a person performing an action under the CA;
- there is an obligation in law to disclose;
- the consent of the person who provided the information has been obtained;
- the disclosure is authorised by law or required by a court or a tribunal;
- the CAK is of the view that disclosure is not likely to cause detriment to the person providing the information or to the person to whom it relates; or
- the CAK is of the view that the public benefit from the disclosure outweighs the detriment occasioned.

Settlements

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

The CAK may enter into a settlement with the party alleged to have engaged in a cartel activity in respect of the administrative financial penalty to be imposed or the quantum of damages to be awarded to the complainant.

Decisions of the CAK may be appealed to the Competition Tribunal or one may institute judicial review proceedings in respect of the decisions.

Regarding the criminal aspect of cartel conduct, the Director of Public Prosecutions may enter into a plea agreement with a person alleged to have engaged in a cartel activity after they have been charged in court. This will be in accordance with the Criminal Procedure Code, which applies to all criminal prosecutions, and is subject to the court's approval.

Decisions of courts in criminal matter may be appealed to the superior courts.

Corporate defendant and employees

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

Full or partial leniency in respect of administrative financial penalties imposed by the CAK covers a corporate applicant, its directors and its employees. It is unclear whether it would cover its former employees.

Dealing with the enforcement agency

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

The Leniency Programme is new and untested, hence it is unclear whether there will be nuances to the practical steps set out with the Leniency Guidelines and also highlighted in question 29.

DEFENDING A CASE

Disclosure

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

The Kenyan competition regime is silent on this. However, it would be expected that the CAK would disclose to the alleged offender information and evidence sufficient to establish the existence of cartel conduct and also enable the alleged offender to defend itself while safeguarding the CAK's obligation to maintain confidentiality as per the CA and Leniency Guidelines.

In addition, the CAK's obligation to maintain confidentiality is subject to the exceptions set out in question 31, which may be used as a basis for the disclosure of confidential information.

Representing employees

36 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 Kenyan competition regime does not mention these issues. If there is a likelihood of conflict of interest, it would be advisable for the corporation and its employees to each seek independent counsel.

It would also be advisable for present and past employees to seek independent legal advice during an investigation by the CAK where there is likelihood that the offenders may be prosecuted.

Multiple corporate defendants

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

The Kenyan competition regime does not refer to this. If there is a likelihood of conflict of interest, it would be advisable for corporate defendants to each have their own independent counsel.

The decision on whether to be represented by the same counsel may depend on whether the corporate defendants are affiliated, in which case their interests are likely to be aligned.

Payment of penalties and legal costs

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

Yes. Kenyan laws do not preclude this.

Taxes

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

No. Fines or other penalties and private damage awards are not tax-deductible.

International double jeopardy

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

The Kenyan competition regime does not refer to this and, being a relatively new regime, it is unclear what approach the CAK or courts would take where penalties have been imposed in other jurisdictions.

Getting the fine down

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

The Leniency Guidelines only provide for the grant of full or partial leniency as a way in which the administrative financial penalties imposed by the CAK may be reduced, but does not mention other ways in which they may be reduced. It is unclear whether a pre-existing compliance programme would reduce the administrative financial penalty.

The Kenyan competition regime does not cover the ways in which a fine imposed by a court, following a conviction for engaging in cartel conduct, may be reduced. The CAK has in the past considered mitigating factors such as cooperation with the CAK, past conduct of parties and duration of breach, among others, to reduce penalties imposed in relation to breaches in respect of merger notifications. Although the CA does not make specific reference to the application of mitigating factors in enforcement against cartels, there is a strong likelihood that the CAK would do so.

UPDATE AND TRENDS

Recent cases

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

Kenya

According to the published CAK Annual Report in 2018, the CAK investigated 15 RTP cases, 13 of which were finalised while the rest were at various stages of investigations at the close of the reporting period. Various remedies, including financial penalties and declaratory orders, were imposed to undertakings found to have infringed the CA.

In relation to cartels, there were investigations in the agriculture sectors, where the CAK interrogated the sugar and maize flour value chains for cartel-like conduct and for any impediments to competition in the sector. The interrogations in the maize flour sector did not establish the alleged claims of cartels in the relevant market, while in the sugar value chain; investigations established that high sugar prices could have been catalysed by the inefficiencies of the sugar millers, the current importation regime and sharing of strategic information through their association. As a result, the CAK advised the Agriculture and Food Authority to employ strategies aimed at increasing production and minimising sharing of disaggregated and historical information.

The highest percentage of the investigations was in the advertising and market research market sector.

COMESA

The majority of the cases handled by the CCC are in relation to exemption applications under article 20 of the COMESA Regulations for entities in vertical relationships. We are not aware of any cartels case that has been investigated, heard or determined by the CCC.

Regime reviews and modifications

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

Kenya

We are not aware of any ongoing or anticipated changes in the leniency programme in Kenya.

A&K | ALN
ANJARWALLA & KHANNA

Anne Kiunuhe
ak@africalegalnetwork.com

Njeri Wagacha
nww@africalegalnetwork.com

ALN House, Eldama Ravine Close
Off Eldama Ravine Road, Westlands
Nairobi
Kenya
Tel: +254 203 640 000/+254 703 032 000
www.africalegalnetwork.com/kenya

Korea

Hoil Yoon, Sinsung (Sean) Yun and Chang Ho Kum
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 investigation, prosecution and adjudication. It has nine commissioners, consisting of a chair, a vice-chair, three standing commissioners and four non-standing commissioners. In addition, it has approximately 652 employees as of September 2019. 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 cartels', including price-fixing, output restriction cartels, market allocation cartels and bid rigging) among unreasonable collaborative acts. The bill of amendment to the MRFTA (proposed on 30 November 2018), which allows for the KFTC and the Prosecutors' Office to share case materials, among others, is pending for legislation.

Changes

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

As of 19 March 2019, the amended MRFTA allows the KFTC to refer to the dispute settlement procedures using its authority, except when it is deemed appropriate for the KFTC to directly investigate cases. Further, under such amendment, from 19 September 2019, a system has been implemented that could indemnify injured parties for up to treble the damages actually incurred by enterprises and enterprise groups that conducted unreasonable collaborative acts and prohibited retaliation measures. However, the liability for damages of enterprises, which were recognised as qualified leniency applicants is calculated as the actual amount of damages incurred by injured parties of cartels. Such trebling of the damages applies to cartels that were formed for the first time after 19 September 2019. In other words, if a cartel was formed prior to 19 September 2019 and continues thereafter, such trebling of the damages does not apply.

The KFTC is expected to relax the requirements for its request for a bidding restriction which could be made on bid-rigging enterprises. Currently, the KFTC could request for a bidding restriction only on enterprises in the public procurement sector that had accumulated more than five penalty points from bid-rigging in the past five years and conducted bid rigging again (ie, recidivist).

There have been criticisms that such high threshold was inadequate to prevent bid rigging in the public procurement sector. Thus, the KFTC announced that it would amend the relevant guidelines so that it could request for a bidding restriction on enterprises in the public procurement sector which had accumulated more than five penalty points from bid rigging in the past five years although such enterprises did not conduct bid rigging again.

Meanwhile, the bill of amendment to the MRFTA, which includes an act of substantially restricting competition by exchanging sensitive information, such as future prices, between competitors as a type of an unreasonable collaborative act (ie, cartel) is pending for legislation. In the EU and the US, among others, the exchange of sensitive information between competitors is deemed to cause considerable anticompetitive effects and is thus prohibited as 'concerted practices' or the information exchange agreement itself is subject to regulation.

On the other hand, the existing MRFTA 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 regulate the anticompetitive exchange of information more effectively, the bill of amendment to the MRFTA (proposed on 30 November 2018) is pending for legislation. This bill states that the existence of an agreement between enterprises may be legally presumed if there exists an external conformity of conducts that could be deemed as a cartel between enterprises and there is an exchange of information necessary for such concerted conducts.

Further, such bill provides that an agreement between enterprises about exchanging information, including price and sales volume, which substantially restricts competition may be deemed as a type of unreasonable collaborative act (ie, cartel).

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 trade in 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 corporation of 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 (see questions 14 and 15). In this case, if there is proof of direct or indirect contact or information exchange among undertakings, this may serve as circumstantial evidence that enforces the above assumption.

For reference, the recently pre-announced legislation of the KFTC's proposed amendment to 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.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are some very limited statutory exemptions from the MRFTA that apply to specific activities and that are provided for in the relevant statutes for specific industries such as export and import, small businesses, marine or air transport and agriculture.

In principle, the same cartel regulations apply to government-regulated conducts as ordinary cases that do not involve government-regulated conducts. However, the application of the MRFTA is excluded in the following cases:

- where administrative agencies are granted by other laws the specific power to issue administrative dispositions to undertakings regarding competition factors such as prices, and undertakings agreed on prices, etc, based on such administrative disposition; and
- where other laws stipulate that administrative agencies may provide administrative guidance to undertakings in regard to engaging in cartel activities that are prohibited under the MRFTA and the administrative agencies induced the agreement among undertakings by providing administrative guidance in compliance with the relevant provisions of such laws and, as a result, the undertakings reached an agreement within the scope of such administrative guidance.

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 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 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 US), Korea does not have a separate waiver provision for export cartels.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

In the 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 onsite 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

10 | 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 are essentially based on the voluntary cooperation of the investigated parties (including suspected violators and witnesses). The KFTC may request the suspected violators and witnesses and suchlike 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 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

11 | 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 EU) or memoranda of understanding (eg, with Brazil, China, Japan and the US). Although the level of cooperation in the past has been rather limited, there has been growing cooperation recently with these countries in cartel cases (eg, by conducting coordinated dawn raids in the *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or through informal exchanges of information in the investigation of individual cases, often with waivers obtained from cooperating companies). Korea actively participates in the OECD Competition Committee. In addition, Korea has 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

12 | 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 KFTC to launch 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

13 | How is a cartel proceeding adjudicated or determined?

The 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

14 | 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

15 | 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 (see questions 4 and 14). 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;
- when the conformity of the relevant enterprises' conducts cannot be explained as a consequence of the market status; and
- when the conformity of conducts would be difficult without an agreement in light of the relevant industry structure.

Therefore, in theory, even without direct evidence for the existence of an agreement, 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

16 | 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

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

Corporate violators are subject to a criminal fine of up to 200 million won. Individuals are subject to imprisonment of up to three years or a criminal fine of up to 200 million won, or both. Under the MRFTA, the KFTC must first make a referral to the Prosecutor's Office for a party to be indicted for illegal acts where criminal sanctions may be imposed. Meanwhile, as examined above, under the 16 July 2013 amendments to the MRFTA, which became effective on 17 January 2014, the KFTC's obligatory referral obligations have been strengthened. Prior to the amendments, only the prosecutor general could make a request for referral to the KFTC.

According to the amendments to the MRFTA, the chair of the Board of Audit, the administrator of the Public Procurement Service or the administrator of the Ministry of SMEs and Start-ups may make a request to the KFTC to refer a case to the Prosecutor's Office. If such request for referral is made, the KFTC is obliged to make such referral. The amendments to the MRFTA also explicitly recognise an exception to referral in the case of cartel activity leniency applicants.

The 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.

Number of cases where the KFTC made a criminal referral with the Prosecutors' Office

Year	Number of criminal referrals
2007	7
2008	5
2009	5
2010	1
2011	8
2012	2
2013	12
2014	36
2015	9
2016	22
2017	27
2018	44
2019 (to July)	13

Source: Korea Fair Trade Commission

Civil and administrative sanctions

18 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 as follows: the *Liquefied Petroleum Gas* case (2009), *Refineries* case (2011), *Life Insurance* case (2011), *Steel Sheet* case (2012) and *Honam Express Railway Construction Bid Rigging* case (2014).

Number of cartel cases and total amount of administrative fines imposed by the KFTC

Year	Number of cartel cases found guilty	Fines imposed (won)
1981 to 2001	359	Per year, average of 22,187 million
2002	47	53,109 million
2003	23	109,838 million
2004	35	29,184 million
2005	46	249,329 million
2006	45	110,544 million
2007	44	307,042 million
2008	65	197,479 million
2009	61	52,932 million
2010	62	585,822 million
2011	71	577,902 million
2012	41	398,866 million
2013	46	364,731 million
2014	76	769,428 million
2015	88	504,919 million
2016	64	756,040 million
2017	69	229,439 million
2018	157	237,950 million
2019 (to July)	46	29,743 million

Source: Korea Fair Trade Commission

Guidelines for sanction levels

19 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 of cartel 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/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; if latter, number of times therefor;
- 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

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

No.

Director disqualification

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

The MRFTA and 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

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

In the 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 the case where the party participated in a cartel.

Parallel proceedings

23 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 at 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

24 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 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 cartelist 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

25 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

26 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 percent to 'up to 20 per cent' for 'amnesty plus', and to enable the KFTC to grant a total of longer than 75 days of supplemental period especially for international cartel cases.

Based on the 2 January 2015 amendment to the Notification on Implementation of the Leniency Programme for Corrective Measures Etc. Against Confessors, the previous practice of having the secretary general of the KFTC provisionally confirm the marker of the leniency applicant was abolished, and the Notification was amended so that the marker of the leniency applicant would only be confirmed through deliberation and adjudication by the 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 on leniency application procedures;
- specification of amnesty plus standards;
- enhancement of the requirements for succession of ranks; and
- amendment to the standards for determining repetitive cartels.

Among the changes, the standards for amnesty plus stipulated in 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 additional reported cartel is at least four times larger than the relevant cartel, the entire amount of the administrative fine is waived. In the case of succession of ranks, when a latter-ranked applicant succeeds the rank of higher-ranked applicant, it has to satisfy the requirements for leniency corresponding to the relevant higher rank in order to have its new leniency status acknowledged by the KFTC. For example, to obtain first rank, the relevant applicant has to satisfy the requirement of 'the KFTC lacking sufficient evidence'. In other words, even when a second-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, as the table below shows, the number of cartel cases in which the KFTC accepted leniency applications has increased dramatically.

Number of cartel cases in which leniency applications have been accepted by the KFTC

Year	Number of cartel cases in which leniency applications accepted	Fines imposed (won)
1999	1	314 million
2000	1	43 million
2001	0	
2002	2	1,288 million
2003	1	3,433 million
2004	2	
2005	7	173,673 million
2006	7	54,992 million
2007	10	221,373 million
2008	21	150,600 million
2009	17	42,000 million
2010	18	557,100 million
2011	32	552,200 million
2012	13	275,128 million
2013	23	352,312 million
2014	44	769,428 million
2015	48	406,020 million
2016	27	753,319 million
2017	41	221,386 million
2018	41	205,242 million
2019 (to July)	23	27,871 million

Source: Korea Fair Trade Commission
Note: Fines after reduction

Subsequent cooperating parties

27 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?

As examined in question 26, 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 26.

Approaching the authorities

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

With respect to the first question, the application for immunity can be filed until the end of deliberation by the commissioners and there are no time limits in regard to filing prior to or after the time when the KFTC's investigation has commenced. However, in case of cartels involving two enterprises, 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

30 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, inter alia, 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

31 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

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

Plea 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

33 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

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

See question 29.

DEFENDING A CASE

Disclosure

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

Among the materials attached to the examiner's report, the KFTC must disclose all materials to a defendant, excluding confidential materials necessary for the protection of trade secrets or privacy, materials related to the leniency application, and confidential materials prescribed under other statutes.

Representing employees

36 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

37 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

38 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

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

Since administrative fines that are imposed owing to cartel activities constitute 'public charges imposed as sanctions for non-performance of duties, or a violation of prohibitions or restrictions under Acts and subordinate statutes' under article 21(iv) of the Corporate Tax Act, they are not included as deductible expenses when calculating the income amount. In the case of civil compensation of damages, since they are not expenses that are generated from ordinary business activities, they are also not included as deductible expenses. In sum, both of the above amounts are not tax-deductible.

International double jeopardy

40 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

41 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

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

In a case of a 'complementary bid rigging' where the complementary bidder was subject to a higher administrative fine than the enterprise that was the actual successful bidder, the Korean Supreme Court declared that such imposition of administrative fine by the KFTC was not unreasonable as it was pursuant to the application of the reduction standards under the KFTC's Notification on Detailed Standards regarding Imposition of Administrative Fines.

Further, there was a Korean Supreme Court precedent declaring as follows: the KFTC's decision that did not recognise the leniency application as it deemed that a requirement for receiving leniency application, namely, 'requirement of faithful cooperation', had not been met was lawful in the case where the leniency applicant 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.

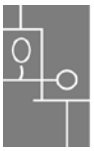
Regime reviews and modifications

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

Meanwhile, the bill of amendment to the MRFTA, which includes an act of substantially restricting competition by exchanging sensitive information, such as future prices, between competitors as a type of an unreasonable collaborative act (ie, cartel) is pending for legislation. In the EU and the US, among others, the exchange of sensitive information between competitors is deemed to cause considerable anticompetitive effects and is thus prohibited as 'concerted practices' or the information exchange agreement itself is subject to regulation.

On the other hand, the existing MRFTA 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 regulate the anticompetitive exchange of information more effectively, the bill of amendment to the MRFTA (proposed on 30 November 2018) is pending for legislation. The amendment bill stipulates that the existence of an agreement between enterprises may be legally presumed if there exists external conformity of conducts that could be deemed as a cartel between enterprises and there is an exchange of information necessary for such concerted conducts. Further, such bill provides that an agreement between enterprises about exchanging information, including price and sales volume, which substantially restricts competition may be deemed as a type of unreasonable collaborative act (ie, cartel).

Initially, the Prosecutors' Office could not indict entities for conducting unreasonable collaborative acts without a criminal referral from the KFTC. However, under the bill of amendment to the MRFTA (proposed on 30 November 2018) pending for legislation, the prosecutor may 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) among unreasonable collaborative acts and the KFTC and Prosecutors' Office may share case materials, among others.



YOON & YANG
법무법인(유) 화우

Hoil Yoon
yoon.hoil@yoonyang.com

Sinsung (Sean) Yun
ssyun@yoonyang.com

Chang Ho Kum
chkum@yoonyang.com

34th Floor, ASEM Tower
517 Yeongdong-daero, Gangnam-gu
Seoul 06164
Korea
Tel: +82 2 6003 7000
Fax: +82 2 6003 7800
www.yoonyang.com

Malaysia

Sharon Tan and Nadarashnaraj Sargunaraj
Zaid Ibrahim & Co

LEGISLATION AND INSTITUTIONS

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, described in question 5.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012, which came into force on 1 April 2013, has introduced general competition law, which is applicable to the postal market. The Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, introduces competition provisions applicable to aviation service.

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, Anti-Competitive Agreements and Abuse of a Dominant Position.

MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010 and had carried out a public consultation on 16 May 2016 on the proposed amendments, but the proposed amendments have yet to be tabled in parliament.

In its early days of enforcement, MyCC has concentrated its efforts on competition advocacy and issuing guidelines to shape its interpretation of the substantive provisions of the Competition Act and procedural requirements. MyCC had issued the following guidelines following public consultation:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Guidelines on Financial Penalties (published on 14 October 2014);
- 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 anticompetitive effect, and MyCC will have the power to take enforcement action against the parties to such agreement.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The Competition Act applies to any commercial activity both within Malaysia and outside that has an effect on competition in any market in Malaysia. The definition of 'commercial activity' does not include:

- any activity, directly or indirectly in the exercise of governmental authority;
- any activity conducted based on the principle of solidarity; or
- any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly is excluded from the application of the Competition Act insofar as the Chapter 1 Prohibition and Chapter 2 Prohibition (with respect to an abuse of dominant position) would obstruct the performance, in law or in fact, of the particular task assigned to the enterprise.

Commercial activities regulated by the Communications and Multimedia Act 1998, Energy Commission Act 2001, the Petroleum Development Act 1974, the Petroleum Regulations 1974, the Gas Supply Act 1993 and the Malaysian Aviation Commission Act 2015 are excluded from application of the Competition Act.

Under the Communications and Multimedia Act 1998, licensees must not engage in any of the following:

- conduct that has the purpose of substantially lessening competition in a communications market;
- agreements that provide for rate fixing, market sharing or boycotts; or
- tying or linking arrangements.

A licensee that has been determined to be in a dominant position can be directed to cease conduct that has the effect of substantially lessening competition in a communications market.

As stated in question 3, the Competition (Amendment of First Schedule) Order 2016 provides further exclusion on any activities regulated under the Malaysian Aviation Commission Act 2015.

MyCC may grant individual or block exemptions where the criteria in section 5 of the Competition Act (see question 4) have been satisfied. Exemptions are made public. They will be made for a limited time period and may be subjected to conditions. MyCC has granted a conditional block exemption to liner shipping agreements in respect of voluntary discussion agreements and vessel sharing agreements made within Malaysia or have an effect on the liner shipping services in Malaysia. This exemption, which took effect from 7 July 2014, was valid for three years and recently renewed for another two years.

Application of the law

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

The competition law provisions in 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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Trigger

MyCC may conduct any investigation it thinks expedient where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Competition Act. Investigations of cartels are usually triggered by a complaint or a participant in the cartel seeking a benefit under the leniency regime. MyCC encourages aggrieved parties to lodge complaints in accordance with the Guidelines on Complaint Procedures. If MyCC decides not to investigate a complaint, it must inform the complainant of the decision and reasons for the decision.

MyCC may, through inter-agency cooperation, work with other competition authorities in enforcement, investigations and other actions, and thus investigate international cartels.

Apart from MyCC's powers to initiate investigations on its own accord, the minister has powers to direct MyCC to investigate any suspected infringement.

Where markets are not competitive, MyCC may conduct a market review to determine if any feature or combination of features of the market restricts competition. This may include a study into the market structure, conduct of enterprises, supplies and consumers in the market. Information gathered from the review can trigger an investigation. By way of illustration, MyCC has conducted a review of the broiler market in Peninsular Malaysia that focused on the structure of the domestic broiler market; and the interactions of farmers, wholesalers and retailers across the broiler supply chain.

In December 2017, MyCC carried out a review of the pharmaceutical sector in Malaysia that examined industry issues such as:

- market structure and supply chain issues;
- the level of competition among players at different levels of the supply chain;
- identification of anticompetitive practices; and
- whether governmental intervention in the industry would be necessary.

MyCC also carried out a review of building materials in the construction industry. The specific objectives of the market review include to:

- determine the market structure, supply chain and profile of industry players that are involved in manufacturing and distribution of selected key building materials;
- identify the prices of selected key building materials at the manufacturing and wholesale levels;
- assess competition in the manufacturing and distribution levels of selected key building materials;
- identify anticompetitive practices among the industry players in the manufacturing and distribution levels of selected key building materials; and
- determine the extent of market distortion and whether government intervention is necessary in curbing anticompetitive conduct in the selected key building materials' market.

Collection of evidence

MyCC has wide powers of investigation. It may request information by written notice and conduct dawn raids (see question 10).

Notice of proposed decision

If, after the completion of the investigation, MyCC proposes to take enforcement action, it must give written notice of its proposed infringement decision to each enterprise that may be directly affected by the decision. The notice will:

- set out the reasons for MyCC's proposed decision in sufficient detail to enable such enterprise to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
- set out the penalties or remedial action; and
- present an opportunity for the enterprise to make written or oral representations to MyCC and the deadline for such representations.

MyCC may also conduct hearings to determine whether an enterprise has infringed the Chapter 1 Prohibition.

Decision

If MyCC determines that there has been an infringement, it must notify the persons affected by the decision and require that the infringement be ceased immediately. It is empowered, inter alia, to impose a financial penalty of up to 10 per cent of the worldwide turnover during the period of the infringement.

If MyCC finds that there is no infringement, it must give notice of such decision and specify its reasons.

Investigative powers of the authorities

10 | 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

11 | 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 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

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

Cartel conduct is investigated and adjudicated by MyCC, which has the power to impose fines and give directions as it sees fit to bring the infringement to an end (see question 18).

Burden of proof

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

The burden of proof in establishing that an infringement has occurred lies with MyCC.

An enterprise that seeks to rely on any exclusion, exemption or other defence (ie, the criteria under section 5 of the Competition Act for relief of liability; see question 4) bears the burden of proving that such exclusion, exemption or other defence applies.

The standard of proof is a balance of probabilities (ie, the same evidential standard for civil claims).

Circumstantial evidence

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

The evidential burden in establishing that an infringement under the Competition Act has occurred is borne by MyCC. The standard of proof is the balance of probabilities. Given that cartels usually function in secrecy and that members of a cartel usually work to avoid detection, it is rare to find any direct evidence of its existence. Investigating authorities would have to rely on circumstantial evidence to determine the existence of a cartel.

Appeal process

16 | What is the appeal process?

Appeals against MyCC's decisions are made to 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 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.

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 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

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

Currently, cartel conduct under the Competition Act is not a criminal offence.

However, obstructing MyCC's investigation may lead to criminal sanctions. Among other things, it is an offence to:

- refuse to give access to documents when directed by MyCC;
- provide false or misleading information, evidence or documents;
- destroy, conceal, mutilate or alter any evidence with the intent to defraud MyCC or obstruct MyCC's investigation;
- tamper with or break a seal affixed to protect the integrity of evidence;
- tip off others in a manner that is likely to prejudice any investigation or proposed investigation; or
- threaten reprisals on persons who file complaints of infringements or cooperate with MyCC in its investigations.

On conviction of any of the above, the penalty for a body corporate is a fine of up to 5 million ringgit, and for subsequent offences up to 10 million ringgit. For individuals, the fine is up to 1 million ringgit or imprisonment of up to five years, or both; and for subsequent offences, a fine of up to 2 million ringgit and imprisonment of up to five years, or both.

To date, there have been no such criminal sanctions imposed under the Competition Act and reported in case law.

Civil and administrative sanctions

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

On finding an infringement, MyCC may impose a financial penalty of up to 10 per cent of the worldwide turnover of an enterprise over the period during which the infringement occurred. There is no minimum financial penalty which MyCC may impose under the Competition Act.

The concept of a single economic unit is recognised under the definition of 'enterprise', and this may enlarge the turnover of the relevant enterprise to include parents with decisive influence, and subsidiaries that do not have autonomy to determine their actions on the market.

MyCC must require that the infringement be ceased immediately, and may specify steps to be taken to achieve this or give any other appropriate direction.

The financial penalty is potentially higher than that in other jurisdictions where the fine is limited to a specified number of years, whereas in Malaysia it may be for the entire duration of an infringement. However, the magnitude of this may not be felt for a while, as it applies only from 1 January 2012, the date on which the Competition Act came into force.

MyCC may bring proceedings before the High Court against any person who fails to comply with its directions.

To date, the financial penalties that have been proposed or imposed by MyCC ranged from 20,000 to 20 million ringgit. In addition, MyCC had in October 2017 published its proposed decision to impose a 213.45 million ringgit penalty against the General Insurance Association of Malaysia (PIAM) and several of its members in relation to an alleged anticompetitive agreement to fix trade discount rates for parts of certain vehicle makes, and labour hourly rates for workshops under the PIAM Approved Repairers Scheme.

Although not all infringing enterprises have been fined with financial penalties, it appears from recent trends that MyCC is taking a stricter stance for deterrence.

The first cartel case in early 2012, investigated by MyCC, involved the Cameron Highlands Floriculturist Association (CHFA). In this case, MyCC found CHFA to be liable for fixing the price of flowers sold to distributors and wholesalers in Malaysia. MyCC, which had initially proposed a financial penalty of 20,000 ringgit on CHFA in its proposed decision, removed that sanction in its final decision stating that CHFA had followed up with consultations with MyCC soon after receiving the proposed decision and exhibited exemplary cooperation in complying with the Competition Act. The final decision from MyCC required CHFA to:

- cease and desist the infringing act of fixing prices of flowers;
- provide an undertaking that its members shall refrain from any anticompetitive practices in the relevant market; and
- issue a statement on the above-mentioned remedial actions in the mainstream newspapers.

In January 2015, MyCC imposed fines totalling 252,250 ringgit on 24 ice manufacturers for allegedly fixing the selling prices of edible tube ice and block ice. The proposed financial penalties for each manufacturer ranged from 1,080 to 106,000 ringgit. Before issuing the proposed decision, MyCC had issued interim measures to the ice manufacturers seeking to prevent them from acting in accordance with their plan (which was advertised through local newspapers in December 2013) to collectively increase the price of edible tube ice by 0.50 ringgit per bag and 2.50 ringgit per block from 1 January 2014. In determining the level of financial penalty, MyCC stated that it took into account the seriousness of the infringement, duration of the infringement and mitigating factors, such as being cooperative during investigation.

In another price-fixing case involving the Pan-Malaysia Lorry Owners Association (PMLOA), MyCC did not propose financial penalties but issued proposed interim measures to PMLOA and accepted an undertaking from PMLOA and related lorry enterprises that they will not engage in any future anticompetitive conduct such as price fixing and shall cease and desist from increasing the transportation charges of up to 15 per cent after MyCC stated that this action constitutes price fixing.

MyCC had also in 2014 found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement that saw the two airlines sharing markets in the air transport services sector within Malaysia. The penalty is less than the maximum fine of 10 per cent of both airlines' respective worldwide turnovers between January and April 2012 (infringement period) as MyCC took into consideration the full cooperation of both parties in providing requested data and information. MyCC had also considered the voluntary action taken by both parties to remove reference to routes and market focus stated in the collaboration agreement as well as the fact that both parties have implemented

competition compliance programmes. MyCC's final decision, however, was subsequently overturned on appeal by the CAT on 4 February 2016 and the fines imposed on the airlines were set aside. MyCC filed for an application for judicial review to the High Court against the Competition Appeal Tribunal'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 and proposed 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

19 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

20 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

21 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 of court to disqualify a director as a result of any cartel activities.

Debarment

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

No.

Parallel proceedings

23 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

24 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 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 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

25 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 representor must satisfy the following criteria to initiate a representative action:

- common interest;
- common grievance; and
- the relief sought must be beneficial to all.

A member of a class who is not represented by the representor may apply to court to be added as a co-plaintiff.

COOPERATING PARTIES

Immunity

26 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, is only available for a breach of the Chapter 1 Prohibition and particularly an admission of an infringement under section 4(2) which deems certain agreements between competing enterprises as having the object of significantly restricting competition (see question 4).

The Competition Act empowers MyCC to grant differing percentages of reductions and provide for reduction of up to a maximum of 100 per cent of any penalties, which would otherwise have been imposed (ie, full immunity). The reductions would depend on whether the enterprise was the first person to bring the suspected infringement to the attention of MyCC, the stage in the investigation at which it admits its involvement in the infringement as well as information or other form of cooperation to be provided and the information already in possession of MyCC.

The leniency regime is only available in cases where the enterprise has:

- admitted its involvement in an infringement of section 4(2) of the Competition Act; and
- provided information or other form of cooperation to MyCC that significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement against any other enterprises.

Based on MyCC's Guidelines on Leniency, 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

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency regime is designed to encourage cartelists to be the 'first in' to supply as much information as possible in order to expedite MyCC's investigation. By being the second as opposed to third or subsequent cooperating party, the second cooperating party is more likely to receive a greater reduction if the application is made during the early stages of an investigation. Further, subsequent applications would be assessed in light of information that MyCC has in its possession including that received from leniency applicants who have received leniency.

Conceptually, the Malaysian leniency regime contains elements of 'amnesty plus' option comparatively similar to that applied in the EU. However, the scope and operational mechanism may differ.

Approaching the authorities

29 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 or she receives a 'marker' that gives the applicant priority in receiving leniency while his or her 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 cartelist has blown the whistle;
- the competition law implications in other jurisdictions, as MyCC is able to disclose the information to competition authorities in other jurisdictions, some of which may have criminal sanctions;
- whether concurrent leniency applications should be made in multiple jurisdictions; and
- whether the enterprise can offer an undertaking on acceptable terms to MyCC (see question 32).

The possibility of liability from follow-on actions should also be considered. MyCC cannot provide immunity from third-party damages actions.

Cooperation

30 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

31 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

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

As infringement of the Chapter 1 Prohibition is not a criminal offence, there is no applicable plea bargain concept.

However, MyCC may accept an undertaking from an enterprise to take remedial action subject to conditions that MyCC may impose. Where this is the case, MyCC shall close the investigation without any finding of infringement, and it cannot impose a penalty on the enterprise. The undertaking will be made public. MyCC may apply to the High Court for an order that the enterprise complies with the terms of the undertaking accepted by MyCC. A breach of the High Court order may be punished as a contempt of court.

Offering a suitable undertaking is particularly useful to avoid a finding of infringement, which can trigger follow-on civil actions.

Corporate defendant and employees

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

There is no effect, as there is no liability for infringement of the Chapter 1 Prohibition on employees. Nor are there criminal sanctions on individuals involved in a cartel.

Note, however, that individuals can have personal liability for offences under the Competition Act (see question 17).

Dealing with the enforcement agency

34 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

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

There is no automatic right under the Competition Act for disclosure of information or evidence by MyCC. However, MyCC may allow reasonable access to its investigation file, in the interest of procedural fairness and to ensure that the enterprise can properly defend itself against the allegations raised in a proposed decision and to enable the effective exercise of the rights of defence. Certain documents may not be disclosed on the grounds of confidentiality.

Representing employees

36 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 for employees involved in a cartel. Typically, therefore, representation is at the enterprise level. A present or past employee would be advised to obtain independent legal advice where the employee is suspected to have committed a criminal offence, for example, where he or she has given bribes to bid-rig a project.

Multiple corporate defendants

37 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

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

Not applicable. Financial penalties are only imposed on the infringing enterprise.

Taxes

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

No.

International double jeopardy

40 | 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

41 | 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 existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is 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

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

In March 2019, MyCC issued a proposed decision against eight enterprises for their alleged involvement in bid-rigging related to information technology procurement by a public higher learning institution. MyCC's media statement states that the enterprises colluded with each other by sharing each other's request for quotations (RFQ) and tender proposal information, manipulating prices and preparing documents for one another. The winner of the RFQs and tender also shared their profits with the losing bidders. In its media statement, MyCC stated that bid rigging is one of the most harmful type of anticompetitive conduct under the Competition Act.

Regime reviews and modifications

43 | 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.

ZaidIbrahim&co
a member of ZICO | law

Sharon Tan
sharon.suyin.tan@zicolaw.com

Nadarashnaraj Sargunaraj
nadarashnaraj@zicolaw.com

Level 19 Menara Milenium
Jalan Damanlela
Pusat Bandar Damansara
50490 Kuala Lumpur
Malaysia
Tel: +60 3 2087 9999
Fax: +60 3 2094 4666/4888
www.zicolaw.com

Mexico

Rafael Valdés Abascal and Agustín Aguilar López
Valdés Abascal Abogados SC

LEGISLATION AND INSTITUTIONS

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, inter alia, merger control, relative monopolistic practices (abuse of dominance practices and vertical restraints) and absolute monopolistic practices (cartel conduct) with the aim of promoting competition and preventing anticompetitive conduct.

Cartels are covered by article 53 of the LFCE, which prohibits absolute monopolistic practices. Criminal responsibility for a cartel is established in article 254-bis of the Federal Criminal Code and is prosecuted according to the National Code of Criminal Proceedings, while civil responsibility is regulated by the Federal Civil Code, the Federal Code of Civil Proceedings and article 134 of the LFCE.

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. The 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.

The 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 individual and collective damages' claims.

Please note, except as mentioned otherwise, any references made in this chapter to the 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?

Article 28 of the Constitution was amended in June 2013 (in force since 12 June 2013) to strengthen competition policy and law enforcement as well as to increase the effectiveness of the telecommunications regulatory framework. Derived from this constitutional amendment, a new LFCE was enacted and the Federal Criminal Code was amended. Both legislative changes were published in the Federal Official Gazette on 23 May 2014 and came into force on 7 July 2014.

Some of the relevant changes contained in these constitutional and legislative reforms are the following:

- executive branch agencies, the Federal Competition Commission (CFC) and the Federal Telecommunications Commission were replaced by new autonomous constitutional entities: the COFECE and the IFT, respectively;
- the five former commissioners were replaced by seven new commissioners for each entity;
- the power to apply the LFCE in the broadcasting and telecommunications industries was transferred to the IFT;
- the COFECE and the IFT are empowered to issue law regulations;
- new federal courts specialised in competition, broadcasting and telecommunications were created;
- the scope of exchanging information as a cartel conduct was extended. Under the former LFCE, the exchange of information was illegal only when its purpose or effect was to fix prices. Under the new LFCE, the exchange of information is illegal also when its purpose or effect is to commit any of the other absolute monopolistic practices (ie, restriction of output, allocation of markets or bid rigging);
- the minimum sanction for criminal offences increased from three to five years. Thus, cartel conduct may be sanctioned with five to 10 years' imprisonment;
- obstructing COFECE or IFT dawn raids is sanctioned with one to three years of prison whenever such obstruction consists of destroying information and documents; and
- COFECE and IFT decisions may be challenged only through an *amparo*, which is a proceeding followed before federal courts. *Amparos* against said authorities will be decided by the specialised district judges and circuit courts.

In November 2014, the COFECE issued its Regulations of the LFCE. Also, the IFT issued its Regulations of the LFCE in January 2015. Mostly, the aim of the aforesaid regulations is to detail procedural aspects, but they also regulate cartel conduct indicia (see question 4).

In June 2015, the COFECE issued its guidelines regarding the Immunity and Reduction of Sanctions Programme and the initiation of investigations. Those guidelines are not binding; their purpose

is to explain the proceedings to the public using practical and clear language. Also, at the end of 2015, the COFECE published its Guidelines for Information Exchange among Competitors and regarding the Cartel Investigation Procedure.

In January 2017, the IFT published its Guidelines on the Immunity and Reduction of Sanctions Programme.

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 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 Regulations, the following will be considered cartel conduct indicia and, as such, may be used for initiating a cartel conduct investigation:

- the invitation or recommendation addressed to one or more competitors to coordinate prices, output, or production, distribution and commercialisation terms and conditions, or to exchange information with the same purpose or effect;
- a situation where the price offered in Mexico by two or more competitors regarding internationally interchangeable goods or services is considerably superior or inferior to the international reference price, as well as a situation where the tendency of its evolution in a specific time span is considerably distinct to the tendency of international prices in the same period, except when such difference derives from the application of tax laws, or from transport or distribution costs;
- the instructions, recommendations or business standards adopted by chambers of commerce or professional associations to coordinate prices, output, or production, distribution and commercialisation terms and conditions of a certain product or service, or to exchange information with the same purpose or effect;
- a situation where two or more competitors establish the same maximum or minimum prices for certain good or service; as well as a situation where those competitors adhere to the prices issued by a competitor, certain chambers of commerce or associations; and
- regarding broadcasting and telecommunications industries, a situation where two or more competitors refrain from participating, or coordinate their bids in certain geographic areas.

With respect to information exchange, the Guidelines for Information Exchange among Competitors establish some criteria under which such conduct will be assessed. First, the Guidelines point out the relevance of the nature and characteristics of the information to be exchanged: strategic, detailed and recent information, exchanged in a frequent basis, is more likely to restrain competition and, as such, the exchange of the aforesaid information is more likely to be investigated by the 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 the 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 the strategic information. Therefore, all non-public information that would not be shared normally with third parties regarding prices, discounts, sales and purchase terms and conditions, clients and suppliers, must be identified;
- the use of strategic information must be limited to indispensable matters and as long as it is strictly needed for an adequate evaluation of the transaction. Such an exchange is indispensable when the information is reasonably related to the parties' understanding of the future profits of the concentration and to determine the value of the transaction;
- when possible, the use of historic and aggregated information to evaluate the relevant aspects of the transaction and for planning the final integration should be preferred;
- the economic agents must establish protocols or strict rules regarding access to strategic information and sign a confidentiality agreement regarding such information. Such rules must:
- limit the use of information only to previous audits; and
- indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not contemplate strategic operational decision-making and/or sales;
- the integration of an isolated and compact team in charge of the concentration. Such team will control the use and generation of the information. It is recommended for this team:
- to be integrated by persons that do not work for the commercial areas of the economic agents and to avoid contact with such areas; and
- to sign confidentiality agreements to oblige themselves to protect and maintain confidentiality of the information;
- if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate such information in the most disaggregated level to then aggregate it for its analysis in the concentration;
- maintain real-time records of all information exchanges and contact between the parties. Such records must be sequential and detailed to the extent that it is possible to rebuild in a reliable way the source of information, the moment in which the information was sent and received by the parties, and the use that was given to the information;
- whenever it becomes necessary to impose restrictions regarding the use and disposal of certain assets or to increase liabilities, in the phase that goes from the execution of the purchase agreement to the closing of the transaction, restrictions shall be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or bid rig before closing, nor impose future decisions to the other party; and
- inform the individuals involved in the concentrations the legal framework regarding merger control and cartel conduct.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific infringements, defences or exemptions for cartel conduct. The LFCE has transversal effect and includes all branches of economic activity, whether regulated or not.

Application of the law

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

The LFCE applies to individuals, corporations and other entities. Moreover, if the 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 the 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 CFC intervened with respect to conduct that took place abroad. In *IO-09-99*, the CFC learned that two foreign companies had pleaded guilty before a Texas court to participating in an agreement to fix the price of various types of vitamins, with international scope. Since the companies had affiliates and subsidiaries in Mexico, the CFC initiated a cartel investigation, given the possible extensive effects of the cartel in national territory.

In *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 another recent precedent (*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 the automobile market was affected by the global cartel as such products were used in the manufacture of cars that were produced and sold in Mexico. The 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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the 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 the COFECE up to four times, but only for justified causes.

During this time, the 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 the LFCE. During the investigation, case files may not be accessed.

Once the investigation has finished, if the COFECE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to the 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 the plenary of the COFECE. Once this proceeding is concluded, the 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

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

The 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 is applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by the COFECE's investigative authority without the COFECE's plenary or any court approval.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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

12 | 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 EU, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the US. Among these jurisdictions, the most significant interplay takes place with the US.

People cooperating under the leniency programme established in article 103 of the LFCE are entitled to object to the 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

13 | How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the COFECE. This body consists of seven commissioners, and decisions are taken by a simple majority. Damages and criminal responsibility are adjudicated under the terms mentioned in questions 1 and 2.

Burden of proof

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

A systematic interpretation of articles 73 and 79 of the LFCE indicates that the 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 DPR shall contain the evidence that the COFECE considered to subpoena the party to the administrative trial. In short, the COFECE must not issue a DPR without sufficient evidence.

As explained in question 9, defendants have 45 business days to answer the DPR and submit the necessary evidence to rebut the accusation. It should not, however, be understood that the burden of proof is thus passed on to the defendant; rather, defendants have the opportunity to prove a different theory of the case.

Certainly, not presenting evidence does not entitle the 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 *amparo* trial against the final decision of the COFECE).

The LFCE does not establish standards of proof to be satisfied by the COFECE. Nevertheless, there are precedents in which the CFC has acknowledged the existence of such standards (*DE-22-2006* and *IO-01-2007*). In terms of these resolutions, the evidence contained in the file must dismiss alternative hypothesis that could reasonably explain the situations observed in the market.

Circumstantial evidence

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

Considering all participants in a cartel have the incentive to hide or destroy any proof of their conduct, courts have established a binding criterion stating that there is no need to prove the arrangement through direct evidence. Accordingly, a presumption of the existence of a cartel is enough to sanction it under the terms of the LFCE, as long as such presumption relies on facts that have been proven through direct evidence; in other words, a cartel can be sanctioned using circumstantial evidence.

Appeal process

16 | What is the appeal process?

Against the decision of the COFECE, the parties can initiate an *amparo* trial before a federal district judge, who will rule on violations to fundamental rights during the administrative proceeding or in the adjudication. The *amparo* ruling may be appealed before the circuit courts. Only after this latter decision can the cartel case be considered legally settled.

SANCTIONS

Criminal sanctions

17 | 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 in question 4.

For a criminal action to be lodged, the COFECE must bring charges before the public prosecutor. Charges may be pressed with the DPR (see question 9). The term in which the criminal action expires is seven-and-a-half years.

Considering criminal sanctions for cartel conduct were enacted in 2011 and that the main procedural obstacle to 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 the COFECE has brought charges before the public prosecutor, which are currently under way.

Civil and administrative sanctions

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

Cartel conduct is sanctioned with a fine of up to the equivalent of 10 per cent of the infringer's income. In case of recidivism, the 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 16.9 million pesos. Such individuals also face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.

Individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to 15.2 million pesos.

Per COFECE's 2018 annual report regarding fines, 31 fines were imposed to economic agents for cartel conduct for approximately 244.53 million pesos. Also, the COFECE applied reductions to fines related to the leniency programme that amounts to 128.26 million pesos.

Guidelines for sanction levels

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

According to article 130 of the LFCE, when determining the fine to be imposed for anticompetitive conduct, the COFECE must consider the infringer's economic capacity as well as the gravity of the conduct. To determine the latter, CFCE shall assess the following elements:

- the damage derived from the conduct;
- the indicia of intention;
- the defendant's market share;
- the size of the affected market;
- the duration of the conduct; and
- possible obstruction of the COFECE actions.

In the case of recidivism, the 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 the COFECE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

Compliance programmes

20 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 of this law (see question 19) states that one of the criteria for the imposition of a sanction can be the intention of the conduct. The COFECE's Regulation in its article 182 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.
- The validation that said illegal conduct was committed as a result of suggestion, instigation or encouragement of any public authority.
- The actions taken to hide the conduct.
- The validation 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 the 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.

In this respect, it would seem that the existence of a compliance programme might be taken into account by the COFECE when imposing a fine on the economic agent that implemented the programme.

Director disqualification

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

Yes. See question 18.

Debarment

22 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

23 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. As stated in question 17, once the CFCE's investigative authority has issued the DPR, it may bring criminal charges before the public prosecutor.

According to article 134, administrative responsibility is a condition to initiate individual or class actions before civil courts, in order to claim compensation for the damages derived from the anticompetitive practice.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 on the terms mentioned above.

Damages claims for antitrust infringements have not been frequent in Mexico, since a decision from the competition authority judging a party to be responsible (as a legally settled matter) is necessary for initiating a civil process on the matter. Thus, private antitrust tort practice is still under development.

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

25 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 CFCE;
- no fewer than 30 members of a class;
- not-for-profit civil associations whose purpose is the defence of rights and interests in antitrust matters; and
- the Attorney-General of Mexico.

This regime came into force in February 2012 and there have been no class actions since then. Therefore, the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

COOPERATING PARTIES

Immunity

26 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 LFCE, as well as articles 114 to 116 of the CFCE's Regulations contemplate the leniency, immunity or amnesty programme. In June 2015 the CFCE issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which the CFCE applies the law and regulations regarding leniency.

Any corporation or individual who has been or is involved in cartel activity may apply for leniency.

In order to qualify for the programme, the applicant must submit evidence, fully and continuously cooperate with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity.

One of the benefits of the programme consists of reductions in the applicable administrative fines. The fines may be fixed at the symbolic amount of one unit of measurement and update (the basis for calculating fines in Mexico) – which, in practice, is equivalent to being awarded 'full immunity' – for the first applicant or may be reduced by up to 50, 30 or 20 per cent of the applicable fine for the second and subsequent applicants. The level of the reduction also depends on the sufficiency of the evidence provided to the CFCE and the cooperation during the proceedings.

Likewise, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, but will still be subject to private monetary damage claims through individual or class actions.

Subsequent cooperating parties

27 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. See question 26.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent applicants who provide the 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

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

Leniency may be sought at any moment before the COFECE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity, and the order in which subsequent applicants approach the COFECE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. The COFECE uses markers in order to determine who the first applicant is and who the subsequent applicants are.

Cooperation

30 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 CFCE during the corresponding proceeding, and cease its participation in the cartel activity. All applicants, in order to qualify, must submit more information than the one that is available in the records of the investigation.

Confidentiality

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

The CFCE will keep confidential the identity of all (ie, first and subsequent) leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, the CFCE will not share the identity of or the information provided by the applicants with other jurisdictions unless it is authorised to do so in writing by the applicant.

Settlements

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

If the requirements are fulfilled by the applicant, the CFCE issues a resolution expressing the applicant's place in line and the corresponding fine reduction. The benefit will be conditional upon the cooperation of the applicant during the investigation and sanction proceedings. If applicants fail to cooperate (eg, if the applicant destroys or hides evidence

or alerts other cartel participants to the investigation), they will lose the benefits of the leniency programme (see question 26).

Also, the plenary of the CFCE is entitled to request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent, as long as the following criteria are met: absence of pending appeals against the CFCE's decisions; and the economic agent is a first-time offender in the terms provided by article 127 of the LFCE and in the terms provided by article 254-bis of the Federal Criminal Code.

Corporate defendant and employees

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

Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous cooperation with the CFCE. If the corporation fails to provide full and continuous cooperation but the employees who received the extension provide such cooperation, these employees will remain protected as if they were the applicants themselves.

Dealing with the enforcement agency

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

If a corporation detects potential cartel activity, it should conduct an internal investigation to assess the existence of enough elements to prove such activity. If so, it should move quickly to apply for the leniency programme. Since providing the CFCE with enough evidence is a requirement to qualify for the programme, in the absence of such evidence, it will be better to prepare a strong defence instead of applying for the programme.

According to the Guidelines on the Immunity and Reduction of Sanctions Programme, the following are examples of the information and documents that may be submitted during the application:

- detailed description of the good or service, including its use, characteristics and price;
- a narrative of the collusive agreement or information exchange, describing the conduct or conducts that are being performed or that were performed. In this narrative, it must be admitted that the applicant participated in such conduct. Also, to back up such narrative the applicant can provide agreements, memoranda, minutes, activity reports, correspondence, emails, telephone records, personal reports and signed testimonies of the participants, among other documents. When the applicant provides digital evidence from computers, laptops, smart phones and other electronic devices, the source and extraction method of the information must be provided;
- identification of the individuals and/or legal entities involved in the collusive agreement or in the information exchange;
- duration of the conduct, the geographical reach of such conduct and specific time of the agreements including the status of the applicant's participation (whether its participation has ceased or not);
- a narrative regarding how the agreements worked. In other words, how the participants communicated, the methods for the information exchange, etc;
- details of the meetings, communications and agreements, including dates, places, participants, objectives and the achieved results;
- actions taken to ensure, follow up and verify compliance of the agreements entered into by competitors;
- a statement about the existence of hard copies of information exchange or agreements, if applicable; and
- identification of the relevant information that is not available for the applicant and the reasons that explain its unavailability (eg, the company is not the owner or has been destroyed).

Likewise, the guidelines establish that cooperation during investigation proceedings includes:

- terminating the cartel conduct;
- keeping confidentiality regarding the information that was delivered to the CFCE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by the CFCE;
- cooperating during the investigation errands;
- implementing all possible actions in order to make the involved individuals to participate in the investigation (ie, when they are subpoenaed); and
- refrain from destroying, falsifying or hiding information.

Also, according to the guidelines cooperation during the sanction proceeding includes:

- refrain from denying, directly or through the submission of evidence, the participation in the cartel;
- submitting useful new evidence;
- refrain from destroying, falsifying or hiding information; and
- cooperating during the procedural errands.

DEFENDING A CASE

Disclosure

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

According to article 79 of the LFCE, the following information or evidence should be contained in the authority's DPR:

- the identification of the economic agents under investigation and, if possible, the corresponding persons;
- the matter under investigation and the probable purpose or effects on the market;
- the evidence and other elements of conviction available on the file and its analysis; and
- the elements that support the DPR and the legal provisions that are considered infringed, as well as the consequences that may result of such infringement.

Representing employees

36 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

37 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

38 | 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

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

Private damages awards are tax-deductible while fines are not.

International double jeopardy

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

Competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, sanctions for non-compliance of local legislation can coexist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

Getting the fine down

41 | 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 the investigation and sanction proceedings may lead the authority to consider a lower fine. The existence of a compliance programme may help, as one of the elements that the COFECEE may consider when imposing a fine is the indicia of intention (see question 19).

UPDATE AND TRENDS

Recent cases

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

Valdés Abascal represented San Antonio in an *amparo* trial against an administrative ruling where COFECE sanctioned this economic agent for alleged cartel conduct. After a lower court decision upheld COFECE's ruling, the *amparo* was won before the Federal Circuit Court. This case represents an important precedent since it is the first time that a circuit court determined that COFECE's interpretation of the elements that configure cartel conduct were incorrect and established the elements that do configure such conduct. Also, it is important to mention that from all the indicted economic agents (five in total), San Antonio has been the only one that won on the merits of the case (another economic agent won an *amparo* trial due to a procedure error by COFECE).

In another case, in April 2019, a collegiate court determined that two companies that form part of the same group of economic interest may be considered as alleged offenders for the conduct of bid rigging when both of the companies filed independent bids. This is a relevant precedent since the members of the same group of economic interest have not been considered as competitors among themselves, which excludes one of the principal elements of absolute monopolistic practices. This precedent only analyses bid-rigging conduct.

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

Regime reviews and modifications

43 | 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 30 September 2019, COFECE published the Regulatory Provisions of the COFECE for the management of information derived from legal counsel provided to economic agents. These Regulatory Provisions establish the measures that COFECE must adopt when gathering documents that are protected by the attorney-client privilege. These Regulatory Provisions are applicable all proceedings carried out by COFECE, not only for proceedings regarding the investigation and sanction of absolute monopolistic practices.

Netherlands

Jolling de Pree, Bart de Rijke and Helen Gornall
De Brauw Blackstone Westbroek NV

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Dutch Competition Act (the Act) entered into force on 1 January 1998 and is modelled closely on European Union competition law. The cartel prohibition contained in the Act is a copy of article 101 of the Treaty on the Functioning of the European Union (TFEU), excluding the effect on interstate trade criterion. An English-language version of the Act is available on the website of the Dutch Authority for Consumers and Markets.

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 2013, the Dutch Competition Authority merged with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) into a single regulator, the Authority for Consumers and Markets (ACM). This organisation has the task of applying and enforcing the Act. The ACM also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in the Netherlands. The ACM has over 500 employees.

The ACM has independent status from the Ministry of Economic Affairs. The Minister for Economic Affairs (the Minister) is empowered to set out general policy rules, and can instruct the ACM to undertake activities in relation to EU and international competition issues. However, the Minister is prohibited from giving instructions to the ACM with respect to any specific case.

Changes

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

The ACM is currently focusing on the upcoming digital challenges for competition law. The ACM together with the Dutch Secretary of State of Economic Affairs calls upon EU lawmakers to help it cope with the rapid digitalisation of markets. According to the ACM, the speed of the digital economy requires swifter regulatory intervention than is currently available. It therefore suggests at EU level of ex ante regulation to regulate gatekeeper platforms.

As mentioned in question 2, the Dutch Competition Authority merged with OPTA and the CA to become a single regulator, the ACM. On 1 August 2014, the Streamlining Act came into force, harmonising the different powers, enforcement tools and procedures of the ACM's predecessors.

In July 2016, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased. Instead of keeping pace with the European Commission's cap of 10 per cent of a company's total turnover in the preceding business year, the maximum fine is set by multiplying the cap of 10 per cent of a company's turnover by the numbers of years of the cartel infringement, subject to a maximum duration of four years. In the case of a repeated infringement, the maximum fine level will double. As a result, a maximum fine of 80 per cent of a company's turnover can be imposed on repeat offenders. Fines for individuals who oversaw and gave instructions regarding cartels have also increased from €450,000 to €900,000.

Substantive law

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

According to article 6 of the Act, which mirrors article 101 TFEU, agreements, decisions and concerted practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market. Similar to the assessment under article 101 TFEU, the distinction between restrictions by object and restrictions by effect is important. For restrictions of competition by object, there is no need to look at any actual effects. The prohibition covers all types of behaviour, horizontal or vertical, irrespective of whether they are based on formal, oral or tacit agreements or concerted practices.

Article 6 does not provide specific examples of restrictive clauses. In practice, any agreement that fixes prices, limits output or divides markets, customers or sources of supply will almost inevitably be considered to infringe article 6. Horizontal price-fixing agreements, collective vertical price fixing, collective boycotts and horizontal agreements aimed at partitioning markets or quota schemes (including limitation of sales and prohibited tendering agreements – bid rigging) are regarded by the ACM as very serious infringements of the competition rules.

As in EU competition law, agreements restricting competition are only prohibited if they affect competition to an appreciable extent.

Article 7 provides for an exemption for restrictive agreements, including hard-core cartels, where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies involved in the supply of goods) or €1.1 million (for other companies) are involved. An additional exemption is available for any restrictive agreement between (any number of) undertakings that are actual or potential competitors if their combined market share on any relevant market does not exceed 10 per cent and whose agreement does not appreciably affect interstate trade.

Article 101 TFEU also forms part of the substantive law on cartels in the jurisdiction, having direct effect in relation to agreements and concerted practices affecting competition in the Netherlands where there is also an effect on interstate trade.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific offences under the Act. The competition rules apply across the board, including in regulated sectors such as telecommunications. The Act provides for non-application of the cartel prohibition to collective labour agreements, sector agreements on pensions between employers' organisations and employees' organisations and (under certain conditions) agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession.

At present, there are various non-industry-specific exemptions from the cartel prohibition, such as agreements benefiting from an EU exemption (falling under a block exemption), which are exempt from the cartel prohibition. However, the ACM has the express power to declare an EU block exemption non-applicable in the Netherlands.

In addition, various categories of agreement can be exempted from the cartel prohibition by general administrative order. Such national block exemptions have been issued for agreements offering temporary protection from competition to undertakings in new shopping centres and certain cooperation agreements in the retail trade.

Restrictive practices necessary for the operation of services of general economic interest may also fall outside the scope of the cartel prohibition.

Similar to the EU rules under Regulation No. 1/2003, companies must self-assess agreements in light of article 6(3) of the Act, which mirrors article 101(3) TFEU. In general, the ACM will not provide written opinions (comfort letters) as to whether an agreement fulfils the criteria of article 6(3). However, similar to the Commission, it will provide advice in 'novel' cases. More and more parties prefer an informal discussion with the ACM over informal opinions.

To assist companies in self-assessment, the ACM has issued guidelines on, inter alia, the application of article 6(3), on the cooperation between companies and on competition in the healthcare sector. The Minister has also published policy rules on competition and sustainability and a bill to facilitate sustainability initiatives is currently pending. In 2015 the ACM held that – in the absence of market power – vertical agreements are usually beneficial to consumers and that enforcement will focus on vertical agreements that negatively affect consumers. By the end of 2018 the ACM made clear that vertical agreements have become a priority and started some cases. In addition, the Minister has published policy rules on consortia arrangements. The policy rules on consortia arrangements are largely based on the Commission guidelines on horizontal agreements and on the application of article 101(3) TFEU. Further guidance as to how to apply these policy rules was published in May 2015.

Application of the law

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

The cartel prohibition applies to undertakings and associations of undertakings. The term 'undertaking' is construed broadly and – in accordance with the case law of the Court of Justice of the European Union – is generally defined by the ACM as 'every entity engaged in economic activity, regardless of its legal status and the way in which it is financed'. Therefore, the Act may also apply to individuals running an unincorporated undertaking. Publicly owned entities may also qualify as undertakings. Intention to make profit is not required.

Agreements concluded between undertakings belonging to the same group of companies are, for the purposes of the Act, considered as agreements within one single economic entity and are in principle not subject to the cartel prohibition.

In December 2014, the ACM, for the first time in its history, imposed fines on a number of investment companies because their former portfolio company engaged in cartel conduct. The ACM seems to follow the European Commission's approach of holding private equity funds liable for cartel infringements by current or former subsidiaries. But the ACM appears to have introduced a new element by imposing individual fines on the investment companies, rather than fining them jointly with the portfolio company. In 2019, the Trade and Industry Appeals Tribunal upheld in last resort the ACM's fining decision. Pursuant to the Act, principals and de facto managers can be made subject to fines of up to €900,000 for involvement in a cartel. In addition, maximum fines of €900,000 can be imposed on individuals for non-cooperation with the ACM's investigations. Similarly, maximum fines of €900,000 or 1 per cent of turnover can be imposed on companies for non-cooperation. The ACM has stated that, as a matter of policy, it will investigate the possibility of imposing fines on individuals in every cartel case. In November 2010, the ACM for the first time used its power to impose personal fines on individuals for a cartel infringement. Personal fines varying between €10,000 and €250,000 were imposed on three executives of two construction companies for their involvement in a cover-pricing cartel. In March 2016, the ACM imposed a fine of €12.5 million on four companies in the cold storage industry. Five executives each received personal fines, the highest of which was €144,000. The cold-storage companies were involved in merger talks between 2006 and 2009 and during these talks, exchanged competitively sensitive information with each other, shared customers and made price arrangements. One of the cold-storage companies admitted to having been 'too open, too soon' when holding merger talks. As a result, it implemented structural changes to its corporate culture and structure to prevent it from happening again. The ACM used a procedure similar to the European Commission's cartel settlement regime to lower the fine imposed on this cold storage company by 10 per cent in return for an acknowledgement of its involvement in and its liability for the infringement. The cold storage company's executives made use of the same procedure to have their personal fines reduced. On 12 April 2018, the District Court of Rotterdam quashed four fines imposed for other reasons than the ACM's use of the (informal) settlement procedure. According to the District Court, the ACM insufficiently substantiated why it had considered the various exchanges between the parties part of a single and continuous infringement, particularly now that these exchanges could also have been part of legitimate talks to explore the intended merger transaction.

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 all conduct that affects competition on part or the whole of the Dutch market. The place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.

In 2004 (Shrimps, No. 2269), the ACM decided it had jurisdiction to impose fines on Dutch, Danish and German undertakings that participated in a cartel that concerned a relevant market comprising Denmark, Germany and the Netherlands. The Danish and German undertakings did not achieve the relevant turnover in the Netherlands. The ACM held that undertakings do not need to have activities in the Netherlands for their restrictive agreements to produce effects on the Dutch market

and therefore to be caught by the cartel prohibition. The ACM's decision was upheld by the District Court of Rotterdam. It follows that the ACM does not necessarily require an undertaking to have direct sales in the Netherlands for its agreements to be subject to the cartel prohibition. There have been no decisions (yet) in which the ACM based its jurisdiction on the basis of indirect sales in the sense of cartelised intermediate products that were sold outside the Netherlands and were incorporated into (final) products sold to customers in the Netherlands. In March 2016, the Trade and Industry Appeal Tribunal upheld how the ACM calculated the fines imposed on a number of companies for participating in a silver skin onion cartel. The cartel participants generated 60 per cent of their combined turnover within the European Union. For the first time, the ACM based the fines imposed on the cartel participants' EU-wide turnover instead of national turnover. The Tribunal held that the ACM was right to do so, since EU Regulation No. 1/2003 authorises the ACM to apply EU competition rules and impose fines.

The ACM also takes account of fines imposed or to be imposed by national authorities of other member states. After consulting with the French and German competition authorities, it adjusted the fine imposed on the Grain Millers group for participating in a flour cartel, as the total of fines to be imposed by the three competition authorities would lead to its bankruptcy.

Export cartels

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

There is no express export cartel exemption laid down in the Act. The Act only applies to conduct affecting competition in part or the whole of the Dutch market; a pure export cartel (ie, without any effects on the domestic market) is therefore unlikely to be caught under the national cartel prohibition. However, pure export cartels may prove to be rare. For instance, in the Silver Skin Onion cartel, although a substantial proportion of the silver skin onions was destined for export and supplied to customers outside the Netherlands, the ACM took the participants' EU-wide turnover into account when calculating the fine by arguing that the sales to customers outside the Netherlands had a potential or actual effect on the competitive process in the Netherlands with a possible negative impact on efficiency and innovation by the participants (the ACM did exclude the turnover achieved in third countries such as Russia from its calculations). In March 2016, the Trade and Industry Appeal Tribunal upheld how the ACM calculated the fines. According to the Tribunal, the ACM was right to take account of the EU-wide turnover, since EU Regulation No. 1/2003 authorises the ACM to apply EU competition rules and impose fines.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Akin to investigations under EU law, investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or ex officio on the initiative of the ACM. Investigations start with fact-finding, by making requests for information to parties possibly involved in a suspected infringement or carrying out on-the-spot inspections (either announced in advance or in the form of dawn raids).

If, on the basis of the information gathered, the ACM has a reasonable suspicion that an infringement has occurred, it will normally pursue a case. Having said this, the ACM has repeatedly emphasised its discretion to prioritise and is encouraging the use of civil law tools by third parties. In March 2016, the ACM published its prioritisation policy on how it prioritises enforcement requests. In this prioritisation policy, the ACM has set the following three criteria to determine which requests will be given priority:

- to what extent does the identified behaviour in the request harm consumer welfare;
- what is the magnitude of the public interest when the ACM takes action; and
- to what extent will the ACM be able to act effectively and efficiently?

According to the ACM, enforcement requests do not need to score high on all three criteria in order to be followed up by an enforcement investigation. In cases where more than one criterion has a high score, there is often sufficient reason to launch a full investigation.

The ACM will send a report (comparable to a statement of objections under EU competition law) to the undertakings concerned. The addressees of the report have access to the (non-confidential) documents contained in the ACM's files and may submit a written reply concerning the contents of the report to the ACM. In practice, addressees of the report are also invited to present their views in an oral hearing before the ACM. The legal department of the ACM subsequently reassesses the case and the ACM issues a decision within approximately seven to eight months of sending the report.

Investigative powers of the authorities

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

Broadly speaking, the powers of the ACM are the same as the powers provided to the Commission under EU Regulation No. 1/2003. The powers given to the ACM may only be used insofar as they are reasonably required.

The ACM's surveillance officials are authorised to enter all premises, with no prior judicial authorisation being required. Private homes are an exception, in that the ACM is not allowed to enter without prior authorisation by the Rotterdam District Court. In the case of a Commission inspection, prior authorisation is required from the Rotterdam District Court if a company withholds permission for an extensive inspection of business premises or if a private home or vehicle is to be inspected.

During the dawn raid, the ACM's inspectors may interview one or more employees. If there is a reasonable suspicion of a violation by the company, the inspectors must inform the company that it is not obliged to answer questions. The ACM generally accepts that all employees of the company may invoke the right not to answer questions. However, for former employees the right to remain silent is limited to cases in which they can be held personally liable for an infringement.

Surveillance officers are also authorised to request information, to examine books and other business records, and to make copies, although attorney–client privilege exists. It should be noted that – as opposed to EU case law – in the ACM's dawn raids based only on Dutch competition law, attorney–client privilege also exists in relation to in-house lawyers who are admitted to the bar. The ACM is of the view that without attorney–client privilege, an in-house lawyer would no longer qualify as a viable competitor for external lawyers, and therefore has retained attorney–client privilege for in-house lawyers. As a result, conflicting regimes remain depending on the capacity in which the ACM conducts an investigation. If the ACM officials conduct investigations on the basis of Dutch competition law, Dutch national rules apply and the correspondence with both in-house and external counsel is covered by attorney–client privilege. The same applies to investigations by the ACM at the request of the Commission or a competition authority of another member state. However, if the ACM inspectors only assist the Commission officials, EU rules apply and correspondence with in-house counsel has no legal privilege coverage.

The ACM is focusing increasingly on searches of computer records during dawn raids. The standard procedure for investigations is laid down in the '2014 ACM Procedure for the inspection of digital data' and the '2014 ACM Procedure regarding the legal professional privilege of lawyers'. This Procedure is partly the result of a ruling in interim relief proceedings, in which the District Court of The Hague ruled that the procedure of the digital logbook laid down in the previous ACM guidelines, Digital Procedure 2007, was an insufficient safeguard against fishing expeditions, since it only provided insight into which files had been opened during the investigation without specifying how long for and how thoroughly the files were examined. As a remedy, the court ordered the ACM to invite an authorised representative of the parties to be present during its investigation of the digital copies to make sure that no copied data beyond the purpose and subject matter of the investigation would be examined. The Procedure takes account of this ruling by providing the relevant company the opportunity to be present during the examination of the digital copies it claims are outside the scope of the ACM's investigation. Interesting to note is that, the Court of Appeal of The Hague ruled in April 2013 that the ACM can order a forensic IT firm to produce a list of companies active in the sector under investigation by the ACM for which the IT firm carried out competition compliance audits. According to the Court of Appeal, the ACM has a legitimate interest in obtaining this list, since the results of these audits could be used by the audited companies to destroy evidence of possible anticompetitive conduct.

In addition, the ACM has a 'sealed envelope' procedure similar to that known under EU case law to further safeguard legally privileged documents during ACM dawn raids. If a company refuses to allow the ACM officials to take a cursory look at a document because it considers it to be covered by legal privilege, the ACM inspector will place the document in a sealed envelope without having examined it and hand it to an independent ACM official: the legal professional privilege officer. The company subsequently has 10 business days to substantiate its legal privilege claim in writing to the legal professional privilege officer. This procedure – although an improvement – still remains controversial, as the legal professional privilege officer is not independent, as prescribed by the General Court in the Akzo case. The ACM contends that a company's employees are obliged to answer questions, although they have the right not to answer questions that could incriminate their employer. The Streamlining Act, which entered into force on 1 August 2014, clarifies that only a company and its current employees have a right to remain silent. Contrary to an earlier ruling by the Trade and Industry Appeals Tribunal, former employees cannot invoke the right to remain silent when questioned by the ACM in connection with an investigation against their former employer. In September 2010, the ACM imposed a fine of €51,000 on the Dutch National Association of General Practitioners (LHV) for breaking a seal. This fine was quashed in appeal. According to the Trade and Industry Appeals Tribunal, LHV could not be held responsible for the seal break because a security guard at LHV's shared office building broke the seal during his rounds. The guard was not directly employed by LHV and LHV had taken all the necessary steps to inform the persons who could possibly enter the room of the affixed seal. It informed the cleaning staff as well as the facilities manager of the shared office building and had affixed yellow tape across the door as an extra precaution. The Tribunal did not consider it necessary for LHV to have instructed the security guard directly, because contact with the security staff usually ran through the facilities manager. As of 1 July 2016, a clause is included in the Establishment Act of the ACM to clarify that a company will also be sanctioned for the breakage of an affixed seal if it has not taken all the necessary precautions to prevent a seal break.

In July 2015, the Dutch Trade and Industry Appeals Tribunal clarified that the ACM can use evidence obtained through telephone taps installed by other agencies for its own competition law investigations. The ACM itself is not authorised to tap phones when investigating suspected anticompetitive practices.

In November 2017, the District Court of The Hague ruled that, when carrying out a dawn raid, the ACM can copy all business-related as well as private data from company employees' mobile phones. The court found that the considerable size of the data stored on mobile phones makes it impossible for the ACM to select the relevant data at the company's premises. As a result, the ACM is allowed to copy all the mobile phones' data to select from at its offices at a later date. According to the court, the interests of an ACM investigation outweigh the right to privacy, as long as there are sufficient safeguards in place to prevent the ACM from inspecting data without being entitled to do so. According to the court, the ACM Procedure for the inspection of digital data provides for these safeguards.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The ACM is an active member of various forums for international cooperation:

- the European Competition Network (ECN) provides for formal cooperation between the Commission and EU member state competition authorities. This cooperation may intensify as a result of Directive (EU) 2019/1 (ECN+ Directive) to grant greater enforcement powers to NCAs.;
- the European Competition Authorities Association, which facilitates informal cooperation between the European Economic Area (EEA) national competition authorities, the Commission and the European Free Trade Area Surveillance Authority; and
- the ACM is also part of the International Competition Network and is involved in competition work undertaken by the Organisation for Economic Co-operation and Development.

The ACM can supply information obtained in the course of the application of the Act to foreign competition authorities. This is an exception to the general rule that information collected about companies should remain confidential and is for internal use only for performance of the tasks entrusted to the ACM. However, such information may only be transferred by the ACM if the confidentiality of the information (where relevant) is sufficiently protected, adequate assurances are given that the information will not be used for purposes other than the enforcement of foreign competition law and the provision of such data is in the interests of the Dutch economy.

Similar provisions allow the exchange of information collected under the Act with national administrative agencies authorised to enforce competition rules under different statutes. There are cooperation protocols between the ACM and a number of other regulators, including the Dutch Inland Revenue, the Public Prosecutor and the Netherlands Authority for Financial Markets.

Interplay between jurisdictions

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

Aside from the allocation of cases within the ECN, international inter-agency cooperation does not formally affect the investigation,

prosecution and sanctioning of cartel activity in the jurisdiction. Of note, however, is an investigation of a public bid-rigging cartel in the painting business, in which the ACM requested that the Belgian competition authority search the home of a manager who resided in Belgium. The evidence was used by the ACM, even though the case was solely based on an infringement of Dutch competition law and not on article 101 TFEU. In addition, in late 2010 the ACM imposed fines, (largely) upheld by the Trade and Industry Appeal Tribunal in 2016, on Dutch, Belgian and German flour producers for their participation in a cartel. The ACM closely cooperated with other European competition authorities in this investigation (see question 7). In December 2017, the ACM issued a press release that its collaboration with the German Competition Authority (Bundeskartellamt) had led to settlements in the towage sector. Following a number of leniency requests, the ACM and the Bundeskartellamt both launched investigations into a possible cartel involving harbour towage service providers in the Netherlands and Germany. During the investigations, the competition authorities concluded that the Bundeskartellamt was best positioned to take action against the cartel. The Bundeskartellamt reached settlements totalling approximately €17.5 million with the harbour towage service providers involved and closed its investigations in March 2018.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The ACM both investigates and adjudicates on cartel matters in the public interest on the basis of administrative law procedures. There is, however, a separation (Chinese walls) between the ACM's staff who carry out investigations and prepare the statement of objections, and those who decide on a possible sanction. In 2011, the Trade and Industry Appeals Tribunal confirmed that high standards apply to the interdepartmental Chinese walls within the ACM. The Tribunal upheld the Rotterdam District Court's earlier ruling that the ACM legal department's meddling in the investigation of an alleged competition law infringement was contrary to the Chinese walls set up between the legal department, responsible for levying sanctions, and the competition department, responsible for conducting investigations. The ACM's statutory Chinese walls go one step further than the traditional all-in-one system according to which the European Commission and many other antitrust regulators seem to be organised. The European Court of Human Rights has confirmed that all-in-one systems of investigation and fining comply with the fundamental right to a fair trial, provided they are safeguarded by sufficiently extensive review of the sanctioning decision by an independent court.

In addition, private parties may initiate civil procedures, for example, for interim relief (under article 3:296 of the Civil Code) and damages. Actions for damages are based on article 6:162 of the Civil Code (unlawful act) or article 6:212 of the Civil Code (concerning unjust enrichment). Actions can be brought by parties to a contract seeking rescission or suspension of terms and conditions. Such civil procedures are now being used more frequently in relation to cartel cases (see question 24). Furthermore, civil procedures can be initiated with respect to breaches of article 101 TFEU.

Burden of proof

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

The burden of proof for showing that the cartel rules have been infringed lies with the ACM. The District Court has full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

The Act includes a provision expressly stating that the company claiming the benefit of article 6(3) of the Act – which is similar to article 101(3) TFEU – shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The Trade and Industry Appeal Tribunal ruled in July 2016 that the question whether certain evidence can be used to back up other evidence depends on its credibility. As a result, leniency statements do not necessarily have to be supported by evidence different to other leniency statements. In October 2009, the District Court of Rotterdam ruled that two general statements of leniency applicants, supported solely by written evidence provided by the same applicants, provided insufficient evidence of a construction company's participation in public bid rigging. The ACM had imposed a fine on the company on the basis of two statements of leniency applicants that the company had participated in a system of public bid rigging. These statements were supported by written evidence on four projects that derived from the same leniency applicants. The evidence of three projects originated from one applicant. The court held that, in view of the company's denial of having participated in the public bid rigging, the statements constituted insufficient proof of the infringement. The ACM was consequently not authorised to impose a fine. This judgment was confirmed by the Trade and Industry Appeals Tribunal in April 2012. In May 2014, the District Court of Rotterdam overturned the fines on Pilkington and Scheuten for their participation in a double glazing cartel. The ACM had based its decision entirely on the leniency statements by rival companies AGC and Saint Gobain. According to the court, the companies' confessions were based on leading questions by the ACM, which affected their reliability. Without any further supporting evidence, the ACM had failed to prove that Pilkington and Scheuten participated in the cartel. This ruling has far-reaching consequences for how the ACM should accumulate evidence based on leniency statements. The ACM should limit itself to what leniency applicants can state by their own account. 'Refreshing' their memory by confronting them with statements of other leniency applicants will not be tolerated by the court.

Circumstantial evidence

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

Yes, as long as the circumstantial evidence proves to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent. See also question 14.

Appeal process

16 | What is the appeal process?

Decisions of the ACM in cartel cases are subject to a three-stage appeal process. The first stage is carried out by the ACM, with the possibility of advice by an independent advisory committee. The second and third stages are before specialist administrative law courts.

First, an addressee of a decision (and other interested parties) can file for administrative review with the ACM. Such an appeal must be lodged within six weeks of the notification of the decision. In this first stage of the appeal process, the ACM reviews its decision on the basis of the appeal. The review is not handled by the initial case handlers. In cases where a sanction has been imposed, an advisory committee of independent experts can advise the ACM. Since 1 August 2014, it is no longer statutorily required to set up an advisory committee on administrative appeals. The administrative review decision may itself be appealed against to the Rotterdam District Court (administrative law chamber), again within six weeks of the notification of that decision. Further appeal is possible

against this judgment to the Trade and Industry Appeals Tribunal. The courts have full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

Since 1 September 2004, it is possible to dispense with the administrative review stage on the basis of the Direct Appeal Act 2004. When filing an administrative review application with the ACM, an applicant can request that the ACM allow a direct judicial appeal to the Rotterdam District Court. It is for the ACM to decide, depending on whether the case is suitable for direct appeal and subject to certain other rules, whether to grant the request.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions under the Act.

In criminal law cases published in June 2005, the Rotterdam District Court discussed the relationship between Dutch criminal and competition law. These cases related to criminal charges brought concerning alleged widespread fraud in the Dutch construction sector. (Reference was also made in these cases to the European Commission's 1992 SPO decision concerning a Dutch association of joint price-setting organisations.) However, these criminal cases are separate from (administrative law) competition cases before the ACM. The Court held that Parliament intended sanctions under the Act to be administrative, not criminal. It held that in practice, the ACM can better deal with most infringements of the Act than the public prosecutor, as competition law is a complicated field of law and distinct from typical criminal cases. Furthermore, it noted that the involvement of just one agency removes possible double jeopardy problems. A distinction was made, however, for criminal sanctions relating to facts prior to 1998. The ACM had no power to impose fines for this period prior to the entry into force of the Act. The previous Act (the WEM) provided for criminal sanctions, including imprisonment for economic delicts, with the public prosecutor responsible for prosecution. In May 2008, the District Court of The Hague confirmed that competition law is an exclusive matter for the ACM; moreover, it noted that criminal prosecution is barred for facts that are an infringement of both criminal law and competition law, because it considers the Act a lex specialis of the general Criminal Law Act.

Civil and administrative sanctions

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

Agreements prohibited by the cartel prohibition laid down in article 6 of the Act are null and void. The consequences of this are governed by civil law. In accordance with article 3:41 of the Dutch Civil Code, an agreement can be partially null and void. The Dutch Civil Code's statutory conversion provision converts invalid clauses into valid ones that correspond as much as possible to the original clause. The Supreme Court ruled in December 2009 that the cartel prohibition's absolute nullity sanction prevents the statutory conversion provision from applying to clauses with an anticompetitive object. In a ruling of December 2013, the Supreme Court made clear that the same goes for clauses with an anticompetitive effect. As noted earlier, article 101 TFEU has a direct effect in relation to agreements and concerted practices affecting competition in the Netherlands, where there is also an effect on interstate trade. There are no civil penalties; only the real damage can be claimed.

Under its powers of enforcement under the Act and under EU Regulation No. 1/2003, the ACM can impose administrative fines for infringements of the cartel prohibition in the Act and of article 101 TFEU. Such fines are imposed on the natural or legal person to whom the infringement can be attributed. If this person can show that he or she cannot be held responsible for the infringement, no fine will be imposed. The Act enables the ACM to fine directors of legal persons personally for breach of the cartel rules (fines can also be imposed for non-cooperation with an ACM investigation). Pursuant to the Act, fines of up to €900,000 can be imposed on principals and de facto managers for breach of the cartel prohibition. In Wegener (September 2012), the District Court of Rotterdam held that a member of the supervisory board of an undertaking can qualify as a principal or de facto manager only in exceptional circumstances, because the powers and influence that a supervisory board member is generally able to exercise are limited to supervising the company. According to the court, a supervisory board member's role in a company must have been atypical for him or her to be held personally liable as principal or de facto manager.

In determining the fine, the ACM must take the statutory limits and the policy rule on fines into account (see question 19).

In addition to the imposition of administrative fines, the ACM can impose an order under threat of periodic penalty payments. Such an order is designed to lead to the quick termination of an infringement, and therefore serves a different purpose from a fine. Both a fine and an order under threat of periodic penalty payments can be imposed for the same offence. Furthermore, the ACM can impose a binding order to comply with the Act on the undertaking or individual acting in violation of the cartel prohibition or impose a periodic penalty payment in the form of a structural measure (similar to article 7 of EU Regulation No. 1/2003). The ACM can also issue binding instructions on an undertaking to behave in a particular way to comply with the cartel prohibition, without the ACM having to establish that the undertaking has committed an infringement. The ACM can impose fines of up to €900,000 or 1 per cent of turnover for non-compliance with the binding instructions it has issued.

Alongside fines or penalties, or both, for infringement of the cartel prohibition in the Act, significant administrative fines can also be imposed for certain other forms of conduct (referred to as non-cooperation). The ACM can impose fines of up to €900,000 or 1 per cent of turnover (in line with EU No. Regulation 1/2003) for non-compliance with the duty on undertakings to cooperate with an investigation, and a maximum of €900,000 on individuals. The Act also enables the ACM to impose fines for breach of the duty to cooperate if companies do not make their accounts available to the ACM when it is setting fines.

Guidelines for sanction levels

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

In July 2014, the Minister for Economic Affairs published a new policy rule on fines to be applied by the ACM. This policy rule is binding on the ACM in determining the fine to be imposed. According to the policy rule the basic fine is calculated as a percentage (0–50 per cent) of a company's sales of products or services covered by the infringement during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating circumstances. As stated in question 3, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased in July 2016. As a result, the maximum fine that can be imposed for a cartel infringement is 10 per cent of a company's turnover multiplied by the number of years the cartel infringement lasted, subject to a maximum duration of four years.

The policy rule on fines states that aggravating circumstances are, in any event:

- the circumstance that the ACM or another competent authority, including the European Commission or a judicial body, has previously established irrevocably that the offender committed the same or a similar violation;
- the circumstance that the offender hindered the ACM's investigation;
- the circumstance that the offender instigated or played a leading role in committing the violation; and
- the circumstance that the offender used or made provision for control methods or coercive methods for the continuation of the practice to be sanctioned.

The policy rule on fines finds that the following are in any event mitigating circumstances:

- the circumstance that the offender, other than under the Leniency Policy Rule, provided the ACM with a degree of cooperation that went beyond the offender's statutory obligation; and
- the circumstance that the offender, of its own accord, provided full compensation to the parties injured by the violation.

Compliance programmes

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

The ACM is not obliged under the policy rule on fines to take into account compliance programmes in the calculation of the fine. That said, the Trade and Industry Appeals Tribunal ruled on 23 October 2018 in the Laundry-cartel case that the ACM should have taken into account that the undertakings actually made efforts to comply with the cartel prohibition even though this was infringed. Their efforts did not consist of a compliance programme, but of seeking advice and acting on that. As a consequence the tribunal lowered the multiplier for the seriousness of the infringement and thereby the amount of the fine decreased. In that light, it can be argued that a compliance programme should be considered as a similar efforts to comply with the cartel prohibition.

Director disqualification

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

In the Netherlands, it is not possible to disqualify directors for a breach of the cartel prohibition under administrative law. It seems however possible to disqualify directors who participated in a cartel when their behaviour can be characterised as a fraud/scam or unfair competition which is prohibited under criminal law as well. We are not aware of any cases of this sort yet.

Debarment

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

The Dutch Procurement act provides for an optional debarment from government procurement procedures for companies which have breached the cartel prohibition. They take into account final decisions of the ACM and European Commission of the last four years. Leniency applicants are exempted from this sanction. Debarment is a discretionary of the procurer and not automatic, since It has to proportional. That Is a case-by-case analysis.

Parallel proceedings

23 | 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 cannot lead to both criminal and civil or administrative sanctions. The Act does not provide for criminal sanctions. Behaviour that could lead to criminal sanctions based on the Criminal Law Act is barred from prosecution by the Public Prosecutor if that behaviour also infringes competition law (District Court of The Hague, as noted in question 17).

PRIVATE RIGHTS OF ACTION

Private damage claims

24 | 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 cartel prohibition has a direct effect in the sense that private parties can commence legal proceedings to obtain injunctive relief or to recover actual (but not punitive) damages (see question 13). The same applies in respect of article 101 TFEU.

The use of civil proceedings is encouraged by the Minister and the ACM, in line with similar promotion of the use of civil procedures at EU level.

The rules of the Civil Procedure Code apply, as does the Act implementing the Damages Directive (2014/104/EU), which entered into force in February 2017.

The burden of proof rests with the claimant unless any special rule or the requirement for reasonableness and fairness prescribes otherwise. (The chair of the ACM board has advocated ACM decisions being made binding on Dutch courts as evidence of a competition law infringement in civil proceedings. This would ease the burden of proof on claimants.) General tort law allows for umbrella purchase claims.

In July 2016, the Dutch Supreme Court ruled in TenneT/ABB on the question whether the passing-on defence is a defence that disputes the amount of the damage or whether it must be characterised as a deduction of collateral benefits from the amount of the damage. In the latter case, it must be established that there is a causal link between the harmful event and the benefits and that deduction of the benefits is reasonable. The Supreme Court held that a court may choose between these approaches. According to the Supreme Court, the requirements are on balance the same in both approaches, especially that in both approaches the deduction must be reasonable. Also, the Supreme Court held that the burden of proof that part or all of the price overcharge has been passed on is with the liable party. In March 2017, the District Court of Gelderland ruled that ABB should pay TenneT, the Dutch electricity grid operator, approximately €68 million in damages for the losses it suffered as a result of ABB's participation in the Gas Insulated Switchgear cartel. The district court dismissed ABB's passing-on defence for three reasons:

- TenneT would have passed the overcharge on to its customers lower down the supply chain (ie, the distribution system operators), which in turn would have passed it on to the end consumer (ie, the electricity users). The chance of end consumers bringing their own damages actions is near to negligible;
- TenneT is a wholly state-owned company. Therefore, the damages paid to TenneT will ultimately benefit all Dutch citizens (eg, by reduced transport and electricity tariffs or profit distribution); and

- it could not be ignored that ABB participated in a cartel but obtained immunity from fines under the European Commission's leniency programme, thereby 'escaping' a fine that would have been tenfold the amount that ABB will now need to pay in damages.

In July 2018, the Court of Appeal of Arnhem-Leeuwarden published an interim judgment in the *TenneT/ABB* proceeding appointing independent economic experts to learn more about how to establish the possible overcharge and how to determine whether the overcharge was passed on or not.

Class actions

25 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?

On 19 March 2019, new legislation was approved which enables Dutch courts to award damages, where previously they could only rule on liability. This new legislation introduces rules aimed at limiting the scope of monetary damages and allows the court to appoint a principal claimant. Furthermore, It tightens the eligibility requirements for claimant organisations in respect of governance, representativeness and funding. As a rule class actions will only apply to Dutch claimants that have not chosen to opt-out of the class action. Foreign defendants will, in principle, only be bound by the outcome of the class action proceedings if they explicitly opt-in. The new legislation is expected to come into force in 2020. Besides there Is the possibility of having collective settlements declared binding on the basis of the Class Action (Final Settlement) Act.

A part from the collective claim regimes, special claim vehicles are often used in civil cartel damages litigation in the Netherlands. These litigation vehicles claiming damages on behalf of cartel victims can either do so on the basis of an assignment-based model or by way of a collective action requesting a declaratory ruling establishing the cartel participants' liability. At the moment, for cartel cases with mass exposure the possibility of declaring a settlement binding on all injured parties may be best suited. According to article 7:907 of the Civil Code, a settlement reached by the defendant and a foundation or association with a statutory goal to represent the injured parties can be declared binding on all injured parties by the Amsterdam Court of Appeal. Pursuant to the Dutch Act on the Collective Settlement of Mass Claims, the parties to a settlement agreement may request the court to declare the settlement agreement binding on all persons to which it applies according to its terms (the interested persons). The settlement agreement must have been entered into between one or more potentially liable persons and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the interested persons. If the court declares the settlement agreement binding, all interested persons are bound by its terms. There is an exception for interested persons that timely submit an opt-out notice, which can only be submitted after the binding declaration has been issued. Being bound by the terms of the settlement agreement basically means that interested persons who do not opt out have a claim for settlement relief and are bound by the release in the settlement agreement. On 12 November 2010 and 17 January 2012, the Amsterdam Court of Appeal delivered important decisions regarding an international collective settlement of mass claims. The Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. The decision will have to be recognised in all European member states, Switzerland, Iceland and Norway under the Brussels I Regulation and the Lugano Convention. The Netherlands is the only European country where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis. This makes the Netherlands an attractive venue for settling international mass claims, irrespective of whether any (class action) litigation has taken place in the Netherlands. In addition, Dutch courts seem to seize jurisdiction quite easily and legal costs are capped, making it a popular country for assigned claims. The upcoming launch of the Netherlands Commercial Court (NCC) will also add to the Netherlands remaining an attractive jurisdiction for cartel damages actions. The NCC will enable parties to have their proceedings relating to international trade disputes conducted in English within short time frames by a team of specialist judges.

COOPEQRATING PARTIES

Immunity

26 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 has been in place since 2002. The current policy rule on leniency applicable to companies as well as individuals wishing to confess to involvement in a cartel was published in July 2014. The policy rule provides that immunity from fines is available for the first party to present information to the ACM about a cartel prior to the start of an investigation which enables the ACM to carry out a targeted inspection or, in the event the ACM has already initiated an investigation, the first to provide information that was not yet in the ACM's possession enabling the ACM to prove the cartel infringement. In addition, the party should not have compelled other companies to take part in the cartel agreement and should continue to comply with its duty to cooperate. Not only companies, but also individuals, can apply for leniency. An individual can apply for leniency independently or jointly with other individuals, on the condition that these individuals at the time of the leniency application are all employees of the same company involved in the cartel. Individuals may also be granted leniency if a company applies for leniency. If a company does so, current employees can benefit from the same leniency if they declare to the ACM that they want to be considered as leniency co-applicants of the company and they individually comply with the leniency requirements. Former employees can benefit from a company's leniency application in the same manner, but only if the ACM determines that there is no conflict with the interest of the investigation.

Subsequent cooperating parties

27 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 immunity from fines is no longer available, parties can still apply for leniency by way of fine reduction if they supply information to the ACM that has significant added value to the investigation and provided they cooperate fully with the ACM's investigation. The duty to cooperate includes the obligation to:

- refrain from any practice that may obstruct the ACM's investigation;
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the ACM; and
- keep its employees and – insofar as is possible – former employees available for statements.

Parties that have not applied for leniency but cooperate with the investigation beyond the legal requirements may also obtain a fine reduction. The policy rule on fines provides that such cooperation qualifies as a mitigating factor when setting the fine.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The second cooperating party can obtain a fine reduction between 30 and 50 per cent for providing the ACM with information that has significant added value. A fine reduction between 20 and 30 per cent is available to the third party submitting information of significant added value. Subsequent parties can obtain fine reductions up to 20 per cent. All leniency applicants will have to continue to comply with their duty to cooperate in order to qualify for leniency. The Dutch rules do not provide for 'amnesty plus'.

Approaching the authorities

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

Whether it is advisable for a company to apply for leniency depends on the specific circumstances of the situation, but although there are no deadlines for applying for leniency, once the decision to apply for leniency has been taken, it is advisable to present the information as soon as possible.

It is also possible to obtain a marker for an incomplete leniency application, if the information provided by the leniency application offers a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel. In most cases, it may prove time-consuming and burdensome to gather all the evidence on the cartel agreement. The marker secures the leniency applicant's position in relation to other possible applicants during a time period that is determined by the ACM's Leniency Office on a case-by-case basis.

Cooperation

30 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 same level of cooperation applies to all leniency applicants, in that from the moment a company submits its leniency application, it should:

- refrain from any practice that may obstruct the ACM's investigation (such as destroying evidence, or any action that would result in the (future) leniency application becoming public knowledge;
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the Leniency Office; and
- keep its employees and – insofar as is possible – former employees available for statements.

Confidentiality

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

The candidate leniency applicant can contact the ACM's Leniency Office anonymously or through an authorised representative to discuss the applicability of the policy rule to a 'hypothetical' case. Prior to applying for leniency, the candidate applicant can also – through an attorney – (anonymously) contact the Leniency Office by telephone to determine whether it can still qualify for full immunity. If the Leniency Office confirms the availability of full immunity, the candidate applicant is obliged to immediately apply for leniency.

Corporate statements containing incriminating information do not have to be provided in writing but can be provided orally. Further, any information presented to the ACM by a company in the context of an application for leniency should not be made public to the extent that the information qualifies as confidential information (eg, business secrets) within the meaning of the relevant article of the Dutch Act on transparency in public administration. The identity of the applicant for leniency is not made public before the ACM has issued its report (comparable to the Commission's statement of objections).

However, confidentiality of information contained in leniency applications in respect of exchange of information between agencies remains a controversial issue (see question 12).

Moreover, the policy rule on leniency also covers breaches of article 101 TFEU with effect in the Netherlands. Rules for exchange of leniency application information and cooperation with the Commission and other EU member state competition authorities are included. The policy rule refers to the Commission's Notice on cooperation within the ECN and states that the ACM will follow the Notice with regard to the position of applicants claiming the benefit of a leniency programme and exchange of information (in relation to article 101 TFEU).

The policy rule on leniency states that the identity of the leniency applicant will remain confidential until the ACM has issued a report, unless there is a legal obligation to do so earlier or the leniency applicant agrees to earlier disclosure of its identity. Addressees of the report will be allowed to inspect the leniency statements (without being able to photocopy or photograph it) but can only use it within the context of the administrative procedure relating to the cartel at hand.

Settlements

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

In December 2018, the ACM published guidelines on how it handles settlements. The ACM states that when it considers a case suitable for a settlement, it will indicate the facts that constitute the Infringement and the fine It intends to impose on the relevant parties. They may react, but the ACM indicates that It does not want to negotiate. If a party acknowledges the Infringement and accepts the fine, the ACM will grant a 10 per cent reduction and publish a summary decision of the case.

Before that, the ACM was already willing to consider settlement of competition infringements by alternative means (to refrain from imposing substantial fines to competition law infringements). In August 2015, the ACM for the first time applied a procedure similar to the European Commission's cartel settlement regime and lowered by 10 per cent cartel fines imposed on two natural vinegar producers in return for

an acknowledgement of their involvement in and their liability for the cartel. The vinegar producers' employees made use of the same procedure to have their personal fines reduced. In the cold storage cases (see question 6), the ACM used a procedure similar to the European Commission's cartel settlement regime to lower the fine imposed on a cold storage company by 10 per cent in return for an acknowledgement of its involvement in and its liability for the infringement.

The ACM may further decide to refrain from sanctions if companies pledge in writing to refrain from certain behaviour, which enables the ACM to adopt a commitments decision (comparable to a commitments decision under article 9 of Regulation No. 1/2003). If the commitments are broken, the ACM can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or €450,000. The ACM cannot accept a pledge if it intends to impose a fine, which will be the case with hard-core cartels. In February 2018, the ACM approved commitments offered by KLM Royal Dutch Airlines and Amsterdam Airport Schiphol not to have any contact about the restriction of growth opportunities of other airlines relative to KLM and other members of the Sky Team airline alliance. The ACM wanted to avoid KLM receiving improper preferential treatment.

According to the ACM, compliance programmes are particularly relevant to sectors in which the ACM's enforcement policy has been successful (eg, the construction industry and insurance sector).

Corporate defendant and employees

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

If a company applies for leniency, individuals can benefit from the same leniency if they declare to the ACM that they want to be considered as a leniency co-applicant of the company and they individually comply with the leniency requirements. Individuals can also apply for leniency by themselves, expressly stating that they do not act on behalf of the company of which they are (former) employees. Individuals can also apply for leniency jointly on the condition that at the time the leniency application is made they are all employees of the same company involved in the cartel.

Dealing with the enforcement agency

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

Applications for leniency must be lodged with the ACM's Leniency Office. Leniency officers are officials of the ACM who are not entrusted with surveillance or investigative duties. The Leniency Office has its own telephone and fax numbers and email address. It will notify a company of the date and time that its application for leniency has been received by the Leniency Office.

The order of applications is determined by the date and time of the initial telephone call or other oral or written contact between the undertaking and the Leniency Office when a company has unequivocally requested leniency on the basis of the policy rule.

DEFENDING A CASE

Disclosure

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

A defendant has a right to access to its file. As a result, the ACM will need to provide it with access to all documents in its case file on which the ACM's decision to impose a fine are based, but also all information that could be to the benefit of the defendant's defence that are in the ACM's case file. In December 2015, the Trade and Industry Appeals Tribunal ruled that transcripts of oral leniency statements should be disclosed. In appeal proceedings against a cartel decision, the ACM had requested that copies of the transcripts of the oral leniency statements be disclosed only to the Trade and Industry Appeals Tribunal, not to the cartel participants appealing the ACM's decision. Counsel for these cartel participants had earlier obtained access to the transcripts at the ACM offices (without being allowed to make copies). The Trade and Industry Appeals Tribunal rejected the ACM's request for restricted disclosure. According to the Tribunal – that appeared to act on its own initiative without any defendant having protested against non-disclosure – a balance should be struck between the interests of the cartel participants in having access to all relevant evidence for a proper defence against their cartel fine and, on the other hand, the interest of the leniency applicants not to be disproportionately harmed by disclosure and the importance of effective ACM enforcement. In this particular case, the interests of a proper defence outweighed the success rate of the ACM's leniency programme. The content of the leniency statements was known to the other cartel participants and the involvement of the leniency applicants in the cartel could also be derived from other, non-confidential documents. The Tribunal therefore ruled that the ACM should submit copies of the transcripts.

Representing employees

36 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?

According to the Rules of Conduct of Members of the Bar, members may not represent the interests of two or more parties if the interests of those parties conflict or if subsequent developments are likely to bring them into conflict. If counsel represents employees as well as the corporation, and a conflict of interests arises, it should withdraw as counsel for one of the parties. It is subsequently barred from acting in that case against the party it no longer represents. Subject to these Rules of Conduct, counsel may represent both a corporation and its (former) employees.

Multiple corporate defendants

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

See question 36. There is no absolute prohibition on defending multiple corporate defendants. However, since a company's leniency application covers its employees but hurts its competitors, conflicts of interest are more likely to arise when defending multiple corporate defendants.

Payment of penalties and legal costs

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

Yes, although the ACM has stated that account must be taken of the corporation's payment of the employees' fine when calculating the fine to be imposed on the corporation.

Taxes

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

In January 2011, the Dutch Supreme Court ruled that cartel fines imposed by the ACM are not deductible for corporate tax purposes. The Supreme Court's ruling confirmed the earlier rulings by the District Courts of Haarlem and Breda on the non-deductibility of fines imposed by the ACM. Both courts had concluded that Dutch corporate income tax legislation explicitly excludes the possibility to deduct fines imposed by the ACM as a result of competition law infringements. There is no case law as of yet on the tax deductibility of private damages.

International double jeopardy

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

The ACM does take into account fines imposed by other national authorities. It, for instance, adjusted the fine imposed on the Grain Millers group for participating in a flour cartel owing to its imminent bankruptcy if it were to pay the fines imposed by the ACM and the French and German competition authorities.

There is no case law as of yet on whether overlapping liability for damages in other jurisdictions is taken into account in private damage claims, although the District Court of The Hague recently clarified that a claimant in a cartel damages action does not have to disclose a settlement agreement with a defendant to the co-defendants. But given that all cartel members are jointly and severally liable for the harm caused by the cartel, the claimant should reduce its damages claim by the settling defendant's internal contribution share in the overall damage. If the settlement amount significantly exceeds that share, the claim will need to be reduced by the actual settlement amount to avoid overcompensation.

Getting the fine down

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

In the policy rule on fines, the ACM notes that a mitigating factor includes the fact that the company identified the infringement itself, terminated the infringement of its own accord and notified the ACM before the ACM initiated an investigation.

Note also the importance of turnover calculations for forming the basis of the fine calculation. This has been shown in the ACM's administrative review decision concerning mobile telephone network operators and dealer bonuses, where reductions in fines of more than 50 per cent were accorded by the ACM on review.

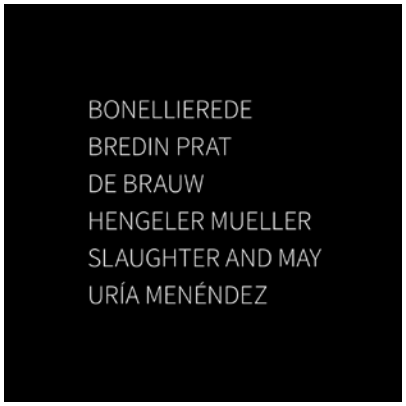
Aside from the leniency programme, there is no standard separate procedure for reducing the amount of a fine prior to its imposition in a decision.

UPDATE AND TRENDS

Recent cases

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

The ACM has changed its priority on vertical agreements. The ACM has demonstrated its interest by starting enforcement actions against possible illegal vertical restraints. Furthermore the digital market and networks are a priority for the ACM.



Jolling de Pree
jolling.depree@debrauw.com

Bart de Rijke
bart.derijke@debrauw.com

Helen Gornall
helen.gornall@debrauw.com

40 Square de Meeûs
1000 Brussels
Belgium
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

Regime reviews and modifications

43 | 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 or proposed changes.

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 (see question 1). Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition regime. Meanwhile, Decree-Law No. 125/2014 of 18 August has enacted the AdC's statutes, superseding Decree-Law No. 10/2003 of 18 January.

It is also worth underlining the long-awaited implementation of the EU Private Enforcement Directive through the Private Damages Act, which introduced changes to a number of articles of the Act, notably regarding confidentiality and access to documents.

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).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

Under the Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

According to article 10(1) of the Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly, to the provisions of article 101(3) TFEU, this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings that invoke the above justification bear the burden of proof of the aforesaid conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between member states, they satisfy the remaining application requirements of a block exemption regulation adopted under article 101(3) TFEU. This benefit may be withdrawn by the AdC if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

As far as regulated sectors are concerned, the AdC's responsibilities are to be carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors (see question 9) establishing the terms of their reciprocal cooperation.

Application of the law

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

The notion of 'undertaking' adopted in the Act is very broad and in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it is financed. Groups of undertakings are treated as a single undertaking where they make up an economic unit or maintain ties of interdependence or subordination among themselves. See question 18 regarding the liability of individuals.

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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Act, as well as infringements of article 101 TFEU that the AdC initiates or in which it is called to intervene, are governed by the Act and, on a subsidiary basis, by the quasi-criminal minor offences regime (see question 1). The most relevant steps are as follows.

Inquiry

Initiating an inquiry: principle of opportunity

Under the Act, the AdC may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Act has adopted the principle of opportunity, pursuant to which, in exercising its powers, the AdC shall be subject to the criteria of public interest in the promotion and defence of competition, and on the basis of such criteria it may grant different degrees of priority in handling the matters it is called to assess. In deciding whether proceedings for infringement of competition rules shall be initiated, the AdC shall take into account:

- the competition policy priorities;
- the elements of fact and of law that are submitted to the AdC;
- the seriousness of the possible infringement;
- the likelihood of proving the existence of the infringement; and
- the scope of the investigation activity required to perform the mission of ensuring compliance with national and EU competition rules.

The AdC has meanwhile adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

As regards processing of complaints, the AdC shall register all complaints received and initiate the corresponding proceedings. However, if on the basis of the information available the AdC considers that there are no sufficient grounds for acting, it shall inform the complainant granting a delay of no fewer than 10 working days to submit observations. If such observations are submitted by the complainant within the prescribed deadline but the AdC does not change its position, declaring that the complaint has no grounds or should not be granted priority, such decision may be appealed to the Specialised Court (see question 16). Conversely, in the absence of the timely submission of the observations, the case is closed.

Scope

Within the framework of the inquiry, the AdC shall carry out all the investigation actions required to establish the existence of an infringement and of the corresponding infringers, and to collect evidence.

Settlement proceedings

During the inquiry phase, the AdC may fix a deadline to the concerned undertaking of no less than 10 working days to express in writing its intention of participating in discussions with the AdC aiming at a possible submission of a settlement proposal. During the inquiry phase, the concerned undertaking may also submit in writing to the AdC its intention of initiating the said discussions.

A concerned undertaking participating in settlement discussions shall be informed, 10 working days before the start of such discussions, of the facts that are attributed to it, of the evidence supporting the application of a sanction and of the limits of the fine.

At the end of the discussions, the AdC notifies the concerned undertaking to submit a settlement proposal within a deadline of no fewer than 10 working days. The AdC may either reject the proposal (a decision that cannot be appealed) or accept it. In this latter case, the AdC shall prepare the draft settlement document, which it notifies to the concerned undertaking. The concerned undertaking shall, within a deadline of no fewer than 10 working days prescribed by the AdC, confirm that the draft settlement document reflects the settlement proposal. In the absence of such confirmation:

- the draft settlement document becomes ineffective;
- the infringement proceedings shall continue; and
- the settlement proposal is deemed ineffective and cannot be used as evidence against any undertaking involved in the settlement proceedings.

The draft settlement document is converted into a definitive sanctioning decision upon the above confirmation by the concerned undertaking and upon payment of the applied fine. Facts included in the decision can no longer be used in other infringement proceedings and the facts confessed by the concerned undertaking cannot be rebutted in an appeal. Furthermore, a reduction of fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings.

Closure with conditions

The AdC may also accept commitments offered by a concerned undertaking that are likely to eliminate the effects on competition of the practices under scrutiny, closing the case with conditions attached aimed at guaranteeing compliance with the commitments offered. Before approving a decision to close the case with conditions attached, the AdC shall publish on its website and in two major national newspapers, at the expense of the concerned undertaking, a summary of the case, fixing a deadline of no fewer than 20 working days for submission of observations by interested third parties. The AdC may, within two years, reopen the case closed with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the closure decision was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months. However, if such deadline cannot be met, the Council of the AdC (the AdC's decision-making body) shall inform the concerned undertaking of that fact, indicating the period required for the completion of the inquiry. Upon completion of the inquiry, the AdC may:

- start the investigation phase notifying the concerned undertaking of the statement of objections, when the AdC concludes that, on the basis of the findings, there is a reasonable possibility of adoption of a sanctioning decision;
- close the case when the findings do not allow for the conclusion that there is a reasonable possibility of adoption of a sanctioning decision;
- put an end to the proceedings adopting a sanctioning decision within settlement proceedings; or
- close the file with conditions attached, under the terms referred to above.

If the inquiry has been initiated following a complaint and the AdC considers, on the basis of the findings, that there is no reasonable possibility of adoption of a sanctioning decision, the AdC informs the complainant thereof, fixing a deadline of no fewer than 10 working days for the submission of observations. If such observations are submitted and the AdC's position remains unchanged, the latter shall adopt an express closure decision, which may be appealed to the Specialised Court (see question 16).

Investigation

Scope

In the statement of objections, the AdC shall fix to the concerned undertaking a deadline of no fewer than 20 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, and to request complementary evidence it may deem convenient. In the observations submitted, the concerned undertaking may request an oral hearing. Upon reasoned decision, the AdC may refuse to undertake additional action with regard to complementary evidence if it considers that the request has mere delaying purposes. The AdC may also carry out additional collection of evidence, even after the submission of the written observations by the concerned undertaking and its oral hearing. In this latter case, the AdC shall notify the concerned undertaking of the evidence gathered, fixing a deadline of no fewer than 10 working days for submission of observations. Furthermore, whenever the new evidence substantially changes the facts initially attributed to the concerned undertaking, the AdC shall issue a new statement of objections, the above applying mutatis mutandis. Pursuant to the Act, the AdC has adopted guidelines on the investigations and procedural steps.

Settlement proceedings

In its observations regarding the statement of objections, the concerned undertaking may also submit a settlement proposal, in which case the proceedings shall be suspended for a period established by the AdC that cannot exceed 30 working days. The remaining steps of the settlement proceedings are largely similar to those indicated above in respect of the submission of a settlement proposal during the inquiry phase.

Closure with conditions

During the investigation phase, the AdC may also close the case with conditions attached, under the same terms as those referred to above.

Decision

The investigation must be concluded within a maximum deadline of 12 months from the notification of the statement of objections. However, if such deadline cannot be met, the Council of the AdC shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the AdC may:

- declare the existence of a restrictive practice and, if applicable, consider such practice justified under article 10 of the Act;
- adopt a sanctioning decision within settlement proceedings;
- close the case with conditions attached, under the terms referred to above; or
- close the case without conditions.

Decisions declaring the existence of a restrictive practice may include the admonition or the application of fines and other sanctions set in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

Interim measures

The AdC may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause a serious damage that is irreparable or difficult to repair. The interim measures may be adopted by the AdC ex officio or upon request by any interested party, and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

Liaison with sectoral regulators

Whenever the infringement occurs in a sector subject to specific regulation, the AdC shall immediately inform the corresponding regulatory authority so that the latter may submit observations. Furthermore, prior to the adoption of the final decision, the AdC shall obtain a prior opinion from the relevant regulatory authority, except in the case of a decision of closure of the case without conditions. Likewise, when a sectoral regulatory authority assesses a practice that may amount to a violation of competition rules, it shall immediately inform the AdC. In this latter case, the sectoral authority, before issuing a final decision, shall submit a draft thereof to the AdC to obtain its opinion.

Investigative powers of the authorities

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

The Act enhanced the extensive powers of investigation already granted to the AdC by the former Competition Act. Under the Act, in investigating restrictive practices the AdC may, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examine, collect and seize extracts from accounting records or other documentation at the premises, land

or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application); or
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the AdC's functions.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees, or other workforce of undertakings or associations of undertakings, evidence of infringements to article 9 of the Act or to article 101 TFEU may be found, the AdC may, upon decision by the competent judge issued upon an AdC's substantiated application, carry out searches in such domiciles. A search in an inhabited house, or in a locked part thereof, may only be carried out from 7am to 9pm, otherwise being null and void. Searches in the office of an attorney-at-law or doctor may only be carried out in the presence of a judge, who shall previously inform the chair of the local attorneys' bar or doctors' association, as applicable, so that he or she, or a delegate thereof, may be present. These rules apply, mutatis mutandis, to searches elsewhere, including vehicles of shareholders, board members or employees or other workforce of undertakings or associations of undertakings.

Seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. Seizure of documents in the office of an attorney-at-law or doctor, which are subject to professional secrecy, is not permitted unless such documents are the object or an element of the infringement, otherwise being null and void. Seizure of documents in a credit institution, which are subject to banking secrecy, is carried out by the competent judge when there are grounded reasons to believe that such documents are related to the infringement or are of great interest to establish the facts.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 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 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 ECN+ Directive, which aims to give the member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the internal market.

Besides such cooperation, the AdC is also a member of the ECA (European Competition Authorities Association). Furthermore, at a multilateral level, the AdC cooperates within international organisations, including the OECD and the UNCTAD. The AdC also participates in multilateral cooperation networks, such as the International Competition Network (ICN) 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

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

See question 11 as regards the interplay between the Portuguese and the EU jurisdictions. According to the AdC's public records, within the framework of Council Regulation No. 1/2003, in 2004 one case was referred to the AdC within the European Competition Network (see the AdC's 2004 Activity Report, page 25).

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

See question 9.

Burden of proof

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

The burden of proof concerning accusations of anticompetitive behaviour rests with the AdC. However, exemptions such as those mentioned in question 5 must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase (see question 9), the decision to start the investigation phase is taken on the basis of a balance of probabilities; conversely, taking into account criminal procedure principles, such as the in dubio pro reo principle, which apply to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences (see question 1), the level of proof required for the final decision is the procedural certainty that without any reasonable doubt is formed by the decision maker.

Circumstantial evidence

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

Pursuant to article 31(4) of the Act, the evidence will be assessed in accordance with the rules of experience and the free opinion of the AdC. In its guidelines for the investigation of cases relating to the application of articles 9, 11 and 12 of the Act and 101 and 102 TFEU, the AdC underlines such legal principles and invokes the rules of experience connected with social and economic relations that are the subject of the competition rules. According to the AdC, such rules of experience allow account to be taken of the specific aspects resulting from the nature and context of the practices in question, in particular the difficulty of obtaining direct evidence in relation to certain infringements, such as concerted practices, and the need to consider circumstantial evidence.

Appeal process

16 | What is the appeal process?

Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the AdC.

Under the current regime, the AdC's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the AdC's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

As regards an appeal of the AdC's final decision condemning the concerned undertaking, it must be lodged within a non-extendable deadline of 30 working days. During a (also non-extendable) deadline of 30 working days, the AdC shall forward the file to the public prosecutor. The AdC may attach to the file written conclusions, together with elements or information it deems relevant for the Court's decision, and shall also indicate and submit the relevant evidence. The AdC shall further be given the opportunity to bring to the hearing any elements deemed relevant for the decision and to have a representative participating in such hearing. Although the Court may in certain cases decide by means of a court order without prior hearing, the AdC, the public prosecutor or the concerned undertaking may oppose such decision. The Court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or the recognition of any right, must be notified to the AdC. The withdrawal of the case by the public prosecutor depends on the AdC's agreement. The AdC has standing to autonomously appeal from the Court's decisions (other than routine decisions).

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

The duration of the appeal proceedings depends on the complexity of the cases and of the concerned courts' workload. It may nevertheless last longer than 12 months.

SANCTIONS

Criminal sanctions

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

The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, disturbance of public auction or tender, etc), since there are no criminal sanctions for competition law offences. Cartel activity per se is considered a quasi-criminal minor offence.

Civil and administrative sanctions

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

In relation to sanctions for quasi-criminal minor offences, under the Act, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the AdC, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 9 of the Act or article 101 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase (see question 9;
- for non-compliance with the behavioural or structural remedies imposed by the AdC (see question 9); or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the AdC, are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the AdC for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine ranges from 10 to 50 'account units' (each account unit currently amounting to €102).

Furthermore, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from two to 10 account units.

Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed double of the higher limit of the fines applicable to the infringements in question.

Additionally, should the infringement be considered sufficiently serious, the AdC can impose, as ancillary sanctions:

- the publication, at the offender's expense, of an extract of the sanctioning decision in the official gazette of Portugal and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market; or
- in cases of competition law infringements carried out during, or due to, public procurement proceedings, the prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

The AdC may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in Portugal in the year immediately preceding that of the final decision, per day of delay counted from the date established in the notification, where the undertakings do not comply with an AdC decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out:

- on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity); or
- by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out, are also liable when:

- holding leading positions, they act on behalf or on the account of the legal entity; or
- knowing, or having the obligation to know, the infringement, they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings, whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment, are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

In relation to civil sanctions, anticompetitive agreements, decisions and practices are considered null and void (except where they are considered justified; see question 5), and civil liability may also arise for the damage caused (see question 24).

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act (see question 19). In addition, on 20 December 2012, the AdC published guidelines regarding the methodology to be used in the application of fines. In drafting these guidelines, the AdC took into consideration the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003. The AdC's guidelines only apply to cases in which the inquiry phase (see question 9) was initiated after the Act came into force. Furthermore, the AdC states in the guidelines that they are not aimed at allowing for the prior calculation of the actual fines to be applied but rather at providing information necessary for the understanding of the methodology followed by the AdC in fixing such fines.

According to the AdC's public decision record, which appears on the AdC's website and only includes definitive decisions (ie, decisions that either were not subject to judicial review, or were subject to appeal and the final judicial decision has already been adopted), and in cases where the AdC has determined that an infringement occurred, the AdC has imposed fines except in those cases where it has exempted the concerned undertakings from the fines pursuant to the application of the leniency regime.

Guidelines for sanction levels

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

Under the Act, the following circumstances may be considered relevant for setting the amount of the fines:

- the seriousness of the infringement in terms of affecting effective competition in the Portuguese market;
- the nature and size of the market affected by the infringement;
- the duration of the infringement;
- the level of participation in the infringement by the concerned undertakings;
- the advantages that the offending concerned undertakings have enjoyed as a result of the infringement, if possible to determine;
- the behaviour of the concerned undertakings in putting an end to the restrictive practices and in repairing the damages caused to competition, notably through the payment of compensation to those injured following an out-of-court agreement;
- the economic situation of the concerned undertakings;
- records of previous competition infringements carried out by the concerned undertakings; and
- cooperation with the AdC until the close of the administrative proceedings.

Consideration of the above circumstances is mandatory for the AdC. However, the absence of a hierarchy and the consideration of circumstances not listed above leave room for discretion.

Furthermore, as stated above, on 20 December 2012 the AdC published guidelines regarding the methodology to be used in the application of fines (see question 18).

Compliance programmes

20 | 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

21 | 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

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

As stated in question 18, in the case of competition law infringements carried out during, or due to, public procurement proceedings, the AdC can impose, as an ancillary sanction, a prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

Parallel proceedings

23 | 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?

As stated in questions 17 and 18 cartel activity per se is considered a quasi-criminal minor offence and does not involve the application of criminal sanctions, without prejudice to the application of general criminal law if the behaviour in question also corresponds to a specific criminal offence.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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: (i) the defendant had committed an infringement of competition law; (ii) this infringement had an additional cost for the direct client of the defendant; and (iii) he acquired the goods or services affected by the infringement, or goods or services derived from the goods or services affected by the infringement, or that contain them.

A novelty resulting from the new damages actions regime is the presumption that the cartels are responsible for damages caused by the infringements that they practise, unless proven otherwise. According to the Damages Act, if it is practically impossible or excessively difficult to calculate accurately the total damage suffered by the injured person or the value of the repercussion above-mentioned, taking into account the available evidence, the court shall calculate it with recourse to the Commission Communication (2013/C 167/07) of 13 June 2013 on the quantification of damages in actions for damages on the grounds of infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Moreover, the Competition Authority shall assist the court, at the latter's request, in quantifying damages resulting from an infringement of competition law, and may request the court to provide a reasoned exemption from providing such assistance.

Class actions

25 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 in representation of injured parties, were already provided for in Law No. 83/95 of 31 August and article 31 of the Code of Civil Procedure being applicable to competition law injuries. The Damages Act restated the application of the said regime and added some rules in this respect. The process is now governed by ordinary civil procedure rules and by the Damages Act itself. In addition to the entities mentioned in Law 83/95, of 31 August, the following now have standing to bring actions for compensation for infringements of competition law: (i) associations and foundations for the protection of consumers; and (ii) associations of undertakings whose members are adversely affected by the infringement of the competition law in question, even if their statutory objectives do not include the defence of competition. From the public records and from our experience, class actions are not a very popular and frequently chosen course of action in Portugal, only one case involving competition law being known (from 2015). In this case, it has very recently been reported (September 2019) that the Portuguese court has given consumers 30 days to opt out.

COOPERATING PARTIES

Immunity

26 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 Act establishes the leniency rules in article 75 et seq In addition, as stated in question 1, the AdC has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Act, the AdC can grant immunity or reduction of fines in procedures for quasi-criminal minor offences that concern agreements and concerted practices between competitors prohibited by article 9 of the Act and (where applicable) article 101 TFEU, which are aimed at coordinating the competitive behaviour of the undertakings or at influencing relevant competitive conditions.

To obtain full immunity, an applicant must:

- be the first undertaking to inform the AdC of its participation in an agreement or a concerted practice, as long as it provides information and evidence that, in the AdC's discretion, enables the latter:
- to substantiate a request for searches or seizure of data, provided that the AdC, at the time the information and evidence are submitted, does not have sufficient elements to perform such acts; or
- to establish the existence of an infringement, provided that, at that moment, the AdC does not have sufficient evidence of the infringement available;
- cooperate fully and continuously with the AdC from the moment of the initial request by:
- providing all data and evidence already obtained or to be obtained in the future;
- responding immediately to any request for information;
- avoiding acts that may endanger the investigation; and
- not informing the other participants in the concerted practice;
- put an end to its participation in the infringement before it provides the AdC the information and evidence, except as reasonably required, in the AdC's opinion, to preserve the investigation effectiveness; and
- not have coerced other undertakings to participate in the breach.

The information and evidence to be provided must contain complete and precise information on:

- the agreement or concerted practice;
- the undertakings involved, including the objectives, activity and way of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

Subsequent cooperating parties

27 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 or reduction of fines.

The AdC shall grant a reduction of fines to undertakings which, not being eligible to immunity, submit information and evidence that adds significant value to those already in the possession of the AdC and provided the conditions are met regarding cooperation with the AdC and putting an end to the infringement (see question 26).

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

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 (see question 9) the above reduction limits are reduced by half. There is currently no 'immunity plus' or 'amnesty plus' option.

Approaching the authorities

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

See questions 26, 27 and 34.

Cooperation

30 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?

See questions 26 and 27.

Confidentiality

31 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

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

Under the Portuguese leniency regime, the AdC is not granted the power to enter into arrangements such as plea bargains. Settlements are permitted under the terms described above, and a reduction in fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings (see question 9). In its most recent cartel decisions, the AdC, in determining the amount of the fines, took into account the cooperation of the companies during the investigation through the use of both the leniency regime and the settlement proceedings. The facts confessed by a concerned undertaking in a settlement procedure cannot be subject to judicial review for the purposes of any appeal.

Corporate defendant and employees

33 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

34 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 management of supervision of the sector of activity concerned in the infringement) and the corresponding contacts. In the case of legal entities, the information shall include the identification of the current members of the board of directors as well as of the members of such board during the duration of the infringement;
- detailed information on the alleged cartel;

- the identification and contact details of the undertakings involved in the alleged cartel, as well as of the current members of their boards of directors and of the members of such boards during the duration of the infringement;
- identification of other jurisdictions where a leniency application has been filed in respect of the same infringement; and
- other information deemed relevant for the request for immunity or reduction of the fine.

Together with the leniency application, the applicant shall submit all the evidence in its possession or under its control.

The leniency application must be submitted at the AdC's head office by any means, notably:

- fax (+351 21 7902 093);
- mail addressed to the AdC's head office;
- email sent to the address clemencia@concorrencia.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 reasoned request, the AdC may accept a simplified leniency application if the applicant has filed, or is filing, a leniency application with the European Commission and the Commission is in the situation provided for in the Commission Notice on cooperation within the network of competition authorities (2004/C 101/03). The application shall, in these cases, be made in Portuguese or English according to the form attached to Regulation No. 1/2013 or by oral statements. The AdC shall provide a document confirming the receipt of the simplified application and the date and hour of its submission. If the AdC starts an investigation of the infringement, it shall request that the applicant completes the application within a time frame of no fewer than 15 days, which, if applicable, shall include a Portuguese translation of a simplified application filed in English. If the application is not completed or the Portuguese translation is not filed within the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and this latter is no longer available (see question 27), the AdC shall inform the applicant that the application may be withdrawn or completed for the purposes of reduction of the fine. If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed.

Upon receipt of a written or oral application for immunity or reduction of fine, the AdC may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of no fewer than 15 days for the completion of the application by the applicant. To benefit from the marker, the applicant must indicate in the application:

- its name and address;
- information on the alleged cartel, and on the products, services and territory affected;
- an estimate of the duration of the alleged cartel;
- whether other applications for immunity or reduction of fines have been filed or are planned to be filed with other competition authorities regarding the alleged cartel; and
- the justification for the marker.

If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed. If the application is not completed, the application shall be refused. Following an analysis of the application, the AdC shall notify the applicant if it considers that the requirements for immunity are not met, in which case the applicant may, within 10 days of such notification, withdraw the application or request the AdC that this latter is considered for the purposes of reduction of the fine.

As regards an application for reduction of a fine, if the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant adds significant value to that already in its possession, it shall inform the applicant of its intention to grant a reduction of the fine, indicating the level of the applicable reduction. The aforementioned rules governing the application for immunity or reduction of fine apply. If the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant does not add significant value to those already in its possession, it shall notify the applicant, in which case this latter may, within 10 days of such notification, withdraw the application. (See also question 27.)

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled (see questions 26 and 27). The final decision on immunity or reduction of fines shall be taken in the final decision of the proceedings adopted by the AdC at the end of the investigation (see question 9).

DEFENDING A CASE

Disclosure

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

The defendant can request the consultation of the case file and obtain, at his or her own expense, any extracts, copies or certificates. Nevertheless, the AdC can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. The AdC shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets. 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

36 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

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

The representation by counsel of multiple corporate defendants may be acceptable to the extent it does not raise any conflicts of interest (see question 36).

Payment of penalties and legal costs

38 | 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

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

Fines or other penalties and private damages awards are not tax-deductible.

International double jeopardy

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

The ne bis in idem principle, which is essentially the equivalent of the double jeopardy principle, applies in the framework of quasi-criminal minor offences and therefore applies to cartel infringements (see question 1). However, in applying the principle, the AdC shall take into account whether the infringement previously sanctioned is the same as that subject to its assessment, in terms of both the specific behaviour in question and the territory where it occurred or had effect.

As regards liability for private damage claims, the overlapping liability for damages shall be taken into account, notably in the determination of the actual amount of damages that may be claimed before the Portuguese jurisdiction (see question 24).

Getting the fine down

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

See questions 9 (in respect of the settlement proceedings and of the closure of the case with conditions attached) and 24 to 31 (on the leniency regime). In addition, the behaviour of the undertaking concerned in putting an end to the restrictive practices and in repairing the damage caused to competition may be taken into account in the determination of the amount of the fine, under the framework described in question 19. We are not aware of any decisions in which the AdC has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

UPDATE AND TRENDS

Recent cases

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

The AdC, which has existed since 2003, continues to be very active. Its president, Margarida Matos Rosa, stated its priority was to focus on sectors and cases where the impact on society was greatest.

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

Thus, in 2018, two cartel condemning decisions were adopted, the first regarding a cartel in the railway maintenance sector and the second in the insurance sector. The AdC reports that it has applied a fine totalling more than €54 million on insurance companies, board members and directors involved in the 'insurer cartel'.

Already in 2019, the most recent in September, the AdC has fined 14 banks a total of €225 million in connection with a concerted practice of exchanging sensitive commercial data.

Search and seizure efforts continued to be carried out. The AdC reports that, during 2018, it carried out dawn raids on eight premises of seven entities relating to four cases in the advertising, telecommunications and food sectors. So far in 2019, the AdC has carried out dawn raids in the healthcare sector and in the waste management sector.

In addition, in 2019, the AdC has notably issued three statements of objections to six large food retail groups in Portugal and three beverage suppliers for taking part in practices equivalent to cartels to artificially determine the prices of the products.

Regime reviews and modifications

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

If not before, the Act is expected to be amended along with the transposition of the ECN+ Directive, which aims to give the member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the internal market.

The AdC's initiatives in this respect in 2019 include the organisation of a consultative workshop for specialised law professionals on the transposition of the ECN+ Directive.

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; and
- information sharing between competing hotels in relation to the provision of hotel room accommodation to corporate customers In Singapore, 30 January 2019.

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. See question 16 for more details.

Changes

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

In his message in the 2017 Annual Report, the chairman of the CCCS indicated that the CCCS will be undertaking a comprehensive review of the Act with a view to recommending changes to balance regulatory and business compliance costs against the benefits from effective competition.

Substantive law

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

As stated in question 1, section 34 of the Act prohibits 'agreements, decisions by associations of undertakings, and concerted practices', which have as their 'object or effect' the 'prevention, restriction or distortion' of competition in Singapore. Specifically, section 34(2) provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;

- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The illustrative list in section 34(2) is not intended to be exhaustive, and the CCCS has specified in its Guidelines on the Section 34 Prohibition 2016 (Revised Section 34 Guidelines) that many other types of arrangements may have the effect of preventing, restricting or distorting competition (including, inter alia, information-sharing agreements in some circumstances).

The CCCS has also stated that agreements, decisions and concerted practices will fall within the ambit of the section 34 prohibition only where they have an 'appreciable' effect on competition. The Revised Section 34 Guidelines, at paragraphs 2.21 to 2.28, provide further details on when an arrangement might give rise to an appreciable effect on competition. Arrangements involving price fixing, bid rigging, market sharing or output limitation will always be considered, by their very nature, to have an appreciable effect on competition such that it is not necessary for the CCCS to proceed to analyse the actual effects of such arrangements.

One important qualification on the application of the section 34 prohibition is that it does not apply to arrangements that give rise to net economic benefit (an exclusion that is provided for at paragraph 9 of the Third Schedule to the Act). To qualify for the exclusion, it must be shown that the arrangement:

- contributes to improving production or distribution, or promoting technical or economic progress; and
- does not:
  - impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; or
  - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

In determining whether an agreement has the object of preventing, restricting or distorting competition, the CCCS is not concerned with the subjective intention of the parties when entering into an agreement. Instead, it will determine if the section 34 prohibition has been breached based on the content and objective aims of the agreement considered in the economic context in which it is to be applied. The CCCS will also consider the actual conduct and behaviour of the parties in the relevant market.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

Certain liner shipping agreements are exempted from the application of the section 34 prohibition by way of a block exemption order (BEO). The BEO initially took effect on 1 July 2006 for a period of five years, and its first extension until 2015 was granted by the Minister for Trade and Industry on 16 December 2010 and second extension until 2020 was granted by the Minister on 25 November 2015. The liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law.

Some other specific activities and industries are excluded from the application of the section 34 prohibition, as specified in paragraphs 5, 6 and 7 of the Third Schedule to the Act. In particular, the section 34 prohibition will not apply to:

- any agreement or conduct that relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law relating to competition, gives another regulatory authority jurisdiction in the matter;
- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap 237A);
- the supply of piped potable water;
- the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- the supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015 (Act 30 of 2015);
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap 263A);
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A);
- the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; or
- any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

Most of the exclusions were made on the basis that the specified activities would be subject to robust sector-specific regulation. Full explanations can be found within Annex B of the CCCS's Second Consultation Paper on the Draft Competition Bill (available at www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/second-round-of-public-consultation-on-the-competition-act).

Section 33(4) of the Act states that the substantive prohibitions will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the government, any statutory body or any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

Application of the law

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

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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

In the usual course, parties generally become aware that they are being investigated for a potential contravention of the section 34 prohibition in one of two ways. First, the CCCS may issue a formal notice, pursuant to section 63 of the Act, requiring the production of information or documents. This notice will set out the details of the potential contravention that the CCCS has reasonable grounds for suspecting has occurred. 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

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

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

* Indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority

The CCCS has the power to issue a formal notice to request documents or information from any person where it considers that such document or information would be relevant to its investigations. The CCCS also has the ability to enter business premises to request the provision of documents or information, and where it has a court-obtained warrant, it may also proceed to search business premises. Specifically, where the CCCS has obtained a warrant, it may:

- enter the premises specified in the warrant and use such force as is reasonably necessary for the purpose of gaining entry;
- search any person on the premises if there are reasonable grounds for believing the person has in his or her possession any document, equipment or article that has a bearing on the investigation;
- search the premises and take copies or extracts from any document appearing to be the kind in respect of which the warrant was granted;
- take possession of any document appearing to be the kind in respect of which the warrant was granted if necessary for preserving the document or prevent tampering, or if it is not reasonably practicable to take copies of the document on the premises;
- take any other step necessary to preserve the documents or prevent interference with them, including the sealing of premises, offices or files;
- require any person to provide an explanation of any document appearing to be the kind in respect of which the warrant was granted or state to the best of his or her knowledge where it could be found;
- require any person on the premises to produce any document of the relevant kind at the time and place, and in the form and manner, required by the CCCS;
- require any information stored in electronic form to be produced in a form that could be taken away and read; and
- remove from the premises any equipment or article that relates to any matter relevant to the investigation (eg, computers).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The CCCS has the ability, under section 88 of the Act and with the approval of the Minister for Trade and Industry, to enter into arrangements with any foreign competition body under which each party may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performing any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, the CCCS is required under section 88 of the Act to take certain precautions (including obtaining an undertaking from the relevant counterparty) relating to the subsequent disclosure of any information provided. To date, the CCCS has entered into 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

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

Cartel matters are investigated and prosecuted by the CCCS, which has the ability to impose fines up to a statutory maximum or to make other directions it deems fit to bring the infringement to an end. Appeals of the CCCS's decisions can be made to the CAB. Thereafter, a more limited right of appeal (in respect of a point of law or the calculation of the financial penalty) is available to the High Court and the Court of Appeal. Further information on the appeal process is set out in question 16.

Burden of proof

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

In establishing that an infringement of competition law has occurred (ie, that the section 34 prohibition has been infringed), the evidential burden of proof is borne by the CCCS. However, in establishing the application of a statutorily provided exclusion, exemption or other defence (ie, that the arrangement in question gives rise to net economic benefit and thus should be excluded through the application of paragraph 9 of the Third Schedule to the Act), the onus would fall on the party seeking to apply the exclusion, exemption or defence.

The standard of proof is the balance of probabilities. However, the CCCS has consistently noted that the standard would depend on the facts and circumstances of the case and 'given the hidden and secret nature of cartels where little or nothing may be committed in writing, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard' (quoting JJB Sports plc and Allsports Limited v OFT [2004] CAT 17).

Circumstantial evidence

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

Yes, see question 14 for more details.

Appeal process

16 | What is the appeal process?

Appeals of the CCCS's decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Parties to an agreement or persons whose conduct in respect of which the CCCS has made a decision as to the infringement of the section 34 prohibition may appeal against (or with respect to) that decision, the imposition or amount of any financial penalty, or any directions issued by the CCCS, to the CAB. An appellant would be required to prove its case on a balance of probabilities to succeed in its appeal.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCCS's infringement decision. Thereafter, the CCCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in Order 55 of the Rules of Court (Cap 322, R 5, 2006 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

SANCTIONS

Criminal sanctions

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

Currently, involvement in cartel activity does not give rise to criminal liability in Singapore. However, criminal prosecutions may arise in the context of cartel investigations where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys or falsifies documents;
- provides false or misleading information; or
- obstructs an officer of the CCCS in the discharge of his or her duties.

An offence of a nature described above is punishable by a prison sentence not exceeding 12 months, a fine not exceeding S$10,000, or both. To date, we are not aware of any such criminal sanctions being imposed in Singapore.

Civil and administrative sanctions

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

The CCCS, under section 69 of the Act, can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement. While section 69 provides a general discretion to the CCCS in making directions, it provides specific examples of the directions that the CCCS may make, including:

- requiring parties to the agreement to modify or terminate the agreement;
- to pay to the CCCS such financial penalty in respect of the infringement as the CCCS may determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years;
- to enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCCS; and
- to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

In determining the amount of financial penalty to impose, in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 (Revised Penalty Guidelines), the CCCS has stated that it will adopt the following six-step approach:

- calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year;
- adjustment for the duration of the infringement;
- adjustment for other relevant factors (eg, deterrent value);
- adjustment for aggravating or mitigating factors;
- adjustment if the statutory maximum penalty is exceeded; and
- adjustment for immunity, leniency reductions or fast-track procedure discounts.

In every infringement decision published to date, the CCCS has imposed financial penalties on the parties involved in cartel activity, unless they enjoyed immunity under the leniency programme.

The maximum amount of financial penalty imposed may not exceed 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. There are no minimum penalties (in absolute terms) stipulated in the Act.

Guidelines for sanction levels

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

Apart from the broad requirement that directions issued by the CCCS must bring an infringement to an end, or remedy, mitigate or eliminate any adverse effect of an infringement, there are currently no publicly available guidelines on how the CCCS will exercise its power to make directions. The CCCS has published guidelines on how it will calculate the appropriate amount of financial penalty to impose on infringing undertakings (namely, the Revised Penalty Guidelines) (see question 18). While these guidelines do not have the force of law, they will generally be followed by the CCCS, subject to any relevant decisions of the CAB relating to calculation of the financial penalty.

Besides setting out the approach that it will adopt in the calculation of penalty, the Revised Penalty Guidelines also provide examples of aggravating and mitigating factors that are considered.

As regards aggravating factors, these include:

- the undertaking's role as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;
- unreasonable failure by an undertaking to respond to a request for financial information on business turnover or relevant turnover;
- in the case of bid rigging or collusive tendering, the CCCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements that are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

As regards mitigating factors, these include:

- the undertaking's role, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps taken with a view to ensuring compliance with the section 34 prohibition, for example, existence of any compliance programme;
- termination of the infringement as soon as the CCCS intervenes; and
- cooperation that enables the enforcement process to be concluded more effectively or speedily.

Compliance programmes

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

The CCCS has stated in its Revised 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

21 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

22 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

23 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?

As discussed in question 17, there are currently no criminal sanctions for cartel activities in Singapore. It is open to the CCCS to impose multiple administrative sanctions where it considers that such sanctions are necessary or appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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, inter alia, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCCS, and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances, or to lodge an appeal with the CAB.

Class actions

25 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

26 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 CCCS operates a leniency programme, which encompasses the prospect of full immunity in certain circumstances. The CCCS's leniency programme is described in detail in its Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016 (Revised Leniency Guidelines).

Under the leniency programme, where a party provides information to the CCCS about a cartel before the CCCS has opened an investigation, that party may benefit from full immunity from financial penalties imposed by the CCCS in respect of such. Paragraph 2.2 of the Revised Leniency Guidelines states that an undertaking will benefit from full immunity from financial penalties if all of the following conditions are satisfied:

- the undertaking is the first to provide the CCCS with evidence of the cartel activity before an investigation has commenced, provided that the CCCS does not already have sufficient information to establish the existence of the alleged cartel activity; and
- the undertaking:
  - provides the CCCS with all the information, documents and evidence available to it regarding the cartel activity

immediately and such information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;
- grants an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where it has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
- unconditionally admits to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
- maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation;
- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS);
- must not have been the one to initiate the cartel; and
- must not have taken any steps to coerce another undertaking to take part in the cartel activity.

Subsequent cooperating parties

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The undertaking that is 'second in' may benefit from a reduction in financial penalties of up to 50 per cent. While the Revised Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCCS will take into account the stage at which the undertaking comes forward, the evidence already in the CCCS's possession and the quality of the information provided by the undertaking.

To date, we are not aware of any public disclosure by the CCCS of the amount of reduction in financial penalties enjoyed by leniency applicants. Accordingly, it may be difficult in practice to make general observations about the difference in treatment between the 'second in' party and those that applied for leniency later. However, on the understanding that the CCCS will take into account the stage at which the undertaking comes forward, and the evidence that it already has in its possession before deciding on the level of reduction in penalties, it is likely that parties that come in later may find it more difficult to produce crucial and quality evidence to justify a significant reduction. To the extent that the 'first in' party has failed to perfect its marker, it is also possible for the 'second in' party to be provided an opportunity to perfect it and benefit from either full immunity or full leniency (where such party may obtain a reduction of up to 100 per cent in financial penalties).

A leniency plus system, whereby a party may benefit from further reductions in financial penalties in respect of one cartel investigation by providing information to the CCCS in respect of another cartel, is available in Singapore. To benefit from this programme, the CCCS states in its Revised Leniency Guidelines that the following conditions must be met:
- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
- the undertaking would qualify (in accordance with the usual qualification criteria for leniency applications) for total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty in relation to its activities in the second market.

If a party can satisfy the above conditions, then it could benefit from a reduction in financial penalties in respect of the first cartel, which is in addition to any reduction that it already stands to receive for its cooperation in respect of the first cartel.

Approaching the authorities

29 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 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 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

30 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, who 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

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

The Revised Leniency Guidelines provide, at paragraph 8.1, that the CCCS will 'endeavour, to the extent consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until the CCCS issues a written notice under section 68(1) of the Act of its intention to make a decision that the section 34 prohibition has been infringed'.

To the extent that information is provided to the CCCS in the course of making a leniency application (regardless of whether it is an immunity, full leniency or partial leniency application), in responding to a notice of the CCCS to provide information or in otherwise cooperating with the CCCS, the providing party can request confidential treatment in respect of such information, or the relevant parts thereof, in accordance with section 89(3) of the Act.

At the point that the CCCS issues its PID, information provided to the CCCS that is not subject to confidential treatment as outlined above, will be available for inspection by all parties subject to the CCCS's PID.

Settlements

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

With effect from 1 December 2016, the CCCS has introduced a fast-track procedure for cases involving the infringement of the section 34 prohibition. The CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases (Fast Track Procedure Practice Statement) explains that under this procedure, 'parties who admit liability for their infringement will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay pursuant to section 69(2)(d) of the Act'. This procedure is not mutually exclusive from the leniency regime and it is possible for a leniency applicant to benefit from discounts arising from both leniency and the fast-track procedure.

While investigated parties may indicate to the CCCS their willingness to participate in the fast-track procedure, the CCCS retains a broad discretion to determine whether the fast-track procedure would be suitable for the case under investigation. In general, the CCCS envisages that it would initiate the fast-track procedure before the issuance of a PID and that this procedure is suitable for cases where the CCCS is reasonably satisfied, based on information and evidence available to it, that the evidentiary standard of proof has been met such that the CCCS would be prepared to issue a PID or infringement decision.

The fast-track procedure will involve the following steps:

- initiation of the procedure;
- discussion between the CCCS and the participating parties on the timelines involved, the scope and gravity of the conduct, the evidence used to determine the scope of the contemplated infringement, non-confidential versions of key documents that the CCCS regards as necessary to enable the party to ascertain its position regarding the contemplated infringements, and the possible range and quantum of financial penalties calculated according to the Revised Penalty Guidelines; and

- agreement to accept the fast-track procedure offer, which will include:
  - an acknowledgement of the party's liability for the infringement and its involvement in it;
  - an agreement to cooperate throughout the CCCS's investigation;
  - an indication of the maximum amount of the financial penalties each party would accept to be imposed;
  - a reservation of rights by the CCCS to adjust the figures in applying the penalties, provided that the final penalty does not exceed the maximum amount of financial penalties the party has indicated, and make further adjustments that may reduce the final penalty without further notice to the party;
  - confirmation of the party's request to use the fast-track procedure;
  - confirmation by the party that it has been sufficiently informed of the contemplated infringements and that it has been given the opportunity to be heard;
  - confirmation by the party that it will not make extensive written representations, request to make oral representations to the CCCS or request to inspect the documents and evidence in the CCCS's file, but it can provide a concise memorandum identifying any material factual inaccuracies in the PID;
  - an acknowledgement that should the party bring appeal proceedings before the CAB in respect of the CCCS's decision, the CCCS reserves the right to make an application to the CAB for a penalty amount that differs from that calculated in its infringement decision, and may require the party to pay the full costs of the CCCS's appeal regardless of the outcome of the CCCS's appeal; and
  - acceptance, which will involve the CCCS adopting a streamlined PID or infringement decision (as appropriate) reflecting the content agreed between the CCCS and each party in the fast-track agreement, and providing for a reduction of 10 per cent on the financial penalty that would have otherwise been imposed but for the party's participation in the fast-track procedure.

Parties to such a procedure may not disclose to any third party any information received from their participation in this procedure unless express prior authorisation by the CCCS has been obtained.

As this procedure has been introduced only recently, it is as yet untested in the courts but it would appear from the language of the Fast Track Procedure Practice Statement that the level of judicial oversight that applies to matters handled under the fast-track procedure would not differ materially from other cases. For more information of such judicial oversight, see question 16.

Corporate defendant and employees

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

Contraventions of the section 34 prohibition by employees would be considered contraventions by their employing undertaking in Singapore. In this regard, and given that there are no criminal sanctions for engaging in activity in breach of the section 34 prohibition, there is no distinction between an undertaking and its employees from the perspective of a leniency or immunity application.

Dealing with the enforcement agency

34 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.

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

35 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

36 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

37 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

38 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

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

Fines and penalties are generally not considered to be tax-deductible. To date, there has been no follow-on private action for competition law infringements, so the position regarding tax-deductibility of awards of private damages remains untested in the context of competition law infringements. However, it is unlikely that such private damages will be considered to be tax deductible.

International double jeopardy

40 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

41 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. For further information about the leniency programme and the leniency plus system, see questions 26 to 29.

Further to this, it is in a party's interest to cooperate during the course of the CCCS's investigation. In all the infringement decisions issued to date, the cooperation of the investigated parties during the investigation was viewed as a mitigating factor, and in many instances parties benefited from a reduced financial penalty. It is also clear from statements of the CCCS in all of these decisions that the immediate cessation of the potentially infringing conduct at a very early stage in the proceedings might be considered, at least, a non-aggravating factor.

The CCCS has stated in its Revised Penalty Guidelines that the existence of a compliance programme may be taken into consideration as a mitigating factor in the context of calculating the financial penalty. See question 20 for further details.

UPDATE AND TRENDS

Recent cases

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

On 30 January 2019, the CCCS issued an infringement decision against eight hotel owners or operators for infringing the section 34 prohibition by exchanging commercially sensitive information in connection with the provision of hotel room accommodation in Singapore to corporate customers. The CCCS's investigations revealed that the sales representatives of the hotel owners or operators had engaged in the exchanges of commercially sensitive information relating to corporate customers between 2014 and 2015. As the CCCS took the view that the conduct was, by its very nature, anticompetitive and had caused serious harm to competition, a total of approximately S$1.5 million in financial penalties was imposed on the parties involved.

Regime reviews and modifications

43 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/leniency programmes.

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

Slovenia

Stojan Zdolšek, Irena Jurca and Katja Zdolšek
Zdolšek Attorneys at Law

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 EU member states, the provisions of article 101 of the Treaty on the Functioning of the European Union (TFEU) shall also apply.

Acting in contravention of the prohibition of restrictive agreements in article 6 of the Competition Act or article 101 TFEU may represent a minor offence pursuant to the Competition Act.

Cartels may also amount to a criminal offence pursuant article 225 of the Slovenian Criminal Code, which defines an illegal restriction of competition as a criminal offence. Whoever, in pursuing an economic activity contrary to regulations governing the protection of competition, violates the prohibition of restrictive agreements between companies, abuses the dominant position of one or more companies, or creates a forbidden concentration of companies and thus prevents or significantly impedes or distorts competition in Slovenia, or in the EU market, or its significant part, or significantly influences trade between member states, which results in a large property benefit for such a company or companies, or a large property damage for another company, shall be sentenced to imprisonment for not less than six months and not more than five years. Intent of the perpetrator has to be proven. Legal persons may be liable and sentenced for a criminal offence pursuant to the provisions of the Liability of Legal Persons for Criminal Offences Act.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific infringements or industry-specific defences foreseen in the Competition Act.

The Competition Act recognises the following exemptions: the article 6(3) exemption, de minimis exemption and block exemption.

According to article 6(3) of the Competition Act, similar to article 101(3) TFEU, the undertaking invoking the exception must demonstrate and bear the burden of proving the following cumulative conditions for the exception to the prohibition of restrictive agreements in article 6(1) of the Competition Act: agreements must contribute to improving the production or distribution of goods or to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit, shall not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives, and shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services that are the subject of the agreement.

Under the de minimis exemption, regulated in article 7 of the Competition Act, the prohibition of restrictive agreements shall not apply to agreements of minor importance, which are agreements between undertakings whose cumulative market share does not exceed 10 per cent in the case of horizontal agreements and mixed horizontal–vertical agreements or agreements where it is difficult to determine whether they are horizontal or vertical, or 15 per cent in the case of vertical agreements. In case of the cumulative effects, thresholds are decreased by 5 per cent. But even if these thresholds are not met, de minimis exemption shall not apply to horizontal agreements having as their object fixing of prices, limiting of the production or sales or sharing of markets or sources of supply, and to vertical agreements having as their object fixing of retail prices or granting territorial protection to the participating undertakings or to third persons.

Regarding block exemptions, the provisions of the Regulations of the European Commission or the Council of the European Union shall apply with the necessary changes, even if there is no indication of an effect on the trade between EU states. The Agency may withdraw the benefit of the block exemption if it finds that an agreement has certain effects incompatible with article 6(3) of the Competition Act or article 101(3) TFEU.

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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The Agency initiates the procedure ex officio with an order on the commencement of procedure, although it may exercise certain investigative powers prior to that. An extract of the order on the commencement of procedure is published on the Agency's website.

The Agency is obliged to perform a fact-finding procedure in accordance with the principle of material truth and free assessment of evidence. The Agency shall decide without an oral hearing unless established otherwise. In cases of urgency, interim measures may be adopted.

The Agency notifies the parties about findings on relevant facts and evidence prior to issuing a decision with a statement of objections on which parties may comment within a time limit set by the Agency and not longer than 45 days.

At the closing of the administrative procedure, the Agency may issue a decision establishing the existence of an infringement and require the undertaking to bring such infringement to an end, or a decision by which the Agency accepts the commitments offered by the undertaking and makes them binding. The Agency may terminate the procedure with an order in case the infringement is not found or if the procedure would not be reasonable.

Liability for minor offences is established and fines are imposed by the Agency in a minor offences procedure.

Investigative powers of the authorities

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

The Agency may address a request for information to each undertaking, partners, members of management or supervisory boards and persons employed with the undertaking. If the Agency requests the information with a special order, an undertaking is obliged to submit all requested documents and information, but not to admit an infringement. If an undertaking to which such an order was issued provides incorrect, incomplete or misleading information or does not supply the requested information within the set time limit, a penalty up to €50,000 may be imposed.

The Agency may also carry out an inspection on the premises of an undertaking, either upon consent given by an undertaking or person whose data is being inspected or upon a court order, issued by the judge of the Regional Court in Ljubljana upon the Agency's proposal if there are reasonable grounds for suspicion of an infringement and the probability of finding relevant evidence with investigation exists.

The inspection is conducted by employees of the Agency, whereby specific professional tasks may be carried out by special organisations, institutions or individuals, and with police assistance, if the undertaking obstructs the investigation or there are reasonable grounds to expect that. During the investigation, authorised persons are also empowered to:

- enter and inspect the premises (premises, land and means of transport) at the registered office of the undertaking and at other locations at which the undertaking itself or another undertaking authorised by the undertaking concerned performs the activity and business for which there is probability of an infringement;
- examine the business books and other documentation;
- take or obtain in any form copies of or extracts from business books and other documentation;
- seal any business premises and business books and other documentation for the period and to the extent necessary for the inspection; and

- ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and purpose of the inspection.

A penalty amounting to up to 1 per cent of the turnover in the preceding business year on an undertaking and up to €50,000 on a natural person may be imposed in case of an obstruction of an inspection.

The Agency may also conduct the investigation on other premises, on the basis of prior court order, if there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of the inspection are being kept at the premises of an undertaking against which the procedure has not been initiated, or on the residential premises of members of the management or supervisory bodies or of staff or other associates of the undertaking against which the procedure has been initiated.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Agency cooperates with the European Commission and other competition offices in EU member states on the basis of the Regulation No. 1/2003 and the Competition Act. 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

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

The Agency may issue a decision establishing the existence of an infringement of article 6 or article 9 of the Competition Act or article 101 or article 102 TFEU.

In the case of the procedure alleging the infringement of articles 101 or 102 TFEU, the Agency shall conduct a single procedure, in which the Agency shall also conduct a procedure alleging the infringement of the provisions of article 6 or 9 of the Competition Act. If during the procedure the Agency should determine that the trade between EU member states has not been affected, an order terminating the procedure regarding the infringement of the provisions of articles 101 or 102 TFEU is issued.

Where the European Commission initiates procedure for the infringement of article 101 or 102 TFEU or has already issued a decision on the same matter, in which the procedure had also been initiated by the Agency, the Agency shall terminate the procedure initiated by the Agency with an order. The Agency may also issue an order of termination in cases where a competition authority of another EU member state has initiated procedure for the infringement of articles 101 or 102 TFEU, or has issued a decision on the same matter.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The Agency conducts the administrative procedure and minor offence procedure.

In the administrative procedure, the Agency assesses restrictive practices and may issue a decision establishing the existence of an infringement of article 6 of the Competition Act or article 101 TFEU and require the undertaking concerned to bring such infringement to an end, may accept commitments with the decision, or may issue an order of termination if no infringement is found or if specific circumstances indicate that the procedure would not be reasonable.

In the minor offence procedure, the Agency assesses liability for a minor offence and imposes the fine.

Burden of proof

14 | 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

15 | 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

16 | 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

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

Pursuant to the Criminal Code, the penalty of not less than six months and not more than five years of imprisonment is foreseen for the illegal restriction of competition as a criminal offence. The court may in certain cases remit the penalty for the perpetrator who announced the criminal offence. Granting of immunity by the Agency does not necessarily mean immunity shall also be granted in the criminal procedure.

A fine of at least €50,000 and up to 200 times the amount of damages caused or illegal benefit obtained through the criminal offence may be imposed on a legal entity found liable for the criminal offence. If certain stipulated conditions are met, also the winding-up of a legal person and the prohibition of a specific commercial activity of not less than six months and no more than five years as a safety measure may be ordered pursuant to provisions of the Liability of Legal Persons for Criminal Offences Act.

Civil and administrative sanctions

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

Pursuant to 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 prohibition of restrictive agreements in article 6 of the Competition Act and article 101 TFEU. A fine between €5,000 and €10,000, or in the case of offences of a particularly serious nature between €15,000 and €30,000, shall be imposed on the responsible person of a legal entity or of an entrepreneur.

Guidelines for sanction levels

19 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, 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

20 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

21 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: (i) a criminal offence, punishable by imprisonment between six months to five years; or (ii) 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

22 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

23 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

24 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 ECJ.

Class actions

25 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 TFEU.

Collective actions can be filed by a senior state attorney or by a non-profit legal person of private law whose activities are directly related to the rights that have allegedly been breached. However, a class action must meet certain additional criteria in order to be approved by the court. Most importantly, it must refer to the same type of claims, based on the same or at least similar factual and legal questions.

Upon approving the collective action, the court will decide whether the system of inclusion or exclusion is to be used in the proceeding. In the case of the former, every injured individual has to expressly state that he or she wishes to take part in the class action proceeding (opt-in system), whereas in the case of the latter, all injured individuals are automatically included, unless they expressly state that they do not wish to participate (opt-out system). In either case, injured individuals are not formally considered parties to the procedure. They are represented by the person who filed the class action and who has a legal duty to protect their interests. Nevertheless, injured individuals will have the option to participate in the procedure and submit comments and evidence to the court.

The Collective Actions Act entered into force on 21 April 2018; however, class actions can also be filed in cases of mass harm situations that occurred prior to the aforementioned date. So far only two collective actions have been filed in Slovenia and neither of them has a basis in competition law.

COOPERATING PARTIES

Immunity

26 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 Competition Act in 2009 and the Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels (Official Journal No. 112/09 and 2/14) (the Decree), which entered into force in January 2010. The Agency can grant either immunity from fines or a reduction of fines with a minor offence decision.

Only the offender involved in a prohibited agreement who first submits information and evidence may be granted full immunity from a fine, provided all the conditions mentioned below are met:

- the offender fully and completely discloses his or her participation in an alleged cartel;
- the offender is the first to submit information 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 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

27 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 above-listed conditions are fulfilled.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

In determining the level of fine reduction the Agency shall take into account the time of the submission of the evidence to the Agency; the sequential order of applications; and the contribution of the submitted evidence to the finding of an infringement. A fine, laid down within the range, may not be lowered below the stipulated threshold.

There are no 'immunity plus' or 'amnesty plus' options.

Approaching the authorities

29 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

30 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

31 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

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

Pursuant to the Competition Act, an undertaking against which the administrative procedure has been initiated may offer commitments with a view to eliminating the circumstances leading to the likelihood of the existence of the infringement. Commitments may be proposed until the expiry of the time limit set by the Agency for comments on the statement of objections. If, in the view of the Agency, the proposed commitments are capable of eliminating the circumstances leading to the likelihood of the existence of an infringement, the Agency shall make the offered commitments binding by adopting a decision.

Corporate defendant and employees

33 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

34 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

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

Parties in the procedure before the Agency have the right to review the documents of the case file throughout the procedure after the issuing of the order on the commencement of the procedure unless the director of the Agency determines this would be against the interests of the investigation and postpones the right to inspection of documents with an order (however, not for longer than to the service of a statement of objections).

Parties may not review or make copies of the internal Agency's documents relating to the case file, including correspondence between the Agency and the European Commission or competition protection authorities of other EU member states, confidential information, including business secrets, information relating to confidential sources, minutes of consultation and voting, and draft decisions.

The Agency may disclose information that constitutes a business secret to the undertaking against which the procedure has been initiated if it deems that disclosure, owing to the right of defence, might objectively prevail over the interests of protecting such information as a business secret. A decision adopted by the Agency may not be based on facts and evidence in respect of which the undertaking against which the procedure has been initiated has not been given the possibility to reply.

Representing employees

36 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

37 | 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

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

There is no explicit statutory provision prohibiting payment of legal penalties issued on its employees by the corporation in the Competition Act, but certain tax and justification issues regarding such expenses may arise.

Taxes

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

In accordance with the Slovenian Corporate Income Tax Act, all expenditures that are not in conformity with normal business practice, including penalties imposed by responsible authorities, represent non-recognised expenditure.

International double jeopardy

40 | 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

41 | 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.

ZDOLŠEK
ATTORNEYS AT LAW

Stojan Zdolšek
zdolsek@zdolsek.com

Irena Jurca
irena.jurca@zdolsek.com

Katja Zdolšek
katja.zdolsek@zdolsek.com

Miklošičeva cesta 5
1000 Ljubljana
Slovenia
Tel: +386 1 3078 300
Fax: +386 1 3078 310
www.zdolsek.com

Sweden

Johan Carle, Stefan Perván Lindeborg and Fredrik Sjövall
Mannheimer Swartling

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Swedish Competition Act (2008:579) (the Act) came into force on 1 November 2008, replacing the previous legislation dating from 1993. The Act governs all aspects of Swedish competition law.

The object of the Act is to eliminate and counteract obstacles to effective competition in the production of and trade in goods and services. The ultimate aim of the legislation is to promote growth and efficiency in the Swedish market. Consumer protection is covered by other legislation, although consumer interests may be referred to in decisions under the Act.

The Act contains two general prohibitions, one against anticompetitive agreements between undertakings (Chapter 2, section 1) and one against abuse of a dominant position (Chapter 2, section 7). The Act also provides for the control of concentrations (Chapter 4). The Act's provisions on anticompetitive agreements between undertakings and abuse of a dominant position are modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Act's merger control rules are modelled on the EU Merger Regulation. The preparatory works (travaux préparatoires) to the Act provide that the Act is to be interpreted in line with EU law, including the case law of the Court of Justice of the European Union.

As with article 101(1) TFEU, the elements of an agreement or practice that violate the Act are void and unenforceable unless the conditions for exemption in Chapter 2, section 2 of the Act are satisfied. The conditions for exemption are the same as under article 101(3) TFEU, which require that the efficiencies produced by an agreement outweigh the anticompetitive effects. Moreover, block exemptions have been adopted in the form of separate regulations largely incorporating their EU counterparts.

Fines may be imposed for infringements of the Act and injured parties may claim damages.

A decision by the Swedish Competition Authority (SCA) may be appealed to the Patent and Market Court.

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 is responsible for implementing and administering the Act, and thus for investigating cartel matters.

The SCA has the power to order an undertaking to terminate an infringement and to apply to the Patent and Market Court for a fine to be imposed on the undertaking for infringement of the Act. The SCA itself also has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fines (a form of settlement in non-contentious cases – see question 32). The SCA may also initiate investigations and has fact-finding powers. The SCA issues guidelines on the application of the competition rules.

The SCA is an independent governmental body consisting of around 200 officials, led by director general Rikard Jermsten (appointed in 2017) and a management group consisting of the heads of departments. It is organised into specialised departments and other units. The SCA is independent of the European Commission but is required to cooperate with it.

Instead of being divided according to different sectors as was previously the case, the SCA's competition enforcement tasks are now entrusted to two units, responsible for investigating infringements of the Act and of EU competition law, as well as handling complaints and notifications; the cartel and merger unit (T1) and the abuse and vertical restraints unit (T2). In addition, there is the department responsible for the enforcement of the public procurement rules, as well as the Chief Economist's department, Legal Services and the International Department. Following a further reorganisation, the department previously responsible for general supervision and support of the public procurement rules was transferred to the newly created National Agency for Public Procurement in 2015.

There is no separate prosecution authority since there are no criminal sanctions for cartel activity or any other violation of the Act.

See question 13 for more details.

Changes

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

The Competition Act was amended on 1 January 2016 to include a specific provision allowing the SCA to carry out indexing and searching of digital material at its own premises in connection with dawn raids. Such an off-site review can only be carried out with the consent of the affected undertaking. Furthermore, the undertaking has the right to oversee the measures taken by the SCA concerning the digital material, such as the SCA's electronic search. It should be noted that this was already common practice prior to the amendment.

On 1 September 2016, the Patent and Market Court replaced the Stockholm District Court as the court of first instance for competition cases. The reform was made in order to make the court procedure in such complex matters more uniform. A new court of appeal, the Patent and Market Court of Appeal, has replaced the previous Market Court and is now set up at the Svea Court of Appeal in Stockholm. The Supreme Court is the final court of appeal.

On 27 December 2016, a separate Competition Damages Act (2016:964) entered into force. The Damages Act governs actions for damages for infringements of the competition law provisions and

ensures compliance of Swedish law with the requirements of the EU Damages Directive. The amendments include changes and clarifications concerning, for example, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

Substantive law

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

The Act, like its TFEU equivalent, provides no legal definition of a cartel. In Swedish doctrine and case law the term 'cartel' is generally applied to horizontal agreements and concerted practices covering hard-core restrictions of competition such as price fixing, limitations on production or sale, market allocation and bid rigging.

Cartels may violate the general prohibition against restrictive agreements found in Chapter 2, section 1 of the Act and, to the extent that collective dominance may be involved, the prohibition against abuse of a dominant position found in Chapter 2, section 7 of the Act.

The prohibition renders the cartel agreement null and void and results in liability to pay fines as well as damages (see question 18). However, there are two possible exceptions to this.

First, to fall under the prohibition against anticompetitive agreements, the agreement must restrict competition to an appreciable extent. Like the European Commission, the SCA has published a Notice on Agreements of Minor Importance (KKVFS 2009:1) (the Notice). According to the Notice, agreements between actual or potential competitors where the parties' combined market share does not exceed 10 per cent and agreements between non-competitors, where none of the parties has a market share exceeding 15 per cent, normally fall outside the prohibition against restrictive agreements. Where the individual turnover of each of the parties does not exceed 30 million kronor, the 15 per cent threshold applies irrespective of the type of agreement. However, according to the Notice, these de minimis principles do not apply to agreements that contain certain 'hard-core' restrictions. More specifically, typical cartels of the kind referred to above are normally prohibited even where the market shares are below the thresholds set out in the notice.

Second, Chapter 2, section 2 of the Act provides for a directly applicable legal exemption. The conditions for exemption are the same as in article 101(3) TFEU:

- the agreement must contribute to improving the production or distribution of goods or promote technical or economic progress;
- the agreement must pass on to consumers a fair share of the resulting benefits;
- the agreement must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the positive effects; and
- the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The Act contains similar exemption rules as the EU competition law regime on, inter alia, motor vehicles. Taxi operations and farming are also, to some extent, covered by special rules. With respect to hard-core cartels, there are no industry-specific bans or exemptions or any specific exemptions applicable to government-sanctioned or regulated conduct. However, the Act will not apply to behaviour that is an intended result of legislation or an inevitable consequence thereof.

Application of the law

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

Chapter 1, section 5 of the Act defines an undertaking as a legal or natural person engaged in an activity of an economic or commercial nature. The term 'undertaking' must be viewed in the broadest sense and is interpreted in the same way as under EU competition law. Virtually every natural or legal person participating in the economic process will be regarded as an undertaking. The term covers any activity directed at trade in goods or services, irrespective of the legal form of the undertaking and regardless of whether or not it is intended to create profits.

Activities that have been held to be commercial activities falling under the Act include healthcare, distribution of fire appliances and leasing of real estate. Activities that have been considered non-commercial activities and thus falling outside the scope of the Act, include the public procurement of translation services, the financing of an information brochure on a national system concerning doctors, the distribution of instructions and dissemination of information as well as the procurement of work clothes for private use.

The Act does not apply to agreements between employers and employees regarding wages and other conditions of employment.

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. The relevant geographic market can be defined as Sweden, a part of Sweden or an area larger than Sweden. An agreement between undertakings situated outside Sweden may be prohibited under the Act if the agreement has actual or potential effects in Sweden.

In practice, this means that a cartel may be prohibited under Swedish law, and the undertakings involved pursued under the Act, if the cartel has appreciable effects on competition in Sweden, even if the cartel in question is organised outside Sweden or the undertakings involved are not Swedish. However, public international law imposes restrictions on the exercise of extraterritorial jurisdiction under the Act and the SCA is unlikely to take action against foreign undertakings unless such action can be enforced.

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 requires that the agreement has actual or potential effects on competition in Sweden (see question 7).

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

When obtaining information, either ex officio or from an informant (leniency applications or tip-offs) that suggests the existence of a cartel, the SCA must decide whether to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the SCA may

file an application with the Patent and Market Court for authorisation to conduct an inspection (dawn raid) at the premises of one or more of the suspected parties (see question 10).

If the information collected during the dawn raid supports the suspicion, the SCA will continue the investigation. At this stage, it is likely that the SCA will contact customers and competitors uninvolved in the suspected wrongdoing and question persons working for the suspected undertakings.

If the SCA considers that it has sufficient evidence to prove the existence of the suspected cartel, it will issue a statement of objections to the suspected undertakings setting out its position and the evidence it has obtained. After having received the response of the undertakings (and providing that its suspicions remain), the SCA can adopt three different courses of action. It can order the undertakings to cease the violation of the Act, subject to a fine for non-compliance (a cease-and-desist order). The SCA can also sue the undertakings before the Patent and Market Court and request a judgment ordering the undertakings to pay an administrative fine for infringing the Act. The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Finally, if the undertaking does not contest the SCA's claim, the SCA does not have to sue before the Patent and Market Court but can instead issue an order for the undertaking to pay fines (a fining order – form of settlement; see question 32).

Typical contentious cartel matters will take a fairly long time from start to finish, often several years. The only time limit to which the SCA is subject is that fines may only be imposed if the SCA's application has been served on the undertaking in question within five years from the date on which the violation ended. In 2018, the average period of review for prioritised cases was 320 days. .

Investigative powers of the authorities

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

The SCA may order a suspected undertaking, or any natural or legal person, to provide information and documents at its disposal and to ask any person considered likely to have useful information to appear before it for interrogation. If the SCA deems it necessary to undertake an on-the-spot investigation (dawn raid) at the premises of an undertaking, it must file an application with the Patent and Market Court. Authorisation will only be granted if there is reason to believe that an infringement has been committed, if the undertaking fails to comply with an order to provide information, documents and suchlike, or there is otherwise a risk of evidence being withheld or tampered with, and if the importance of the measure being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it. An order to provide information, documents and suchlike, as well as a decision to allow a dawn raid, may be imposed under penalty of a fine for non-compliance.

Such an application to the Patent and Market Court can be granted without consulting the suspected undertakings in advance if there is a risk that the value of the investigation would otherwise be reduced (in particular where the undertakings can be expected to destroy or hide evidence if they are informed about the investigation). This is the normal approach.

During a dawn raid, the SCA may examine and take copies of, or extracts from, accounting records and other business documents (including computer records), request oral explanations from representatives or employees of the undertakings and otherwise investigate the premises, property and means of transport of the undertaking. Provided the company under investigation consents, the SCA usually also 'mirrors' digitally stored material and reviews the material at the SCA's own premises (see question 3). To ensure that the undertaking allows the officials of the SCA full access to the premises, the officials are normally accompanied by representatives of the Swedish Enforcement Authority.

An undertaking whose premises are about to be searched may send for legal counsel. The investigation may not start until the lawyers have arrived, unless the investigation would be unduly delayed by waiting or the investigative order has been made without consulting the undertaking concerned. Since the latter is typically the case, the SCA does not normally wait long for counsel to arrive before starting its investigation.

The SCA may not examine or take copies of, or extracts from, documents that are covered by legal professional privilege, or collect documents that are not covered by the scope of the court authorisation. In the event of a dispute as to whether a certain document is privileged, the document shall immediately be sealed and sent to the Patent and Market Court by the SCA. The Court shall decide, without delay, whether the document is privileged.

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 a decision from the Enforcement Authority is subject to appeal (see Updates and trends below).

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.

During 2018, the SCA conducted dawn raids at the premises of 10 different companies, which related to two investigations. In the first half of 2019, the SCA did not conduct any dawn raids.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Under EU law, the SCA must cooperate with the European Commission and assist it in gathering information from undertakings in Sweden. In addition, under Regulation 1/2003 the SCA must cooperate with the national competition authorities of other EU member states within the framework of the European Competition Network (ECN). The ECN allows for exchange of information on current investigations and assistance through evidence sharing and investigative measures. In October 2004, the SCA undertook, under article 22(1) of Regulation 1/2003, its first cross-border dawn raid in cooperation with the Danish Competition Authority concerning alleged anticompetitive behaviour in the market for natural gas. In September 2017, a new Nordic cooperation agreement was proposed to replace and extend the equivalent arrangement to which Sweden had been party since 2003. This Agreement on Cooperation in Competition Cases between Sweden, Denmark, Finland, Greenland, Iceland and Norway formalises and strengthens the existing framework for information exchange and other inter-authority collaboration to improve Nordic enforcement during cartel, abuse of dominance and merger control investigations.

The SCA also cooperates with other national competition authorities outside the ECN and the Nordic agreement. On a global level, such cooperation takes place within the frameworks of the International Competition Network, the OECD's Competition Committee and the UN's Conference on Trade and Development, with the purpose of exchanging experience regarding methodology and to further the understanding

of competition law matters and the value of effective competition policies. On occasion, the SCA has also coordinated certain reports with its equivalents in the Baltic states, for instance, with the Latvian competition authority concerning the waste disposal sector.

Sweden is not, however, a party to any legal assistance treaty in relation to non-EEA countries. This is partly owing to the provisions of the Public Access to Information and Secrecy Act (2009:400), which places restrictions on the SCA regarding the provision of information covered by secrecy to authorities outside Sweden and the possibility of keeping information received from non-Swedish authorities, secret.

Rules on some forms of international cooperation were introduced in 2002. These rules provide that the SCA may, upon application by an authority in a state with which Sweden has entered into an agreement on legal assistance in competition law matters, order an undertaking to provide information, documents and other materials, and require persons who are thought to be able to provide information to attend interrogations.

Furthermore, at the request of such an authority, the Patent and Market Court may, upon written application by the SCA, allow it to carry out a dawn raid to assist the other state in its investigation into whether a party has infringed the competition rules of that state, if the following conditions are met:

- there is reason to believe that an infringement has been committed;
- the conduct under investigation would have been found to infringe Chapter 2, sections 1 or 7 of the Act or of articles 101 or 102 TFEU, if those rules had been applied to the conduct;
- there is particular reason to believe that evidence is in the possession of the party to which the request refers;
- the party in question does not comply with an order to provide information, documents and suchlike, or there is otherwise a risk that evidence will be withheld or tampered with; and
- the importance of the action being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it.

Under a confidentiality rule introduced together with the rules on international assistance described above, information received by the SCA in the context of international assistance is confidential if it can be assumed that the assistance was requested by the foreign authority on condition that the information would not be disclosed.

In view of the increasing regulation at an EU level of cooperation between national competition authorities of the member states and between national authorities and the European Commission, the rules on international assistance described above are believed to be of practical relevance mainly in the context of cartels limited to another Nordic country where information also needs to be collected in Sweden.

At the domestic level, the SCA cooperates in various ways with the various county administrative boards in Sweden. Pursuant to a government regulation, the county administrative boards have a responsibility to promote competition in their respective counties and to report activities suspected of restricting competition to the SCA. The SCA also regularly consults with other Swedish authorities affected by its activities.

Additional cooperation, for example in relation to advocacy work with other agencies in the field of corruption (such as the police and the Swedish Anti-corruption Institute) may become more common due to a trend of tip-offs relating to both competition and anti-corruption law issues, in particular in relation to procurement.

In 2019, the SCA joined the framework for fair and effective regulatory processes recently adopted by the International Network for Competition Authorities (ICA). The aim of the framework is to harmonise principles for efficient supervisory processes. The framework concerns cooperation between the authorities and opportunities to take part in each other's current competition laws and procedural regulations.

Interplay between jurisdictions

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

See question 11.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

The SCA does not have authority to impose fines other than in non-contentious cases. If the SCA decides to sanction companies for cartel activities and the undertakings do not accept the fines, the SCA will have to file an application before the Patent and Market Court. Hence, such an application results in civil litigation under the general procedural framework.

The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required, but should typically be granted in a cartel case. The judgment by the Patent and Market Court of Appeal may, in turn, be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent (see question 16).

When the SCA issues a cease-and-desist order (see question 9), its decision may be appealed to the Patent and Market Court.

Burden of proof

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

The burden of proof lies with the SCA, or, in the case of private damages claims based on violations of the Act, normally with the party claiming to have suffered damage. The SCA must prove that the conditions are fulfilled for imposing a fine, and the Market Court (now replaced by the Patent and Market Court of Appeal) has held that the level of proof for the SCA is relatively high, but not as high as the level required in criminal cases (ie, beyond reasonable doubt).

Circumstantial evidence

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

In principle, there are no rules in Swedish law to limit the type of evidence that the court may try. Parties, such as the SCA, can rely on virtually any kind of document, statement and occurrence in attempting to prove their case. The court may freely evaluate the evidence presented by the parties at its discretion. Thus the court has to examine what has been put forward by the parties in line with the principles of free submission of evidence and free evidence assessment. On a purely practical level, proving an infringement on circumstantial evidence alone would, of course, be more challenging. As mentioned in question 14, the SCA must prove that the conditions are fulfilled for imposing a fine and the level of proof for the SCA is relatively high.

Appeal process

16 | What is the appeal process?

As mentioned in question 13, the Patent and Market Court is the court of first instance in fining matters. Its judgments can be appealed to the Patent and Market Court of Appeal, which will review the case on the

merits. Leave to appeal in the Patent and Market Court of Appeal will be granted if there is reason to question the accuracy of the Patent and Market Court's decision; it must grant leave to appeal to be able to determine the accuracy of the Patent and Market Court's decision; the determination of the Court may be of importance as a precedent; or otherwise there are extraordinary reasons to grant appeal. Judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent. Also the Supreme Court's leave to appeal is required, and would typically only be granted in exceptional cases.

The party that wishes to appeal must do so in writing within three weeks of the pronouncement of the judgment or from when the plaintiff received the judgment. As regards timing, the procedure before the Patent and Market Court of Appeal is usually less time-consuming than the procedure before the Patent and Market Court.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activity or any other violation of the Act.

Civil and administrative sanctions

18 | 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 ex tunc. The SCA may order cartel members to cease the cartel activity, subject to a fine for non-compliance with the order. The imposition of the fine requires a decision by the relevant courts.

Further, the cartel members may, as an administrative sanction, upon application by the SCA, be ordered by the Patent and Market Court to pay fines as an economic sanction for their illegal activities. The application by the SCA should be filed with the Patent and Market Court. The decision of the court may be appealed to the Patent and Market Court of Appeal. As mentioned earlier, the SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine.

To date, the SCA has lodged about 30 court cases on fines, ie concerning alleged abuses of a dominant position as well as anti-competitive 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. A tendency can be observed regarding the SCA's increased interest in different kinds of competition restrictions, whereby it no longer focuses only on the most grave and obvious cartels, but also pursues cases,for example, involving various forms of bidding cooperation.

A fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous financial year. There is no lower limit to the fine. Unlike under EU competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all undertakings belonging to the same group. Fines are primarily determined according to the gravity and duration of the infringement. The degree of gravity is measured by the harmful effects of the infringement on competition and prices in the market, as well as by the extent of direct economic losses suffered by other parties. Moreover, when setting the fines, it may also be taken into account whether the undertaking in question has previously violated Articles 101 and 102 TFEU or the corresponding national rules (see question 19).

The highest individual fine yet imposed in Sweden amounted to 200 million Swedish krona as a result of a cross appeal in the Asphalt case. The *Asphalt* case is the biggest cartel case in Sweden to date. Following the 2007 judgment of the Stockholm District Court, total fines on all nine companies involved amounted to approximately 500 million Swedish krona after all appeals were settled. Although the amount is high for Sweden, it is considerably lower than the 1.2 billion Swedish krona sought by the SCA. To establish the fines in that case, the court made an overall assessment of the violations that had occurred and all relevant circumstances.

In two more recent cases where fines were imposed, the infringements were not upheld in court. The first case involved three healthcare companies, which had cooperated through sub-contractor arrangements in a 2008 procurement. The SCA's claim for fines of about 30 million Swedish krona was upheld at first instance, but was ultimately dismissed by the Patent and Market Court of Appeals. The court held that the cooperation in question could not be regarded an infringement by object, and that evidence on effects was very limited. The second case, from 2016, concerned bidding cooperation between Telia and Gothnet. Fines totalling in 16 million Swedish krona were imposed by the Patent and Market Court (less than half of the amount sought by the SCA). However, in 2018, on appeal by one party only, the case (and fine) against Telia was overturned as the court of appeal disagreed with the SCA's claim that an infringement by object had occurred. As a result of this development, the SCA noted in its 2018 annual report that there is an increasing demand for effect analysis in its investigations.

Moreover, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 or article 101 TFEU, provided such injunction is necessitated by the public interest (see question 21).

In addition to administrative sanctions, the Act contains an explicit right to claim damages for parties that have suffered injury as a result of infringements of the prohibitions against anticompetitive agreements or abuse of a dominant position (see question 24). There is also a possibility for the Consumer Ombudsman to represent consumers in class actions in accordance with the Group Proceedings Act (2002:599) (see question 25). Finally, the Swedish Arbitration Act (1999:116) stipulates that the civil law consequences of competition law violations may be subject to arbitration. When determining damages, administrative fines imposed by competition authorities are normally taken into account.

Guidelines for sanction levels

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

Swedish legislation does not provide for criminal sanctions for violations of the competition rules. With respect to fines, the Act follows the method used in EU law and the SCA has also published a methodology paper on how to determine fines. Similar to under EU law, Chapter 3, section 8 of the Act states that the gravity and the duration of the violation shall be taken into account when determining the basic amount of the fine. When the basic amount of the fine has been determined, the SCA may take into account aggravating and mitigating circumstances that result in an increase or decrease in the basic amount as determined above. Regarding aggravating circumstances, particular attention is paid to any steps taken to coerce other undertakings to participate in the infringement, or if the undertaking has had a role of leader in the cartel or has in some way punished other companies in order to keep them adhering to the behaviour that constitutes the infringement. Regarding mitigating circumstances, particular attention is paid to evidence that the undertaking's involvement in the infringement is

substantially limited. The lack of intent of the undertaking to be involved in the infringement is also taken into account. However, to participate in the infringement because of pressure from other companies, to prove that no profits were made or that the company suffered damage from the cartel operations are not considered to be mitigating circumstances.

The SCA may also take into account circumstances that are not connected to the specific infringement in question. These circumstances include previous infringements of the prohibitions in the Act or in the TFEU; evidence that shows that the infringement was terminated as soon as the SCA intervened; and the financial situation of the undertaking. As previously stated in question 18, a fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous year. The SCA will not impose fines in minor cases.

The sentencing principles mentioned are binding on the adjudicator. The SCA methodology paper, however, is not binding on the adjudicator, but it is binding on the SCA when determining what fines to ask for (and when imposing binding fines on undertakings not disputing the fines, see also question 32).

Compliance programmes

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

The fact that a company has a compliance programme to prevent competition infringements from occurring is not, as such, considered a mitigating circumstance when calculating the fine.

Director disqualification

21 | 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. The new Trading Prohibition Act was introduced in 2014 and the SCA has published guidelines (KKVFS:2015:12) on the application of the rules on injunctions against trading. The new Act broadened the scope for trading prohibitions, in the sense that injunctions can now be imposed on all persons that conduct the management of a business. The Act also gives the Swedish Enforcement Authority a mandate to oblige a third party to submit information regarding his or her economic dealings with the person alleged to have participated in the infringement. The SCA may apply for an injunction against trading either in conjunction with an action for administrative fines or in separate proceedings before the Patent and Market Court.

In assessing whether an injunction against trading is necessitated by the public interest, it should be considered whether the conduct was systematic or intended to produce significant personal gain, whether such conduct caused or was intended to cause significant harm, whether the person in question has previously been convicted of criminal acts in respect of business activities and whether the conduct was intended to prevent, restrict or distort competition. The infringement must therefore have been of a serious nature and of relatively long duration for an injunction to be imposed. Furthermore, where the person against whom the injunction is considered has participated in giving significant assistance in the investigation of the infringement by the SCA, the European Commission or a competition authority in another member state, an injunction shall not be considered necessitated by the public interest. This will particularly apply in cases where a company takes part in a leniency programme.

An injunction against trading may be issued against members and alternate members of the board of directors, the managing director and the deputy managing director, provided that such a person committed the wrongdoing in respect of business activities or was serving in such a post at the time of the infringement of the competition rules. An injunction against trading can also be imposed on individuals who, in another capacity, have in fact conducted the management of a business, or who have held themselves out to third parties as responsible for a business.

Debarment

22 | 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, according to Chapter 13, section 3, paragraph 1(4) of the Public Procurement Act (2016:1145). It is not a sanction that can be imposed during the competition infringement procedure, but is instead decided in the procurement procedure. For debarment, some conditions must be met.

First, the undertaking must have been guilty of grave professional misconduct proven by any means that the contracting authorities can demonstrate. Non-compliance with the cartel ban, which has been the subject of a final judgment, or a decision by the SCA where the undertaking in question does not dispute the fine, may constitute professional misconduct of that kind.

Second, debarment must be proportionate to the gravity of the professional misconduct, according to Chapter 4, section 1 in the Public Procurement Act and the Supreme Administrative Court in the case RÅ 2010 ref 79. If those conditions are met, the authority may debar an undertaking from participation in a procurement process. The possibility of debarment shall, however, be construed restrictively considering the grave consequences for excluded undertakings.

A decision to debar a tenderer can be made at any time during the procurement procedure, although it should as a general rule be made as early as possible in the procurement procedure, although there is no provision in the Public Procurement Act stating a formal time limit. The decision can be appealed to the Administrative Court of the circuit where the procuring authority is located.

There are a number of cases concerning debarment from government procurement procedures as a result of cartel activity (see, for example, the judgments of the Stockholm Administrative Court of Appeal of 2 December 2013 in cases 3727-13, 3725-13, 4081-13 and 5060-13).

Whether a tenderer can be debarred is assessed on a case-by-case basis considering, for example, proportionality – that is, there is no specific duration of debarment.

Parallel proceedings

23 | 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?

See questions 17 and 18.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 2016 Competition Damages Act (2016:964) – which implements the EU damages directive into Swedish law – governs actions for damages for infringements of the competition law provisions and includes changes and clarifications on, inter alia, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

An undertaking that has intentionally or negligently violated Chapter 2, section 1 or Chapter 2, section 7 of the Act, or articles 101 or 102 TFEU, is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act. Both contractual liability and indemnity liability are included, and the liability covers pure economic loss without any link to personal or property damage. Thus, this means that the proven injury can be recovered, which presumably would be considered single level damages. Hence, Swedish rules on damages are of a 'compensatory nature'. Passing-on defences and similar will thus be permitted under Swedish law.

The scope of persons entitled to damages is not defined in the Act, 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.

The Act itself gives little guidance on the size of damages that can be awarded, and there are very few cases.

Regarding the judicial procedure, the Patent and Market Court hold 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 if 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 (Chapter 2, section 6 of the CDA).

Class actions

25 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 the Group Proceedings Act (2002:599), it is possible to initiate individual group actions (class actions), public group actions and organisational group actions. A person who is a member of a group may bring an individual group action. This means that the plaintiff must have standing to be a party to litigation with respect to one of the claims to which the action relates. The organisational action means, as with the public group action, that someone is given standing to sue without the dispute in any way affecting the plaintiff's own legal interests. This is contrary to the normal principles regarding standing under Swedish law. The procedural rules are with only a few exceptions the same as in civil proceedings.

A group action can be initiated in certain competent courts. Since the entry into force of the Competition Damages Act in 2016, the jurisdiction to hear private antitrust group actions has moved from the general courts to the Patent and Market Courts.

No competition cases have to date been subject to a class action in Sweden.

COOPERATING PARTIES

Immunity

26 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 12-15 of the Act provide for immunity or reduction from fines. These rules were amended in 2014 to introduce more predictability and to mirror the EU leniency system (trough the addition of a marker system). The SCA has also published guidelines on its leniency policy (KKVFS 2015:1, 2017:1). 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 cartels).

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if it is owing only to the information contained in the application that the SCA has obtained sufficient material to take action against the infringement, if the undertaking: (i) provides the SCA with all the information about the infringement that it has at its disposal; (ii) cooperates fully with the SCA throughout the investigation of the infringement; (iii) does not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and (iv) has ended its involvement in the infringement, or ends it as soon as possible after informing the SCA. An undertaking that has forced others to participate may not obtain immunity.

In the event that another company has already obtained a marker (see question 29), immunity may not be granted before the period of extension has ended, nor may immunity be granted if the SCA has stated in a decision that the conditions for immunity are fulfilled.

All the information that the leniency applicant has at its disposal relating to the alleged anticompetitive agreement at the time of the application has to be provided for an application to be considered as filed. In addition, the information must be relevant to prove the infringement and include the identification of the other participants, the affected market, as well as the type and duration of the infringement. Even where the SCA already suspects an infringement at the time of the application, this does not prevent an undertaking from being granted immunity. However, the requirements are not fulfilled if the SCA has already in some other way received sufficient information to intervene. It does not matter whether a decision to intervene has already been made.

Additional information to which the undertaking may subsequently gain access during the ongoing investigation must also be given to the SCA. In other words, the undertaking must continuously, and voluntarily, submit all relevant information regarding the infringement and copies of all relevant material to which the undertaking has access, for example, notes or minutes from meetings. Informing other participants about the application or evidence supplied and other measures that hinder the SCA's investigation will remove the possibility of immunity.

If the SCA has received sufficient information to commence an investigation into an infringement and no undertaking has applied for leniency in accordance with the above, immunity may still be granted to an undertaking if it, in addition to criteria (i) to (iv) set out above, is (v) the first to provide information that makes it possible to establish that an infringement has occurred, or (vi) in some other way to a very significant extent has facilitated the investigation of an infringement. The latter criterion will, according to the SCA's guidelines, be interpreted strictly and the availability of immunity is intended to be very limited under this rule.

Subsequent cooperating parties

27 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 Act, only the first undertaking to cooperate with the SCA may qualify for immunity. However, the undertaking that comes second may get a reduced fine under Chapter 3, section 13 of the Act if the undertaking fulfils the same kinds of conditions on cooperation applicable to immunity applicants. The SCA decides in its writ of summons whether the information an undertaking has provided has added considerable value, and the level of reduction. The reduction for the first undertaking for providing information adding considerable value will be between 30 and 50 per cent, for the second undertaking the reduction will be 20 to 30 per cent, and for other undertakings the reduction will be up to 20 per cent. In determining the level of reduction within these categories, the SCA will take into account at what time the information was provided, to what extent the information added value and to what extent and with what continuity the undertaking has cooperated with the SCA after the information was provided.

There are no formalised amnesty-plus or penalty-plus systems available under the Swedish leniency regime. This means that there is not explicit scope to receive lenient treatment in one case as a result of providing information about an infringement in another separate case, nor does a company risk more severe fines if It does not report previous infringements.

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 27.

Approaching the authorities

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

Although there are no express 'deadlines', if an undertaking wishes to benefit from full immunity under the Swedish leniency programme, it should file an application as soon as it has gathered the necessary information. Otherwise, it runs the risk that one of the other participants may 'blow the whistle' first, considerably limiting the undertaking's chance of qualifying for immunity. However, even if the undertaking is not first in, there is a chance of qualifying for a reduction of the fine.

An undertaking whose application is incomplete may obtain a marker, provided that the application contains information on the market concerned by the infringement, which other companies are involved in the infringement and the object of the infringement. The time limit is at the discretion of the SCA, but is usually no longer than two weeks unless the undertaking can provide sufficient reasons for a longer time limit.

Cooperation

30 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?

See questions 26 and 27.

Confidentiality

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

Confidentiality issues are regulated by the Public Access to Information and Secrecy Act (2009:400). Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc, that the SCA intends to undertake may be confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. The information related to an investigation by the SCA (not only planning and preparations) will be confidential if, considering the object of the investigation, it is of exceptional importance that the information is not disclosed. The information is primarily confidential in relation to the companies subject to the investigation, but it may also be confidential in relation to third parties. Information provided by leniency applicants or other cooperating parties may be treated as confidential under this rule.

The provisions guarantee the confidentiality, in matters regarding investigations of infringements of Chapter 2, section 1 and Chapter 2, section 7 of the Act or articles 101 or 102 TFEU, of reports and other information provided to the SCA by an informant, if it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed. The confidentiality concerns both legal and natural persons. Both information given on an informant's own initiative and information provided on request from the SCA may be confidential under this rule. However, since the object of the rule is to protect the informant, only information that could somehow disclose the identity of the informant is treated as confidential under this rule. The provisions also guarantee the confidentiality of certain information in the context of legal assistance requested by another state (see question 11).

Information in public records related to the SCA's investigations and other enforcement measures remain confidential for a maximum of 20 years, or otherwise as long as it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed.

It follows from the rules that the level of confidentiality does not depend on the level of cooperation by the parties.

Settlements

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

The SCA may not enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity. However, Chapter 3, section 16 of the Act provides the SCA with the right to issue a binding settlement to alleged cartel members. This is referred to as a fine order. This section is of a non-mandatory nature, which means that the SCA can issue settlements in suitable cases. According to the preparatory works of the Act, settlements should not be issued in cases where the facts are uncertain. If the settlement is confirmed in writing by the alleged cartel member, within a period of time determined by the SCA, the settlement will have the same effect as that of a judgment with legal force. A settlement that has been approved in writing can be appealed to the Patent and Market Court within a year of the written confirmation.

Corporate defendant and employees

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

As mentioned in question 21, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 of the Act or article 101 TFEU, provided such an injunction is necessitated by the public interest. However, where the person against whom the injunction could be imposed has participated in the provision of significant assistance in the SCA's investigation of the infringement, an injunction shall not be considered necessitated by the public interest.

Dealing with the enforcement agency

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

If an undertaking wishes to take advantage of the leniency programme, it should contact the SCA for an assessment of its chances of qualifying for immunity from, or a reduction of, fines (see question 26). The contact must be made by a person empowered to represent the undertaking (but can initially be anonymous). The undertaking cannot qualify for immunity until a formal application has been filed with the SCA. This application can be made in writing. However, in practice, the SCA accepts oral applications since undertakings sometimes hesitate to file written applications due to the risk that the material will be used in proceedings for damages.

DEFENDING A CASE

Disclosure

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

As indicated in question 31, the SCA may keep certain information confidential for a company concerned during the investigation phase. This is typically the case for trade secrets provided to the SCA by certain third parties, for instance competitors or customers, and evidence concerning other parties' involvement in an infringement.

Access to the case file in its entirety (with few exceptions, see below) is normally granted at the stage when the SCA considers that it has sufficient evidence to prove the existence of a suspected cartel and thereby issues a draft statement of claim (similar to a statement of objections). The companies concerned will, before the SCA files an allocation to issue fines, be granted an opportunity to review and comment on the draft application and the evidence disclosed.

As indicated, there are a few limited possibilities, however, for the SCA to keep certain information confidential to a party also after the draft statement of claim has been issued, or to release documents to a limited number of individuals under the proviso that the documents may only be used for exercising defence rights, etc. Similarly, certain information may be disclosed only at the SCA's own premises (typically quantitative data). Also in such cases, the SCA issues a decision to limit the group of people that may have access to the information, for instance legal and economic advisers.

At the stage when the SCA has submitted an application to the Patent and Market Court asking it 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

36 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 mentioned in questions 21 and 33, the Act provides the SCA with the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 of the Act or article 101 TFEU. The preparatory works of the Act states that nothing prevents the employee being represented by counsel during interrogations held by the SCA. As there are often conflicting interests between an undertaking under investigation on the one hand, and its employees on the other, it is advisable to have separate counsel representing the undertaking and its employees.

Furthermore, when the SCA applies for an injunction against a person in a district court, the court may appoint a public defence counsel if there are special reasons.

Multiple corporate defendants

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

The guidelines on ethics of the Swedish Bar Association contain stringent provisions relating to the representation of clients with conflicting interests. For members of the Swedish Bar and their employees, these provisions limit the possibility to represent multiple corporate defendants. Subject to these limitations, a multiple corporate defence is possible.

Payment of penalties and legal costs

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

Legal penalties are imposed on the undertakings involved in the cartel, and are not imposed on the employees of those undertakings. Hence, individual employees cannot be ordered to pay fines or other monetary sanctions. However, undertakings may pay the legal costs of their employees.

Taxes

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

No. Fines, penalties and similar public charges (such as fines imposed by the SCA or the European Commission) are non-deductible for Swedish tax purposes.

Private damages awards may be tax deductible depending on the circumstances. In general, private damages awards should be tax-deductible if they qualify as an operating expense. Certain specific exemptions exist but these should not be relevant here.

International double jeopardy

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

To answer this question, first it must be considered whether the SCA or the courts can fine or otherwise penalise an undertaking that has been penalised in other jurisdictions. Second, the question arises as to whether sanctions already imposed in other jurisdictions shall be taken into account when determining the fine. Regard must be had to EU law

and consequently to whether the earlier penalty had been imposed within the EU.

The European Competition Network (ECN) was set up with the objective that each case involving application of EU competition law should be dealt with by a single authority in a member state. However, the rules are not binding and Regulation 1/2003 article 13, paragraph 2 stipulates that a complaint that has already been dealt with by another competition authority may be rejected by the authority (here: the SCA). Hence, the SCA can choose not to reject the complaint and the system consequently allows for sanctions under the EU competition rules by more than one authority in the same case. However, the principle of ne bis in idem is a general principle of EU law (article 50 of the Charter on Fundamental Rights). The ECJ held in *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* that if the Commission had penalised an undertaking for anticompetitive behaviour with reference to the object or effects in a certain territory, the undertaking cannot again be brought to a national court with reference to the object or effects in the same territory. It follows from the principle of *ne bis in idem* and the condition of 'identity of facts'. Accordingly, an undertaking cannot under the principle of *ne bis in idem* be fined in a Swedish national court for the same anticompetitive conduct, if the object or effects in Sweden have already been taken into account in a previous proceeding within the EU (including the Commission's power to issue fines).

Thus it should not be considered 'double jeopardy' if a company will be fined in respect of indirect sales in Sweden where the direct sales have been penalised elsewhere, following *Toshiba Corporation and Others*.

With respect to non-EU member states, there are no safeguards protecting an undertaking from fines or penalties in Sweden if the undertaking has been penalised in a state outside the EU.

There is no clear legal ground for taking into account any penalties imposed in other jurisdictions. The SCA does not mention it as a mitigating factor in its methodology paper on how to determine fines (see question 19), nor is it mentioned as a mitigating factor in the Act.

The system of reducing a fine by the amount of previous penalties has been rejected by the advocate general as not satisfying the principle of *ne bis in idem* (opinion in C-213/00 P, pages 96–97). Similarly, the European Court of Human Rights has rejected that kind of system.

As indicated in question 24, Swedish rules on damages are of a compensatory nature. This means that overlapping liability for damages can be taken into account when assessing damages.

Getting the fine down

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

Companies can avail themselves of the leniency principles described in question 26. The existence of a compliance programme does not affect the level of the fine, owing to the difficulties in assessing the impact of such a programme. Hence, compliance initiatives undertaken after the investigation has commenced would typically not affect the level of the fine.

UPDATE AND TRENDS

Recent cases

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

In recent years, the SCA's enforcement focus has been less on hard-core cartels and more on other kinds of anticompetitive arrangements, often involving the delicate distinction between infringements by object and infringements by effect, in particular in relation to tendering processes.

MANNHEIMER SWARTLING

Johan Carle
johan.carle@msa.se

Stefan Perván Lindeborg
stefan.pervan.lindeborg@msa.se

Fredrik Sjövall
fredrik.sjovall@msa.se

Norrlandsgatan 21
PO Box 1711
111 87 Stockholm
Sweden
Tel: +46 8 595 060 00
www.mannheimerswartling.se

An ongoing investigation concerns suspected anticompetitive practices in connection with the procurement of insurance solutions. To date, however, the main focus of this investigation has been the SCA's dawn raid practices. During a dawn raid on these insurance companies in 2017, the SCA mirrored hard drives and seized a high volume of documents from insurance broker, Söderberg & Partners. The SCA then reviewed the material and decided that a large amount was relevant and would become part of the case file. Despite the fact that the Act does not technically contain rules enabling judicial review of such decisions, Söderberg & Partners challenged the SCA's decision to seize the documents and claimed that a significant proportion of the material was outside the scope of the court decision authorising the dawn raid. The company argued that it would violate its fundamental right of access to effective remedies and a fair trial to deny the possibility to appeal. The Patent and Market Court and the Patent and Market Court of Appeal both dismissed the action on the basis that the SCA's decision was not, as such, a reviewable act under the relevant legislation. The Swedish Supreme Court, which granted further leave to appeal, also confirmed this view. However, the Supreme Court also found that since there was disagreement on the documents covered by the authorisation, the SCA should have sought assistance from the Swedish Enforcement Authority (see question 10). In such cases, the Enforcement Authority would then have adopted a decision that would itself have become subject to judicial review. As the SCA had not done so, the Supreme Court found that the SCA had acted in a way that denied Söderberg & Partners a right to appeal. The Supreme Court also found that Söderberg & Partners was entitled to compensation as a result of the wrongdoing. As a consequence, the SCA has changed its procedures relating to the copying of documents during investigations.

An interesting case relating to cartel damages is currently pending before the Swedish Supreme Court. In this case, envelope manufacturer Bong, addressee of the EC's *envelopes cartel* decision in 2014, has asked the court to declare that Bong is not liable to pay damages to one of its customers (a number of companies in the Office Depot group). This request for a negative declaration was made following a threat by Office Depot to initiate legal proceedings in the English High Court for an alleged loss, which it subsequently went on to do. A key question before the Supreme Court is whether a Swedish court is competent to try an action for a negative declaration against all claimant companies, in line

with the ECJ's *CDC Hydrogen Peroxide* case (the lower instances found that they were competent to try an action against the Swedish Office Depot subsidiary, but not against the claimant companies domiciled in different member states). The Swedish Supreme Court will decide during 2019 if it will grant leave to appeal.

Aside from ongoing court cases, investigations are ongoing into, for example, the traffic services, musical instruments, furniture and construction sectors. The SCA recently closed investigations into the construction and recruitment service sectors. No dawn raids have been carried out so far in 2019, according to information in the public domain.

Regime reviews and modifications

43 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 or proposed changes to the legal framework in the public domain.

Switzerland

Mario Strebel, Christophe Rapin and Fabian Koch
Meyerlustenberger Lachenal 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 Competition Commission (the 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 (the Secretariat), which are based in Berne. They are independent of the federal government. The Commission consists of 13 members and is headed by its president and the two vice-presidents. The majority of the Commission's members must be independent experts (having no interest in or special relationship with any economic group whatsoever). While investigations are conducted by the Secretariat, which also prepares the Commission's decisions, the deciding body in cartel matters is the Commission.

Based on the Commission's internal rules of procedure of 15 June 2015 that entered into force on 1 November 2015, two separate chambers of the Commission with independent decision-making power were introduced; first, a chamber for partial decisions and second, a chamber for merger control clearance. The chamber for partial decisions has been introduced in particular for the closing of hybrid cartel cases (ie, proceedings in which only some of the parties agree to close the investigation with an amicable settlement). All decisions that are not 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 70 employees, 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 January 2019, the Secretariat revised its notice on leniency, in particular setting out that leniency markers no longer be submitted via fax, but only in writing, via email or in person. Furthermore, the COMCO has decided to extend the applicability of the communication regarding competition law treatment of vertical agreements in the motor vehicle sector for one year from end of 2022 to end of 2023. In addition, such communication has been adapted to the *Elmex toothpaste* cases (see question 4).

There are also some proposals for change to the regime. These proposals are set out in question 43.

Substantive law

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

The Cartel Act prohibits unlawful restraints of competition such as anticompetitive agreements between two or more independent undertakings operating at the same or different market levels that have a restraint of competition as their object or effect (article 4(1) of the Cartel Act). Importantly, the notion of anticompetitive agreement does not only cover binding or non-binding agreements in a strict legal sense but also 'gentleman's agreements' or concerted practices such as the exchange of information in order to knowingly substitute practical cooperation for the risks of competition. To be unlawful, an agreement must either eliminate effective competition or significantly restrict competition without being justified on economic efficiency grounds (article 5(1) of the Cartel Act).

By law (article 5(3) and (4) of the Cartel Act), the following agreements are presumed to eliminate effective competition and are thus considered as hard-core restrictions (hard-core restraints):

- horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners; and
- vertical agreements that set minimum or fixed prices (resale price maintenance) or allocate territories to the extent that (passive)

sales by other distributors into those territories are not permitted (absolute territorial protection).

Such a presumption may be rebutted if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. If competition is not eliminated, it has to be assessed whether the agreement significantly restricts competition. In the landmark cases with regard to Gaba and Gebro in the matter of the *Elmex toothpaste* cases of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, the Federal Supreme Court substantially tightened its practice with regard to hard-core restraints. The Federal Supreme Court decided that vertical and horizontal hard-core restraints as listed above in principle significantly restrict competition. The significance of the competition restraints is assumed for hard-core restraints owing to their quality without the need to examine quantitative effects such as market shares. According to the Federal Supreme Court, already a small degree of a restriction of competition suffices to constitute significance. Horizontal and vertical hard-core restraints must therefore be justified on the grounds of economic efficiency to be permissible.

Economic efficiencies justifying otherwise unlawful anticompetitive agreements include:

- a reduction of production or distribution costs;
- the improvement of products or production processes;
- the promotion of research into or the dissemination of technical or professional know-how; and
- a more rational exploitation of resources.

The strict approach adopted with the *Elmex toothpaste* cases has recently been confirmed by the Federal Supreme Court in its Altimum SA decision (mountaineering equipment) of 18 May 2018 (2C_101/2016). In this decision, the Federal Supreme Court also made clear that the barriers to justify otherwise unlawful anticompetitive agreements based on grounds of economic efficiency are high, in particular for hard-core restraints.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The Cartel Act does not provide for any industry-specific offences or defences or any antitrust exemptions for government-sanctioned activity. However, pursuant to article 3(1) of the Cartel Act, statutory provisions that do not allow for competition in a certain market for certain goods or services take precedence over the Cartel Act. Such statutory provisions include, in particular, provisions that establish an official market or price system and provisions that grant special rights to specific undertakings to enable them to fulfil public duties. However, according to the Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

The Cartel Act also empowers the Federal Council and the Commission to issue ordinances or general notices respectively on specific anticompetitive agreements that are, in principle, justified on efficiency grounds. Such anticompetitive agreements include:

- cooperation agreements relating to research and development;
- specialisation and rationalisation agreements (including agreements concerning the use of schemes for calculating costs);
- exclusive distribution and purchase agreements for certain goods or services;
- exclusive licensing agreements for intellectual property rights; and
- agreements with the purpose of improving the competitiveness of small and medium-sized enterprises provided that they have only a limited effect on the market.

On this basis, several general notices and communications have been published by the Commission:

- On 22 May 2017, the Commission adapted its Vertical Agreements Communication in particular to the Federal Supreme Court's landmark decisions in the *Elmex toothpaste* cases and has additionally issued for the first time explanatory notes as an interpreting aid on 12 June 2017, as amended on 9 April 2018 (see question 4). The latter particularly also contain explanations with regard to online sales restrictions. This communication incorporates the principles developed by the Commission and the appellate courts based on article 5(4) of the Cartel Act and, in principle, seeks harmonisation with the Block Exemption Regulation 330/2010 and the related Guidelines on Vertical Restraints while taking the economic and legal specificities of Switzerland into account.
- On 19 December 2005, the Commission adopted the Communication on Agreements of Minor Importance (de minimis), specifically targeting agreements between small and medium-sized enterprises to improve their competitiveness provided that the agreements are no hard-core restraints and have only a limited effect on the market.
- On 1 November 2002, the Commission enacted the Motor Vehicle Communication and a brief explanatory note regarding its application. The aims of the Motor Vehicle Communication were essentially to allow the parallel importation of motor vehicles from the EU and EEA to Switzerland, to suppress the link between retail and after-sales servicing, to facilitate the sale and the parallel importation of spare parts and to give distributors more freedom in relation to multi-branding. On 1 January 2016, the Commission's revised Motor Vehicle Communication entered into force and replaced the communication of 2002.
- Moreover, the Commission has published a general notice on homology and sponsoring of sports goods and another on the use of cost-calculation schemes (cost-calculation aids). The purpose of the latter, which is the much more important of the two in practice, is to distinguish lawful use of cost-calculation aids from illegal horizontal price fixing. To qualify as a lawful cost-calculation aid, the following requirements must be met:
  - the aid may only set out the basis for the cost calculation, but may not stipulate any flat costs;
  - know-how may be exchanged to allow the cost calculation; however, information on how prices are set must not be disclosed;
  - the parties must be free to set prices and conditions and to determine discounts in whatever form; and
  - price elements, discounts or consumer prices shall not be 'proposed'.

Communications of the Commission are not binding upon Swiss courts.

Finally, upon specific request by the parties subject to a decision of the Commission or the appellate courts, the Federal Council may authorise otherwise unlawful anticompetitive conduct in exceptional cases if such conduct is deemed necessary for compelling public interest reasons (article 8 of the Cartel Act). To date, such authorisation has never been granted.

Application of the law

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

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.

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 competition law infringements, only the undertaking is. Further, undertakings that perform tasks in the public interest and that are vested by law with special rights (such as the Swiss Post for specific postal services) are also (partly) exempted.

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 in principle codifies the international law principle of the effects doctrine. According to the landmark judgment in the *Elmex toothpaste* decisions, the Federal Supreme Court ruled that the Cartel Act applies to all agreements and concerted practices that may have an effect within Switzerland (see question 4). Therefore, agreements concluded abroad or conduct that takes place outside Switzerland but that might have effects in Switzerland may fall under Swiss jurisdiction. In its most recent practice, the Commission imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the EEA. As Switzerland is not part of the EEA (and was as a result affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. This in general is in line with the Commission's past practice to interpret effects in Switzerland broadly in a sense that the mere possibility of effects suffices. Both the *BMW* and *Nikon* decisions were upheld by the Federal Supreme Court and the Federal Administrative Tribunal, respectively.

Export cartels

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

In light of the effects doctrine set out in question 7, conduct that only affects customers or other parties outside Switzerland should, in general, not fall under Swiss jurisdiction. However, in cases where there might be repercussions on the Swiss market as, for instance, in an (re-)import scenario, the Swiss Cartel Act could nevertheless be applicable. In this context, one has to bear in mind that, based on the *Elmex toothpaste* decisions by the Federal Supreme Court (see question 4), the scope of the effects doctrine has been significantly widened. 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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

Cartel proceedings under 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, the Commission may open an in-depth investigation even without going through a preliminary investigation.

The Secretariat can initiate preliminary investigations either on its own initiative, at the request of 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 Department of Commerce of the Swiss government. During preliminary investigations, the parties concerned have no procedural rights (that is to say, no right to consult files or records and no right to be heard). By the same token, third parties cannot bindingly request the Secretariat or the Commission to open a preliminary investigation or an investigation, respectively. The preliminary investigation shall determine whether an investigation is necessary. The decision to open an investigation does not qualify as a formal decision and hence cannot be appealed. It is on the Commission to decide, what in-depth investigation is to prioritise.

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 have the possibility to join the investigation, albeit with limited procedural rights, upon a corresponding request made within 30 days of the announcement. All parties to the investigation are vested with the usual procedural rights. They may consult files and suggest witness statements and have the right to be heard and to participate in hearings. The Secretariat conducts the investigation, but the Commission has the power to intervene and to hold hearings, a right that the Commission has made frequent use of in the recent past.

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Commission, to issue necessary procedural rulings. On the basis of the conducted investigation, the Secretariat brings forward a motion for a draft of a decision, which is comparable to the statement of objections in the European Union. The parties and participating third parties may comment on such draft decision. If important new facts emerge, another round of hearings and witness statements may take place. Formally, however, the decision itself is not issued by the Secretariat, but by the Commission. Accordingly, the investigating and decision-making bodies are separate, even though at least one of the presidium members of the Commission is involved in some of the investigatory actions.

An investigation can have one of the following outcomes. First, the Commission may decide that there is no evidence of an unlawful agreement and close the investigation without any consequences. Second, the formal decision of the Commission can state that an agreement or conduct is unlawful and order measures to restore effective competition or pronounce direct fines, as the case may be.

There are no statutory time limitations applying to investigations. As a rule of thumb, a preliminary investigation can take several months and a formal investigation from several months to two years or more.

Investigative powers of the authorities

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

The Secretariat has broad investigative powers. It may hear the parties that have allegedly committed the violation as well as third parties concerned (such as competitors or suppliers) and ask for written statements. It can compel testimony from witnesses, although not from the parties alleged to have entered into illegal anticompetitive agreements. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to access and to comment on these minutes.

Upon specific request for information, the undertakings under investigation are also obliged to provide the Secretariat with all information required for their investigation and to produce necessary documents (article 40 of the Cartel Act), in due consideration, however, of the right against self-incrimination (*nemo tenetur* principle).

The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions. Moreover, according to article 42(2) of the Cartel Act, the president or each vice-president of the Commission has the power to order inspections or dawn raids and seizures upon request of the Secretariat. The Federal Act on Criminal Administrative Law applies by analogy to such proceedings.

The Secretariat published a note on selected instruments of investigation in January 2016. Therein it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data. The representatives of the Secretariat in charge of the inspection will, inter alia, not wait for the arrival of external lawyers before starting to search the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, the undertakings being dawn-raided may request the sealing of specific or even all documents and electronic data. Moreover, legal privilege applies to any document produced in the course of the (core) professional activity of independent attorneys admitted to the bar that are allowed to professionally represent parties in Swiss courts. Hence, legal privilege is not granted to work products of in-house counsel. It applies irrespective of when such document was created (ie, before or after an investigation was launched) and of where such document is located, be it in the custody of the attorney him- or herself, the client or any other third party. Legal privilege may be invoked by the attorney him- or herself, the client and also every third party having a protected document in custody.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 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 Cartel Act also provides for a specific regime with regard to investigations in the air transportation industry (article 42a of the Cartel Act). Such investigations are governed by the agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999, allowing sector-specific cooperation between the Commission and the European Commission on a formal legal basis. Moreover, on an informal basis, the Commission and its Secretariat cooperate with various national competition authorities in Europe such as the German Bundeskartellamt as well as with the US antitrust authorities. In the absence of specific future cooperation agreements, such cooperation, however, is not allowed to go beyond the exchange of non-confidential information.

Interplay between jurisdictions

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

Investigations, prosecutions and sanctions decided by antitrust authorities abroad are not legally binding for the Commission and appellate courts. However, because of the supposedly congruent legal framework as the one in the European Union, as referred to by the Federal Supreme Court in its *Elmex toothpaste* cases (see question 4), and the fact that such regulatory framework has often made significant inroads into the past Swiss competition law practice, its case law will have a significant impact also on future decisions taken by the Swiss authorities.

CARTEL PROCEEDINGS

Decisions

13 How is a cartel proceeding adjudicated or determined?

The Commission is the authority that is empowered to take decisions and remedial actions against cartels, and also to impose fines on undertakings that violate Swiss competition law. It has wide decision-making and remedial powers and can, inter alia, also issue injunctions to terminate a specific conduct or to change and modify a specific business practice. Moreover, a specific chamber of the Commission is empowered to render partial decisions on the closure of proceedings, the approval of amicable settlements including other measures, in particular fines and costs, for some of the parties while the proceeding is continued for the other parties (hybrid cartel cases; see question 2). The Secretariat is responsible for conducting investigations and preparing cases and, together with one presidium member of the Commission, to issue necessary procedural rulings (see question 9). In addition, an undertaking impeded by an unlawful restraint of competition from entering or competing in a market may request before the civil courts:

- the elimination of the unlawful agreement or cartel;
- an injunction against the unlawful agreement or cartel;
- damages; and
- restitution of unlawful profits.

Only civil courts have jurisdiction over claims for damages.

Burden of proof

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

According to the principle of investigation, which applies generally in administrative proceedings and in particular in connection with cartel proceedings, the competition authorities and the courts have to investigate the facts ex officio. This obligation to investigate extends to justifications on the grounds of economic efficiencies. Nevertheless, the parties to the investigation or proceedings before the appellate courts are obliged to cooperate in assessing the facts and circumstances. Ultimately derived from the criminal law nature of cartel proceedings and the consequent applicable presumption of innocence, it is, however,

in any case for the authorities to prove that an undertaking acted, in fact, illegally by taking part in an agreement or concerted practices.

With regard to the level of proof required, as a general rule, only certainty in the sense that no reasonable doubts shall continue to exist with regard to the relevant facts is deemed sufficient. However, the existence of purely theoretical doubts does not matter. Further, according to the Swiss Federal Supreme Court, exceptions to that rule only exist with regard to complex economic issues such as market definitions and substitutability questions. With regard to such issues, a prevailing probability shall suffice as required level of proof since full proof is by the nature of these matters impossible.

In recent judgments of the Federal Administrative Tribunal in the bid-rigging case against building undertakings from the canton of Aargau, it stated that a thorough assessment of the evidence is required without a reduction of the burden of proof or other facilitations, even if accusations from leniency applicants against other undertakings were submitted. The Federal Administrative Tribunal further clarified that accusations made in a voluntary report against other competitors are not sufficient evidence if the non-cooperating undertakings deny these accusations. Instead, the competition authorities must take into account all the specific circumstances of a case (eg, the statements of the undertakings that filed a voluntary report and the statements of the non-cooperating undertakings). If the situation remains unclear, further investigations and taking of evidence is needed, meaning that in practice, additional evidence that corroborates the accusation of another undertaking must be found.

Circumstantial evidence

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

In line with the principle of free appraisal of evidence, the Commission as well as the appellate courts accept the establishing of a Cartel Act infringement by using circumstantial evidence without direct evidence of an actual agreement. Both direct evidence and circumstantial evidence are, a priori, considered to be of equal value and can be used to fulfil the required level of proof (see question 14).

Appeal process

16 | What is the appeal process?

Decisions of the Commission and, to a limited extent, interim procedural decisions also, can be appealed to the Federal Administrative Tribunal within 30 days of the notification of the decision.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether these third parties are 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 anticompetitive conduct shall be regarded as parties to an investigation and thus have the legal standing to appeal a decision.

An appeal can be lodged on the following grounds: wrongful application of the Cartel Act; the facts established by the Commission and its Secretariat were incomplete or wrong; or the Commission's decision was unreasonable, a claim that is, however, rarely invoked in practice. Hence, the appeal before the Federal Administrative Tribunal is a 'full merits' appeal on both the findings of facts and law. However, in practice, the Federal Administrative Tribunal grants the Commission a significant margin of technical discretion.

Judgments of the Federal Administrative Tribunal and, to a limited extent, interim procedural decisions, may be challenged before the Federal Supreme Court within 30 days of the notification of the decision. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims (ie, the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, in the ECHR or other international treaties). The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

In addition, the parties involved may at any time during and after appeal procedures request the Federal Council to exceptionally authorise specific behaviour for compelling public interest reasons (see question 5). To date, such authorisation has never been granted.

Judgments of the civil courts may ultimately be challenged before the Federal Supreme Court. If the legality of a restraint of competition is disputed before a civil court, this question shall be referred to the Commission for an expert report. However, civil courts rarely refer such cases and the Commission's expert opinion is not binding upon the civil courts.

SANCTIONS

Criminal sanctions

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

There are no direct criminal sanctions for individuals as natural persons for cartel activities. Swiss law does not provide for imprisonment for cartel conduct. However, individuals acting for an undertaking, but not the undertaking itself, violating a settlement decision, any other enforceable decision or court judgment in cartel matters may be fined up to 100,000 Swiss francs. These sanctions are time-barred after five years following the incriminating act.

Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to 20,000 Swiss francs. Statute of limitations for these sanctions is two years following the incriminating act.

Individuals who can be fined include executives and board members, as well as all de facto managers and directors.

Civil and administrative sanctions

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

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies ex tunc.

From an administrative law point of view, under article 49a of the Cartel Act, direct sanctions (fines) are imposed on undertakings that:

- participate in a hard-core horizontal cartel according to article 5(3) of the Cartel Act (see question 4);
- participate in hard-core vertical restraints pursuant to article 5(4) of the Cartel Act (see question 4); or
- abuse a dominant position pursuant to article 7 of the Cartel Act.

The maximum administrative sanction is a fine of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative). The Ordinance on Sanctions lays down the method of calculation of the fines (see question 19).

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Commission or a judgment of the appellate courts can be fined up to 10 per cent of the undertaking's consolidated net turnover in Switzerland during the past three financial years (cumulative). In calculating the fine amount, the presumed profit arising from such unlawful practice shall be taken into due consideration.

Furthermore, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an ongoing investigation, can be fined up to 100,000 Swiss francs.

Since individuals acting as private undertakings fall under the Cartel Act (see question 6), they can also be fined in cartel cases, as recently shown in the *Upper Valais Driving Instructor Cartel* case in which the Commission sanctioned also natural persons following an amicable settlement.

Guidelines for sanction levels

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

The principle of direct sanctions is set forth in article 49a of the Cartel Act. Sentencing guidelines are laid down in the Ordinance on Sanctions. The Commission has, in addition, issued an explanatory communication. According to the principles in the Ordinance on Sanctions, the penalty must be assessed on the basis of the duration and the seriousness of the unlawful conduct, the probable profit that the undertaking has achieved as a result of its conduct and the principle of proportionality.

In a first step, the Commission determines the base amount of the fine which is up to 10 per cent of the consolidated net turnover generated on the relevant markets in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the severity and nature of the infringement.

In a second step, the base amount is increased based on the duration of the infringement.

In a third step, aggravating factors (such as, for instance, 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 settlement) influence the final amount of the fine. In its recent decision in the matter *Road Construction*, a bid-rigging case, the Commission reduced sanctions substantially for those undertakings that agreed with cartel victims on compensation for damages (see question 42). Full immunity or a discount can also be obtained based on leniency cooperation (see question 26).

Eventually, the Commission shall ensure that the penalty imposed is proportional and that the maximum fine amount (see question 18) 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

20 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 regarding Gaba of 28 June 2016 (2C_180/2014; one of the two *Elmex toothpaste* cases, see question 4), the 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 Federal Supreme Court argued in that regard that from a competition law perspective, compliance programs aimed at preventing anticompetitive 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 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 Federal Administrative Tribunal in its *Nikon* decision 2016. The mere existence of a compliance programme should not be enough in that regard.

A motion by Rolf Schweiger (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, the parliamentary initiative by Dominique de Buman (16.473) that, inter alia, addressed the same matter was withdrawn in 2017.

Director disqualification

21 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

22 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 ongoing procurement procedure or delete them from a list of qualified undertakings in cases of illegal cartel conduct. In addition, several cantonal procurement acts provide that undertakings may be banned from participating in procurement procedures for a period of several years in cases of illegal cartel conduct. However, no automatic exclusion applies at the federal or cantonal level.

Parallel proceedings

23 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 ongoing investigation, are subject to administrative or criminal fines, or both (see questions 17 and 18). Criminal prosecutions against individuals rely on similar criteria to those applied in imposing administrative sanctions. However, the roles of individuals in the violation of a decision or judgment, or the failure to comply with their obligations to provide information, as well as subjective criteria (degree of intent) are more important. Civil sanctions may be accompanied by claims for damages and reparations or restitution of unlawful profits from third parties affected by the illegal cartel activity.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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; the passing-on defence is not excluded in Switzerland. However, a claimant may request the remittance of illicitly earned profits. Court costs as well as legal costs, as determined by the court, must usually be borne by the losing party in the proceedings. The claimant bears the burden of proof. Under Swiss law, the main difficulties are providing specific and sufficient proof of the damage incurred and establishing the required causal nexus between the anticompetitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims.

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

25 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.

COOPERATING PARTIES

Immunity

26 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 Cartel Act, an undertaking that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from full or partial immunity. Only the first applicant may enjoy full immunity and rather high thresholds apply.

The leniency programme particularly applies to (horizontal and vertical) hard-core restraints. The Commission may grant full immunity from a fine if an undertaking is the first to either:

- provide information enabling the Commission to open an investigation and the Commission itself did not have, at the time of the leniency filing, sufficient information to open a preliminary investigation or an investigation; or
- submit evidence enabling the Commission to prove a hard-core restraint, provided that no other undertaking must already be considered first leniency applicant qualifying for full immunity and that the Commission did not have, at the time of the leniency filing, sufficient evidence to prove an infringement of the Cartel Act in connection with the denounced conduct.

However, immunity from a fine will not be granted if the undertaking:

- coerced any other undertaking to participate in the infringement and was the instigator or ringleader;
- does not voluntarily submit to the Commission all information or evidence in its possession concerning the illegal anticompetitive practice in question;
- does not continuously cooperate with the Commission throughout the investigation without restrictions or delay; or
- does not cease its participation in the Cartel Act infringement voluntarily or upon being ordered to do so by the competition authorities.

In September 2014, the Secretariat published a revised notice on leniency, which included a form for leniency applications. The notice was slightly revised in August 2015 and again in January 2019.

The Cartel Act does not expressly regulate the possibility for the Commission to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example, if facts are discovered that justify withdrawal, amendment or a final decision is unjustified. There is no cartel specific case law in that regard. However, the bar for immunity revocation has to be set very high.

In addition, no fine will be imposed if undertakings notify a possible hard-core restraint before it produces any effects (notification procedure). For that purpose, the Commission has published specific filing forms. In contrast, a sanction may be imposed if the Commission communicates to the notifying undertakings the opening of a preliminary investigation or the opening of an in-depth investigation (see question 9) within a period of five months following the notification and the undertakings continue to implement the notified restriction.

Subsequent cooperating parties

27 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 calculated according to the method explained in question 19 is available at any time in the proceeding to undertakings that do not qualify for full immunity. Further, the fine amount can be reduced up to 80 per cent if an undertaking provides information to the Commission about other hard-core restraints that were unknown to the Commission at the time of their submission ('leniency plus'). This reduction is without prejudice to any possible full immunity or partial reduction of a fine for the newly disclosed infringements. The continuous cooperation with the Commission throughout the investigation without restrictions or delay is also an indispensable requirement for receiving a partial fine reduction. The decisive factor for determining the reduction percentage is the importance of the undertaking's contribution to the success of the proceedings (the position in the queue is not per se relevant).

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

Being the second or third or subsequent cooperating party will not allow for full, but only partial immunity (see question 27). However, as the

decisive factor for determining the leniency bonus is the contribution to the success of the proceedings, being second alone does not guarantee a better bonus than the one for the subsequent cooperating parties.

In addition, there is a leniency plus option (see question 27).

Approaching the authorities

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

There are no statutory deadlines for submitting leniency applications or for perfecting a leniency marker. However, pursuant to the Cartel Act, full immunity is limited to the 'first in' but also possible for cooperation that enables the Commission to prove a Cartel Act infringement and therefore when an investigation has already been opened and a dawn raid conducted (see questions 26 and 27). 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, or orally by protocol declaration). Importantly, it is not possible to submit a leniency marker via telephone or fax (with regard to submission via fax transmission, the regime changed in January 2019). According to past investigations with several leniency applicants, it may be a matter of days or even hours whether and which undertaking may qualify for full immunity.

Cooperation

30 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 investigation without restrictions or delay as well as discontinuing its involvement in the infringement no later than the moment at which it provides information or submits evidence concerning the unlawful practice or upon receipt of the first injunction of the Commission are indispensable requirements for receiving full or partial reduction of the fine (see questions 26 and 27).

In its recent practice, the Secretariat has repeatedly insisted that a leniency applicant must at least admit its involvement in an unlawful agreement subject to potential sanctions. It made clear that it is not sufficient to simply produce factual elements. In the Secretariat's view, a leniency applicant would in principle have to admit that the unlawful agreement had effects on the markets. However, the recent decisions of the Federal Administrative Tribunal in the *Metal Fittings for Windows* case clearly state the right of the leniency applicants to argue against the Commission's legal interpretation of the facts. Only two of these three judgments have not yet become final and been handed down to the Federal Administrative Tribunal again by the Federal Supreme Court.

Where an undertaking does not meet these conditions, but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the possibility to reduce the sanction.

Confidentiality

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

The right of access to witness statements, hearing minutes and other documents relevant to the investigation may be limited to protect cooperating parties. The level of confidentiality protection is the same for all leniency applicants. Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis.

The Commission and the Secretariat are aware of a leniency applicant's particular need for confidentiality and, in the recent past, have established several measures to protect the leniency applicants' interests in that regard. However, these measures have not been tested in court so far. The catalogue of protective instruments includes the possibility to submit oral leniency statements, paperless proceedings and restricted access to the files. Access rights of other parties subject to an investigation were, in the Secretariat's practice, limited to access the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or hearing minutes were not allowed. In addition, access to the files was only granted shortly before the Secretariat provided the Commission and the parties with the draft decision (ie, shortly before the end of an investigation and the Commission's decision on the merits). The Secretariat has also implemented a number of specific internal measures to protect the leniency applicants' interests. Internal access to the file is restricted, and only the case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file. The above practice has been set out by the Secretariat in the notice on leniency.

With judgments of August 2016, the Swiss Federal Administrative Tribunal has authorised the Commission to grant access to certain data of a closed cartel investigation regarding a bid-rigging cartel in the construction sector to municipalities seeking civil damage claims. In doing so, the tribunal limited the access to files in various respects: first, data may only be accessed to the extent necessary, not allowing data retention for later use. Second, access is to be limited to data that 'directly affects' the requesting party. Third, access may only be granted and data may only be used to serve the purpose disclosed in the access request and a legally binding restriction of use must be imposed on the requesting party to that effect. Fourth, access to the files must not include data of undertakings that finally had not been addressees of the decision. The tribunal, however, did not have to decide on information requests of private undertakings where the conditions applied by the court could all the more be relevant. Also, the tribunal did not have to formally decide on the issue of access to leniency application data since the Commission excluded all leniency information before providing it to the municipalities. However, the tribunal did at least not question this practice of the Commission to exclude leniency information completely from access by third parties. Whether these third parties are public or private entities should have no bearing.

In the case of opening an investigation, the Secretariat gives notice by way of official publication. The notice states the purpose of and the parties to the investigation. There is no express obligation to keep the identity of the leniency applicants confidential. In practice, the Secretariat keeps the leniency applicant's identity confidential as long as possible. However, even if the final decision does not reveal the name of the leniency applicant, it is not excluded that a party familiar with the facts of the case may deduce its identity from the context. In

addition, the competition authorities' publications must not reveal any business secrets.

Settlements

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

Amicable settlements are an important feature of the Swiss cartel enforcement regime. During preliminary investigations, the Secretariat may propose measures to eliminate or prevent restrictions of competition. In the framework of an investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose to the undertakings involved an amicable settlement concerning ways to eliminate future restrictions. Hence, amicable settlements solely deal with an undertaking's conduct in the future, meaning that a party can voluntarily undertake to terminate respectively not to commit certain illegal conduct any more. However, the fine amounts to be imposed for illegal conduct in the past cannot be agreed on – Swiss competition law does contemplate plea bargaining. This also means that, in principle, an undertaking is allowed to appeal against a decision of the Commission and the imposed fine even if it has entered into an amicable settlement. It would be inadmissible to request a formal waiver of a party's right of appeal. Nonetheless, in practice, the Secretariat requests a party to a settlement agreement to confirm in writing that no grounds to appeal the final decision exist if the Commission will finally approve such agreement and does not exceed the framework of a possible fine set out therein; such requested memorandum of understanding should also be deemed to be void.

Amicable settlements shall be formulated in writing and approved by the Commission, typically in its decision on the merits. The Commission shall either approve the amicable settlement as proposed by the Secretariat, or refuse to do so and send it back to the Secretariat and suggest amendments. According to the Commission, it cannot amend the terms of a settlement on its own. However, it did so in one case, namely by setting a time limit to the amicable settlement.

Amicable settlements are binding upon the parties and the Commission and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties. Amicable settlements do not hinder the Commission from imposing fines on the parties if they have committed illegal hard-core infringements in the past. Yet concluding an amicable settlement is generally regarded as cooperative conduct and is taken into account as a mitigating factor when calculating the fine. In recent cases, reaching an amicable settlement has led to a reduction of the fines of about 10 to 20 per cent. However, the Commission takes the moment of the amicable settlement very much into account. In a late settlement case, the Commission only reduced the fine by 3 per cent and indicated that it would not reduce fines any more if amicable settlements are signed after the Secretariat's second draft decision. According to the Amicable Settlement Guidelines (see question 3), a fine reduction will no longer be granted in case of a settlement after the second draft decision has been served, if any.

Corporate defendant and employees

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

There is no effect on employees of the defendant. They are not addressees of administrative sanctions. However, employees might be subject to criminal penalties if they committed a corresponding offence in connection with the undertaking's conduct leading to the administrative sanction (for instance, fraud or forgery of a document). The granting of immunity or partial leniency concerning a corporate defendant has, in principle, no effect in this regard.

Dealing with the enforcement agency

34 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

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

While during the preliminary investigation procedure, there is no right of access to file, the defendant has such right after the opening of an investigation. The files include submissions from parties and the comments made thereon by the authorities, any documents serving as evidence as well as copies of rulings already issued. The authority may under certain conditions – for example, owing to essential public or private interests – refuse access to a file. In particular, access to a file may be limited with respect to business secrets as well as information regarding leniency applications of other parties (see question 31).

Representing employees

36 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

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

Under the Cartel Act, the Commission may require groups of more than five parties in a cartel proceeding to appoint a common representative, provided that these parties have identical interests and if otherwise the investigation would be unduly complicated. In practice, the Secretariat mainly applies this rule in cases involving trade associations, and

provided that the members of such trade associations agree to one representative.

Payment of penalties and legal costs

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

Corporations can pay the legal costs of their employees. However, the employees remain personally liable for any imposed criminal sanctions (see question 17).

Taxes

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

With a judgment of September 2016, the Federal Supreme Court clarified that fines and other sanctions of a criminal nature are not tax-deductible for legal entities, as they are not deemed to be business-related expenses that would be tax-deductible under Swiss law. According to the Federal Supreme Court, tax deductibility is only possible insofar as fines aim at disgorging illegally obtained profits (ie, fines that do not have a criminal or punitive purpose, but aim at correcting an unlawful situation). It is thus essential for Swiss (corporate) income tax purposes to distinguish sanctions with a penal nature from such aiming at disgorging illegally obtained profits. The Federal Supreme Court handed down the judgment to the lower instance to assess this question 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 is currently still pending before the Swiss parliament.

Private damages awards that take place in the ordinary course of business qualify in principle as business expenses and are deductible from profit taxes.

International double jeopardy

40 | 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

41 | 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. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition will in principle enjoy full or partial immunity (see question 26). Moreover, a settlement with the authority may also result in a reduction of the potential fine (see question 32).

Further, it is more important than ever for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law for their agreements and practices. It is often advisable for undertakings active in Swiss markets to implement an effective antitrust compliance programme or to undertake a competition law-related due diligence of their agreements or practices to identify possible violations of Swiss competition law, and to take appropriate measures to reduce their potential exposure to investigations and fines.

There is no statutory provision under Swiss law according to which the existence of a compliance programme would affect the level of a fine. It can be taken into consideration by the Commission when deciding on the level of fines. However, the Commission has been reluctant to do so in its recent practice and there is no legal certainty as to the sanction-mitigating effect of a compliance programme (see question 20).

UPDATE AND TRENDS

Recent cases

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

In particular, the following cases are of relevance in this section, for a different reason in each case (listing in chronological order):

- In February 2019, the Commission sanctioned two concrete and gravel producers in its *KTB-Werke* decision with a fine of 22 million Swiss francs in total for price fixing and allocating markets geographically. According to the Commission, the two undertakings agreed on their price lists, exchanged information on their volume discounts and provided for a common gravel and concrete contribution. Furthermore, they granted their customers certain discounts only if they sourced all the gravel and concrete from them. They also operated a joint collection agency for the calculation and payment of the rebates and discounts through which they exchanged detailed volume and price information.
- In March 2019, the Commission decided on the *Upper Valais Driving Instructor Cartel* case. This case seems remarkable because it involves also the sanctioning of natural persons, that is, driving instructors, for partaking in illegal price fixing conduct.
- Following a decision by the European Commission in the same matter in May 2019, the Commission concluded amicable settlements with several banks regarding the cartels *Three Way Banana Split* and *Essex Express* in June 2019. The cartels concern the partial coordination of conduct in foreign exchange spot markets regarding certain currencies by the involved banks or their traders, respectively. Interestingly, the coordination took place by use of a chat function. As sanction, the Commission imposed fines of about 90 million Swiss francs on the concerned undertakings. One undertaking, UBS, has been granted full immunity based on its first leniency application. The investigation against Credit Suisse is still pending.
- In July 2019, the chamber for partial decisions of the Commission sanctioned eight financing companies with sanctions in the total amount of 30 million Swiss francs for inadmissible information sharing regarding interest rates. With the exception of one undertaking, against which the investigation is still ongoing, the investigations were terminated with amicable settlements. One undertaking, Mercedes-Benz Financial Services Schweiz AG, qualified for full immunity under the leniency programme.

- Also in July, the chamber for partial decisions of the Commission concluded its investigation against Lloyds and Rabobank based on an amicable settlement involving sanctions for inadmissible information sharing regarding yen interest rate derivatives based on the yen Libor. Further investigations regarding yen interest rate derivatives against other banks are still ongoing.
- 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 in particular 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 ongoing 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.

Regime reviews and modifications

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

With regard to regime reviews and modifications, in particular the following from the competition law pipeline of the Swiss legislator must be mentioned:

- Fair price initiative/indirect counterproposal: The federal popular initiative 'Stop the high price island – for fair prices (fair price initiative)' was submitted on 12 December 2017. The initiative promises to create the basis for effective legal measures against abusive Swiss surcharges and to guarantee the non-discriminatory procurement of goods and services abroad. It demands that undertakings that are dependent on other undertakings be able to purchase goods or services offered in Switzerland and abroad in the country of their choice at the prices that are practised there. This is to be achieved by introducing the concept of 'relative market power' into the Cartel Act. The initiative also calls for Swiss consumers to be able to shop online without discrimination. On 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 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 which is expected in autumn 2019.
- The motion *Fournier* of 15 December 2016 'Improvement of the situation of small and medium-sized enterprises in competition law proceedings' calls on the Federal Council to amend the provisions of the Cartel Act in order to, inter alia, simplify and speed up competition law proceedings, grant parties compensation for their costs and expenses and provide a milder sanction regime for small and medium-sized enterprises. The first two points have been accepted by the Swiss parliament. The Federal Department on Economic Affairs, Education and Research is currently elaborating a consultation draft in this regard.
- The *Schneider-Schneiter* motion of 15 December 2017 'Geoblocking. Will Switzerland miss the boat again? Task force on digital free trade now!' calls on the Federal Council to set up a task force on digital free trade in order to be able to remove trade barriers such as geoblocking as soon as possible. The motion is still pending in the Swiss parliament.
- The motion by Français 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' calls on the Federal Council to amend article 5 of the Cartel Act in response to the *Elmex toothpaste* cases (see question 4).

Mario Strebel
mario.strebel@mll-legal.com

Christophe Rapin
christophe.rapin@mll-legal.com

Fabian Koch
fabian.koch@mll-legal.com

Schiffbaustrasse 2, PO Box 1765
8031 Zurich
Switzerland
Tel: +41 44 396 91 91
Fax: +41 44 396 91 92

65 rue du Rhône, PO Box 3199
1211 Geneva 3
Switzerland
Tel: +41 22 737 10 00
Fax: +41 22 737 10 01

Grabenstrasse 25
6340 Baar/Zug
Switzerland
Tel: +41 41 768 11 11
Fax: +41 41 768 11 12

1 rue de Bourg, PO Box 5379
1002 Lausanne
Switzerland
Tel: +41 21 310 40 20
Fax: +41 21 310 40 21

www.mll-legal.com
www.mll-news.com

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.

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 competition law enforcement work through approximately 130 case handlers. A research department, a decisions unit, an information-management unit, an external-relations unit, a management services unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members. If a cartel activity amounts to a criminally prosecutable act, such as bid rigging in public tenders, it may separately be adjudicated and prosecuted by Turkish penal courts and public prosecutors.

Changes

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

Other than the recently published amended Guidelines on Vertical Agreements, there have not been any significant recent developments in the Turkish cartel regime. The amended Guidelines included provisions concerning internet sales and most favoured customer (MFN) clause.

The Draft Proposal for the Amendment of the Competition Law (the draft law) issued by the Turkish Competition Authority in 2013 still remains null and void as it had not been submitted and proposed to the presidency of the Turkish parliament in the new legislative year. Currently, there are no indications as to whether or not the draft law will be renewed. However, it could be anticipated that there will be no comprehensive and significant changes to the previous draft.

Currently, a significant expected development in the Turkish competition law regime is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines). There is no anticipated date for the enactment of the draft regulation on fines. The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the authority's intention to bring the secondary legislation in line with the EU competition law during the harmonisation process. The draft regulation was sent to the Turkish parliament on 17 January 2014, but no enactment date has been announced as yet.

Finally, the following key legislative texts were announced or enacted between 2013 and the time of writing:

- Block Exemption Communiqué No. 2016/5 on R&D Agreements;
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicle Sector;
- Communiqué No. 2017/2 Amending the Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No:2010/4);
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of Act No. 4054 on the Protection of Competition (Communiqué No. 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 Treaty on the Functioning of the European Union (TFEU) (formerly article 81(1) of the EC Treaty). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not bring a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal-to-deal agreements. A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicle Sector, sets out revised rules for the motor vehicle sector in Turkey, overhauling Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector. Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

The Turkish antitrust regime also condemns concerted practices and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The special challenges posed by the proof standard concerning concerted practices are addressed in question 14.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Owing to the 'presumption of concerted practice' (see question 14), oligopoly markets for the supply of homogeneous products (eg, cement, bread yeast, ready-mixed concrete) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (more than 32 investigations in the cement and ready-mixed concrete markets in 21 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Competition Law does not provide any specific exceptions to government-sanctioned activities or regulated conduct. There are, however, examples where the Board took the state action defence into account (see, eg, Paper Recycling, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*, 2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

Application of the law

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

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 if they act 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 (see, for example, *The suppliers*

of rail freight forwarding services for block trains and cargo train services, 16 December 2015,15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; Imported Coal, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156). It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a colourable argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent they produce an effect on a Turkish market, regardless of where the conduct takes place.

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 jurisdiction of the Competition Authority as per article 2 of the Competition Law. In Poultry Meat Producers (25 November 2009, 09-57/1393-362), the Competition Authority launched an investigation into allegations that included, inter alia, an export cartel. The Board found that export cartels are not sanctioned as long as they do not affect the markets of the host country. Although some other decisions (*Paper Recycling*, 8 July 2013, 13-42/538-238) suggest that the Competition Authority might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the Competition Authority's jurisdiction if and to the extent it does not produce an impact on Turkish markets.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) (see question 10) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to eight months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

Investigative powers of the authorities

10 | 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 26,027 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. 2019/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations and dawn raids. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). It may also lead to the imposition of a fine of 0.05 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision, for each day of the violation (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

The Competition Law provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Competition Authority does not need to obtain

judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed time. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (that is, that which is written on the deed of authorisation).

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 (DG Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Competition Authority also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

Interplay between jurisdictions

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

The Board can initiate an inspection about an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Private suits against cartel members are tried before regular courts. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

Burden of proof

14 | 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

15 | 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

16 | What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff the court, by providing its justifications, may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes about 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

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

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

Civil and administrative sanctions

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

In the case of a proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings or the compliance with their commitments and suchlike in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in case there is a possibility of serious and irreparable damages.

The Board has recently levied an administrative monetary fine within the investigation launched against 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey (28 November 2017, 17-39/636-276). The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of an in-depth investigation, the Board has unanimously concluded that BTMU, ING and RBS have violated article 4 of Law No. 4054. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million Turkish liras and 66.4,000 Turkish liras, respectively, over their annual turnover in the financial year of 2016. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant

to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.

Another recent decision concerns allegations that 10 undertakings active in producing ready-mix concrete in the İzmir region in Turkey would have artificially increased the prices of ready-mix concrete by entering into an anticompetitive agreement or concerted practice (22 August 2017, 17-27/452-194). The Board took into account that the economic evidence shows the relevant undertaking was not involved in any kind of anticompetitive agreement or concerted practices and it is understood that the Board took the view of the defendants that it was implausible to reach an agreement within the alleged duration of the agreement, which was three months. Moreover, it could be argued that the decision constitutes a good example that the undertakings subject to investigation based on the allegations of anticompetitive agreements or concerted practice are able to defend themselves based on economic and legal evidence even under the presumption of concerted practice of article 4 of the Competition Law and marks the importance of economic evidence.

Civil actions are still rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply and price manipulation allegations. Civil damage claims have usually been settled among the parties involved prior to the court rendering its judgment.

Similar to the US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 et seq of the Competition Law entitle any person who is injured in his or her 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 usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

Guidelines for sanction levels

19 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 and suchlike in determining the magnitude of the monetary fine. In line with this, the Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in.

The aggravating and mitigating factors are set forth in the Regulation on Fines. As per article 5/3 of the Regulation on Fines, the amount of fine determined according to the above-mentioned method may be increased by 50 per cent for violations that lasted between one and five years, and by 100 per cent for violations that lasted more than five years. Pursuant to article 6 of the Regulation on Fines, the base fine may be increased by 50 to 100 per cent for each instance of repetition if the violation is repeated and if the cartel is maintained after the notification of the investigation decision. Moreover, the base fine may be increased by:

- 50 to 100 per cent, where the commitments made for the elimination of the competition problems raised within the scope of article 4 of the Competition Law have not been met;
- up to 50 per cent, where no assistance with the examination is provided; and
- up to 25 per cent in cases such as coercing other undertakings into the violation.

Mitigating factors on the other hand are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner. In this regard, the base fine may be reduced at a rate of 25 to 60 per cent if the undertakings or association of undertakings concerned prove certain facts such as provision of assistance to the examination beyond the fulfilment of legal obligations, existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and occupation of a very small share by practices subject to the violation within annual gross revenues. The Regulation on Fines applies also to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

The Regulation on Fines is binding on the Competition Authority.

Compliance programmes

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

As explained in question 19, 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 at a rate of 25 to 60 per cent if the undertakings or association of undertakings concerned prove certain facts such as provision of assistance to the examination beyond the fulfilment of legal obligations, existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and occupation of a very small share by practices subject to the violation within annual gross revenues.

In this regard, 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 recent *Mey İçki* (16 February 2017, 17-07/84-34) might be signalling a change in the Board's perception of compliance programmes. The Board decided to apply a 25 per cent reduction on the grounds that *Mey İçki* ensured compliance with competition law by taking into account the competition law sensitivities

highlighted by the Board even before the final decision of the Board. Similarly, in *Consumer Electronics* (7 November 2016, 16-37/628-279), the Board applied a 60 per cent reduction to an undertaking because of its compliance efforts, since the undertaking amended its contracts before the final decision of the Board.

Director disqualification

21 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 the employees and/or board members/executive committee members of the infringing entities in cases where 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

22 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 even a duty, not an option, for administrative authorities to apply for blacklisting in the case of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging – it is not available in cases of other forms of cartel infringement.

Parallel proceedings

23 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

24 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 lawsuits for treble damages. Article 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish obligation law regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, the debtor shall pay on the amount of their shares. However, in the event that the debtor make a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust-based private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations. Civil damage claims have usually been settled by the parties involved prior to the court rendering its judgment.

Indirect purchaser claims have not yet been tested before the courts. However, there is no regulation that prevents potential umbrella purchaser claims as well since the article 58 of the Law No. 4054 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

25 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

26 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

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Competition Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

Amnesty Plus is regulated under article 7 of the Regulation on Fines. According to article 7, the fines imposed on an undertaking that cannot benefit from immunity provided by the Regulation on Leniency will be decreased by 25 per cent if it provides the information and documents specified in article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

Approaching the authorities

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

As stated in question 26, 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

30 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: 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. A marker is also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered. The applicant must also convey any new documents to the Authority as soon as they are discovered; cooperate with the Authority on additional information requests; and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In *3M* (27 September 2012; 12-46/1409-461), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

Recently, however, the Board eased the tensions a little and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the reasoned decision of the *fresh yeast*

producers investigation was released (14-42/783-346). The decision is the first of its kind to be entered by the Board where it granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was afforded to a submission made after the initiation of the preliminary investigation and dawn raids. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids. The Board justified its unprecedented application by claiming that substantive evidence and added value was brought in through the leniency application. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

Confidentiality

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

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or the employees or managers of the undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well. While the Board can also evaluate the information or documents ex officio, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request in writing confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Board has decided on the case.

Settlements

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

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. When enacted, the new Draft Law is expected to introduce a form of settlement procedure.

Corporate defendant and employees

33 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 cartelist entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency a manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

Dealing with the enforcement agency

34 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

35 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

36 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 the investigated corporation and its employees. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

Multiple corporate defendants

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

So long as there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

Payment of penalties and legal costs

38 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

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

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

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

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

No. The Turkish Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules (see question 9).

Overlapping liability for damages in other jurisdictions is not taken into account.

Getting the fine down

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

Aside from the recently introduced leniency programme, article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established through a very diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

Following amendments in 2008, the new version of Law No. 4054 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;
- the financial power of the undertakings; and compliance with commitments.

As explained in question 20, there have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas,* 13-49/710-297). In *Industrial Gas*, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's recent *Mey İçki* (16 February 2017, 17-07/84-34) might be signalling a change in the Board's perception of compliance programmes. The Board decided to apply a 25 per cent reduction on the grounds that *Mey İçki* ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board even before the final decision of the Board. Similarly, in *Consumer Electronics* (7 November 2016, 16-37/628-279), the Board applied a 60 per cent reduction to an undertaking because of its compliance efforts, since the undertaking amended its contracts before the final decision of the Board.

UPDATE AND TRENDS

Recent cases

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

During the past year, there has not been a significant cartel decision where the Board imposed significant administrative monetary fines. On the contrary, there has been 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 2018, the Board decided on 378 cases and 88 of them were related to competition law violations. Forty-six out of 80 were related to article 4 of the Law No. 4054. Similarly, 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). 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 Competition Law, ordering them to cease any behaviour that may generate competition law infringements.

Moreover, 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 recently levied an administrative monetary fine within the investigation launched against five undertakings and one association of 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 A.Ş. (Tramola)*, *Kale Nakliyat Seyahat ve Turizm A.Ş. (Kale Nakliyat)*, *İstanbullines Denizcilik Yatırım A.Ş. (İstanbullines)*, *İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd. Şti. (İDN)* and *İstanbul Deniz Otobüsleri Sanayi ve Ticaret A.Ş.* (İDO) have violated article 4 of the Competition Law by way of collectively determining prices. In this respect, the Board imposed an administrative monetary fine to: (i) Tramola and İstanbullines equivalent to 4 per cent of their annual gross income; (ii) to İDN and İDO equivalent to 0.8 per cent of their annual gross income; and (iii) to Kale Nakliyat equivalent

to 1.6 per cent of its annual gross income as the Board did not grant full immunity to the leniency applicant. Moreover, the Board imposed an additional fine on İstanbullines for the submission of incomplete information to the Competition Authority by one per thousand of its annual gross income. Overall, the total amount of the fine imposed to all undertakings was 7.4 million Turkish liras.

Regime reviews and modifications

43 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 no ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime. The Prime Ministry sent the Draft Law, which is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure, to the Presidency of the Turkish parliament on 23 January 2014. However, the Draft Law is now null and void following the beginning of the new legislative year of the Turkish parliament. To reinitiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish parliament. At this stage, it remains unknown whether the new Turkish parliament or the government will renew the draft law.

ELİG GÜRKAYNAK Attorneys at Law

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

K Korhan Yıldırım
korhan.yildirim@elig.com

Çitlenbik Sokak No. 12
Yıldız Mahallesi Besiktas
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
www.elig.com

Ukraine

Nataliia Isakhanova, Yuriy Prokopenko and Andrii Pylypenko
Sergii Koziakov & Partners

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The main domestic legislation regarding 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 apply a term 'cartels' but rather use notion of 'anticompetitive concerted actions'. Moreover, the Code of Ukraine of Administrative Offences and the Economic Code of Ukraine apply the term 'illegal contracts' to contracts dealing with monopoly price (tariff) fixing (raising), discounts, allowances (surcharges), market setting (raising), market allocation based on geographic areas, types of products, types of customers, output volume or other factors. Therefore, both horizontal and vertical anticompetitive concerted actions are subject to substantially the same control regime.

The Law On Protection of Economic Competition (the Competition Law) distinguishes between concerted actions and anticompetitive concerted actions.

According to Part 1 of article 5 of the Competition Law, 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 appropriate division of competences.

The main objectives, competences, powers and organisational principles of the AMCU's system are envisaged in the Law of Ukraine on the Antimonopoly Committee of Ukraine, articles 3 and 7.

Notably, pursuant to article 3 of the Law On the Antimonopoly Committee of Ukraine, the AMCU's key goal is to prevent, detect and terminate infringements of the legislation on protection of economic competition, and also 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 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 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 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 calculation 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 situation on the commodity market gives evidence that there are no objective reasons for taking such acts (omissions).

Anticompetitive concerted actions are prohibited and give rise to responsibility under the law. The AMCU may set conditions under which the concerted actions are exempt from such prohibition. The AMCU adopted Model Requirements as for criteria of admissibility applied to horizontal concerted actions (cartels).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

All anticompetitive concerted actions are a priori forbidden. But the law grants a plethora of exceptions from the general requirements. Exemption from liability in certain circumstances may occur if the offender voluntarily informs the AMCU authorities about the illegal deal. The system of exceptions to the general requirements of the prohibition on anticompetitive concerted actions also includes agreements on the transfer of intellectual property rights and exemptions for small and medium-sized enterprises. In addition, concerted actions in relation to the supply and use of one's own products do not fall under the prohibition. With the general prohibition 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).

Application of the law

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

The legislation on protection of economic competition regulates relations of governmental authorities, municipal authorities, bodies of administrative and economic management and control and business undertakings, undertakings with other undertakings, with consumers, other legal and natural persons in relation to an economic competition. Both individuals and companies may participate in anticompetitive concerted actions.

Under article 52 of the Competition Law, 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 practice, 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.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The procedure for investigating infringements in the form of anticompetitive concerted actions is determined by the relevant provisions of the Competition Law and the Rules of Consideration of Infringement Cases, approved by Order of the AMCU as of 19 April 1994 No. 5. It envisages the following stages of the investigation:

- determination of signs of the violation;
- starting the proceedings;
- collection and analysis of evidence in the case;
- drafting presentation on preliminary findings;
- preparation of objections and comments to submission, familiarisation by the parties with the case materials, carrying out a preliminary hearing in the case;
- adoption of the preliminary decision in the case;
- adoption by the AMCU of its decision; and
- execution of the decision.

Grounds for commencement of an investigation

The AMCU starts an investigation on violation of legislation on protection of economic competition following the applications of: undertakings, citizens, associations, institutions and organisations on violation of the legislation on the protection of economic competition; following presentations of bodies of power, bodies of local self-government, bodies of administrative management and control concerning violations of the legislation on the protection of economic competition; under the own initiative of the AMCU.

In considering the application on violation of antimonopoly legislation a check of the facts stipulated in the application to identify signs of abuse must be performed.

The period of consideration of applications on violation of the legislation on protection of economic competition or legislation on protection from unfair competition is 30 calendar days.

If additional information is needed, the period of consideration of application may be extended by 60 days.

Conclusions made based on the analysis of applications and motions may be either negative (no signs of violation of legislation revealed) or positive. If the conclusions are negative, then the case will be dismissed, and the applicant shall be notified thereof in writing.

Consideration of the case on violation of the legislation on protection of economic competition

In the presence of signs of infringement, the competent authority of the AMCU orders the investigation of the case to begin.

The order to start proceedings shall be notified to the defendant within three working days from the day of its adoption.

In cases when the defendant is determined after the start of the case, within three working days he or she shall be notified on the order on the initiation of the case consideration and the order on involvement in the case as a defendant.

The plaintiff may ask for confidentiality of its information in the case if a reasoned motion from the plaintiff is submitted to the address of the authority of the AMCU at the start of the case including:

- compilation and analysis of documents, expert opinions, explanations of persons, other information that is evidence in the case;
- obtaining an explanation of persons involved in the case or any person upon their request or upon their own initiative; and
- drawing up a presentation with preliminary conclusions following the results of the collection and analysis of evidence in the case.

Adoption of the preliminary decision

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

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

In accordance with article 7 of the Law of Ukraine On the Antimonopoly Committee of Ukraine, the AMCU has the following authority in the field of control over observance of the legislation on economic competition protection:

- to consider applications and cases of violation of the legislation on economic competition protection, and to carry out investigations on these applications and cases;
- to make orders and decisions envisaged by the legislation on economic competition protection in respect of applications and

cases, check and revise case decisions and make its conclusions as to classification of actions under the legislation on economic competition protection;
- to check undertakings in accordance with the legislation as to their compliance with the requirements of the legislation on economic competition protection
- to request from undertakings, associations, their officials and employees and other individuals and legal entities an information, including restricted data, during consideration of applications and cases of violation of the legislation on economic competition protection;
- to appoint an examination and expert from among persons who have knowledge necessary for giving an expert opinion;
- to examine the office premises and transport of undertakings – legal entities, withdraw or arrest articles, documents or other information media, which may be used as evidence or sources of evidence in the case;
- in the case of keeping employees of the AMCU from exercise of their powers, to engage police authorities for application of measures provided by legislation, in order to overcome any obstacles;
- to engage police authorities, customs and other law-enforcement authorities to ensure consideration of a case of violation of the legislation on economic competition protection;
- to carry out market research, set limits on the commodity market, as well as the position of undertakings in this market, and make relevant decisions or orders;
- to apply to a court with claims, applications and complaints on application of the legislation on economic competition protection; and
- to apply to, and receive from, competent authorities of other states the information necessary for exercising their powers.

The above-mentioned powers of the AMCU do not require court authorisation for their execution.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The AMCU's bilateral cooperation in the area of competition policy is based on principles of mutual confidence, similarity of interests and traditions, and enhanced legal norms. Inter-agency cooperation is geared to the practical implementation of bilateral agreements in cross-border investigations.

The AMCU has concluded a range of inter-agency cooperation agreements to deepen professional cooperation with foreign competition authorities in conducting investigations on violation of Ukrainian competition law. These agreements, for example, are as follows:
- the Memorandum on Cooperation in the sphere of competition policy between the AMCU and Competition Authority of Turkey as of 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

12 | 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

13 | How is a cartel proceeding adjudicated or determined?

Upon receipt of parties' commentaries and objections, the AMCU has to prepare a draft decision on the basis of its preliminary findings. Normally, a decision on cartels is made by the collegiate authorities that form part of the AMCU structure. The parties may submit commentaries on a preliminary decision. The authority adopts a final decision after considering commentaries, proper discussion and deliberation.

Burden of proof

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

The burden of proof lies with the AMCU, which shall prove critical facts of the case, unless otherwise prescribed by law. Any factual data may be regarded relevant evidence when they find an infringement or lack thereof. These data may be obtained from different sources: parties' or third parties' statements, statements of public officials and individuals, documentary and material evidence or expert opinions. National courts acknowledge that competition authorities are not limited in choosing the source for obtaining the information necessary for the fulfilment of their tasks envisaged by the legislation on the protection of economic competition.

The AMCU collects evidence regardless of where it is located. Parties involved in a case may also submit evidence and prove its authenticity.

Evidence of anticompetitive concerted actions may be divided into two groups:
- direct evidence that directly expose a link between cartel participants and prove anticompetitive nature of the concerted actions;

this is a documentary confirmation of the anticompetitive concerted actions; and
- secondary evidence that implies cartel practice but does not directly expose the conditions under which the concerted actions were carried out (eg, records of phone calls between competitors' representatives, correspondence, joint participation in events, other proofs of contact making targeted at conduct coordination, compelled withdrawal from a market by competitors).

Circumstantial evidence

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

Concerted actions may be committed by both individuals and companies. For certain actions to be found illegal, the anticompetitive effect must be determined. The Competition Law provides a comprehensive list of factors on which the AMCU should focus, for example:
- setting prices or other conditions with respect to the purchase or sale of products;
- limitation of production, product markets, technical and technological development, investments or establishment of control over them;
- distribution of markets or sources of supply based on territorial principle, in accordance with the assortment of products, the volume of their sale or purchase, circle of sellers, buyers or consumers or otherwise;
- distortion of the results of bids, auctions, contests or tenders;
- removal from the market or restriction of access to the market (exit from the market) for other undertakings, buyers or sellers;
- applying different conditions to equivalent agreements with other undertakings, which results in the creation of a disadvantage for these undertakings in terms of competition;
- concluding agreements provided that other undertakings assume supplementary obligations, which according to their content or in terms of trade customs and other fair customs in entrepreneurial activities do not relate to the subject of these agreements; and
- significant restriction of the competitive ability of other undertakings on the market without objective reasons therefor.

If there are facts of synchronous establishment of uniform prices by business entities, these facts may be deemed evidence of violation of consumers' rights to purchase products on the free market, whose participants compete with each other, and also confirm the intention and direction of such actions to restrict competition. Thus, if there is no agreement, but business entities collectively restrict competition, their behaviour can be recognised as concerted action. The ban on concerted actions may be in addition to the ban on restrictive competition agreements in the sense that the behaviour of economic entities may be deemed to be anticompetitive even in the absence of an agreement.

To recognise collective actions as coordinated and violating antimonopoly legislation, it is necessary to ascertain that business entities informed each other about their actions, coordinated them and that these actions harmed competition by preventing, restricting or eliminating it. It is necessary to prove the reason for harming competition, the harm to competition and the relationship between cause and effect. 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

16 | What is the appeal process?

AMCU decisions may be reviewed either by the committee or its administrative board, on its own initiative or upon application of the parties involved in a dispute. In the latter case, the AMCU initiates a review based on the appropriate request. The period for consideration of the review application or request shall not exceed two months.

The decision shall be reviewed by the authority that has made the corresponding decision. It conducts the review on its own initiative or upon a party's complaint. The decision may be reviewed if any circumstances existed that led to the illegal or groundless decision. The law defines such circumstances as follows: essential facts of the case the AMCU was not or could not be aware of; or when the decision was made on the basis of unreliable information; or when the AMCU authorised the concerted actions on the basis of circumstances that have ceased to exist.

Pending the review, the AMCU may suspend enforcement of the decision. It shall respectively inform the parties involved in the case in writing.

Upon the result of the review, the AMCU 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; prove the facts relevant to the case and that are deemed established; the findings of the decision do not correspond to the facts of the case; or duly comply with or apply substantial or procedural legal provisions.

The plaintiff, defendant or third party may appeal a decision of the AMCU 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

17 | 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

18 | 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

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

Cartels in Ukraine are not uncommon. The government should always analyse markets and identify the preconditions that allow and even encourage business representatives to negotiate and violate legislation on the protection of economic competition.

Identifying signs of a cartel is, in principle, not difficult, since most consumer markets are currently transparent for monitoring. Its main symptom is rising prices. But it is difficult to prove the substance in court, because there is usually no direct evidence for this.

In 2016, the AMCU updated the Recommendation Clarifications regulating the order of fines determined for each infringement of the legislation on protection of economic competition. The above-mentioned document submits anticompetitive concerted actions to the severest punishments. In the process of fine determination the AMCU is guided by the above-mentioned Clarifications.

Horizontal anticompetitive concerted actions of undertakings (cartels) are subject to the severest punishments. For such actions, the AMCU's Clarifications provide for a basic fine of 45 per cent of income (revenue) from sales of goods (works, services) or the buyer's expenses on the purchase of a product, either directly or indirectly related to the violation.

The total amount of a fine is to be determined in two steps. First, the AMCU determines a basic amount of the fine, and second, the basic amount is adjusted according to any aggravating and mitigating factors.

The basic amount of the fine shall be reduced up to 50 per cent in aggregate if evidence of mitigating factors is as follows:

- a defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;
- a defendant compensates for damage caused by the infringement, or remedies the infringement in another way, before the AMCU structural division makes a corresponding final or preliminary decision;
- a defendant eliminated conditions contributing to the infringements, before the AMCU structural division has made the corresponding final or preliminary decision;
- the defendant's cooperation with the AMCU structural division contributed to the finding of facts, notably where some facts and data not requested by the authorities were revealed or other infringements of competition legislation were found, including those committed by another person; or
- the defendant proved that infringements were committed under undue influence exercised by an executive authority, a local authority, a body of administrative management and control or other enterprise, on which the defendant is economically dependent.

Compliance programmes

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

Legislation on 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 other enterprise, on which the defendant is economically dependent.

Director disqualification

21 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

22 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

23 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

24 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 economic courts of Ukraine.

Class actions

25 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

26 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. 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

27 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

The immunity programme can only be granted to the first party of anticompetitive concerted actions appealed to the office of the AMCU. Other participants of anticompetitive concerted actions had better to cooperate with the AMCU in the process of considering of the case, as such cooperation may be regarded as a mitigating circumstance when rendering the decision. The above-mentioned conditions of cooperation are laid down in paragraphs 17 and 18 of Recommendation Clarifications of the Antimonopoly Committee No. 39-pp.

Approaching the authorities

29 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

30 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:

- voluntarily reporting on its participation in the anticompetitive concerted actions before other participants of anticompetitive concerted actions; and
- providing information essential to the decision in the case. Its amount and content has 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, with presenting relevant supporting documents, evidence on paper or other media.

It is also worth noting that a party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions or provided for control of such actions.

Confidentiality

31 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

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

There 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

33 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

34 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

35 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

36 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.

Multiple corporate defendants

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

Ukrainian antitrust law does not provide for employee liability, therefore there is no need to represent (multiple) corporate defendants. If to represent multiple undertakings as defendants, then there is a need to check the presence of conflict of interest between the clients.

Payment of penalties and legal costs

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

It is possible but, as mentioned in question 33, Ukrainian competition law does not provide for employee liability. The AMCU imposes fines directly on undertakings.

Taxes

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

The fine shall be paid from the undertaking's income that is subject to taxation. The fine as such is tax-deductible.

International double jeopardy

40 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

41 | 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 other enterprise, on which the defendant is economically dependent.

UPDATE AND TRENDS

Recent cases

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

In this context, the case of Sanofi-AMCU is interesting. The AMCU by its decision of 14 November 2017 imposed a fine on Sanofi-Aventis Ukraine LLC (the sole importer of Sanofi medicines) of nearly 70 million Ukrainian hryvnia, and the largest wide-ranging pharmaceutical distributors of Ukraine – BADM LLC, worth almost 29 million Ukrainian hryvnia, and Optima-Farm Ltd.worth just over 40 million Ukrainian hryvnia – for their anticompetitive concerted actions.

According to the AMCU, companies were selling drugs in such a way as to limit the sale of cheap analogues. The AMCU fined these market players a total of 139.094 million Ukrainian hryvnia for supplies of medicines carried out during 2010–2011.

On 30 May 2019, the Supreme Court rendered the final decision in the case that had been litigated for almost one and a half years. The court found that the allegations of antitrust law violation made against Sanofi Ukraine were unfounded and therefore annulled the multimillion fine resulting from the AMC decision.

Regime reviews and modifications

43 | 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 currently no ongoing or anticipated reviews or proposed changes to the legal framework, the immunity or leniency programmes or other elements of the regime.

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

United Kingdom

Lisa Wright and Annalisa Tosdevin
Slaughter and May

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

There are two principal pieces of UK legislation governing cartel activity in the UK: the Competition Act 1998 (the Competition Act) and the Enterprise Act 2002 (the Enterprise Act). Both the Competition Act and the Enterprise Act were amended in 2014 by the Enterprise and Regulatory Reform Act 2013 (the Reform Act). In addition, EC Council Regulation No. 1/2003 allows the UK competition authorities and courts to apply and enforce article 101 (and 102) of the Treaty on the Functioning of the European Union (TFEU).

See also question 4 for an explanation of the substantive law.

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 the UK, both the Competition Act and article 101 (and 102) TFEU are currently enforced by the Competition and Markets Authority (CMA) and certain sectoral regulators, such as those responsible for communications matters, electricity and gas, water and sewerage, civil and railway services. These sectoral regulators have concurrent competition powers, subject to the CMA's role as a central governing body. The Financial Conduct Authority (in relation to financial sector activities) and the Payment Services Regulator (in relation to participation in payment systems) are the most recent regulators to be given a full set of concurrent powers (from 1 April 2015). There is no separate prosecution authority for civil cartel infringements.

The CMA's powers of investigation and prosecution in respect of the criminal cartel offence under the Enterprise Act are shared with the Serious Fraud Office (SFO). The SFO is the intended prosecutor for this criminal offence in England, Wales and Northern Ireland in cases that involve serious or complex fraud. In Scotland, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO through the National Casework Division (NCD) of the Crown Office. The CMA and NCD cooperate to investigate and prosecute criminal cartel cases in Scotland.

The Competition Appeal Tribunal (CAT) hears appeals against cartel decisions taken by the CMA or the sectoral regulators under the Competition Act. The criminal cartel offence may be tried either in a magistrates' court or before a jury in the crown court. With regard to the criminal cartel offence, there is a right of appeal to the higher courts under the normal rules governing criminal cases. For further details of the appeals regime, see question 16.

Changes

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

The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the Damages Regulations), which implement the EU Damages Directive in the UK, came into force on 9 March 2017. The Damages Regulations amend the Competition Act to introduce further provisions in relation to private actions for damages including clarification on the burden of proof in claims relating to overcharges or underpayments, a rebuttable presumption that cartels cause harm and limits on the disclosure of cartel leniency statements, settlement submissions, competition authority investigation materials and materials in a competition authority's file. It also provides that final decisions of the competition authorities or review courts of EU member states are prima facie evidence of an infringement of competition law and prohibits the award of exemplary damages in competition proceedings.

The CMA has been active in revising its procedural guidance to clarify and streamline its processes:

- in January 2019, the CMA published revised guidance on the CMA's investigation procedures in Competition Act cases. The revisions do not represent any significant changes to the CMA's processes;
- in February 2019, the CMA published guidance on competition disqualification orders, outlining the ability of the CMA to apply for a competition disqualification order or accept competition disqualification undertakings (see questions 18 and 21);
- in April 2018, the CMA issued revised penalties guidance (see question 19). The revisions have clarified the CMA's approach to calculating penalties but do not represent any major changes to the CMA's practices; and
- in November 2017, the CMA published guidance on leniency applications, with the effect that the CMA is now the single first port of call for all such applications, including those in regulated sectors (see question 26).

The UK's withdrawal from the European Union may result in changes to cartel regulation within the UK. At this stage, it is difficult to predict with certainty how and when the legal framework may change.

See also questions 42 and 43.

Substantive law

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

The provisions of article 101 TFEU are outlined in the EU chapter. The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that:

- may affect trade within the United Kingdom; and

- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

This prohibition, known as the Chapter I prohibition, is modelled on article 101 TFEU. The Competition Act contains a non-exhaustive list of conduct that will be caught by the Chapter I prohibition, mirroring the equivalent provisions of article 101 TFEU. This includes agreements, decisions or practices that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, technical development or investment; or
- share markets or sources of supply.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of Chapter I. The CMA's view is that these types of restriction are 'hard-core' and may be presumed to have negative market effects.

If, however, the criteria set out in section 9 of the Competition Act are satisfied, an agreement that is otherwise caught by the Chapter I prohibition will be exempt. This provision mirrors article 101(3) TFEU and requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is, however, almost inconceivable that a hard-core cartel agreement could qualify for such an exemption.

The Competition Act provides that, as far as possible, it is to be interpreted consistently with the corresponding EU rules.

Under the Enterprise Act, it is a criminal offence if an individual agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings involving the following prohibited cartel activities: price fixing, market sharing, limitation of production or supply, and bid rigging. Generally, the offence only applies to horizontal agreements (although it may also apply, for example, where a supplier procures or facilitates a horizontal arrangement between retailers). An offence may be committed regardless of whether the agreement is actually implemented.

The Reform Act has removed the requirement in the cartel offence for individuals to have acted 'dishonestly' in order for a conviction to be secured. The only mental elements that the prosecution has to prove are the intention to enter into an agreement and the intention as to the agreement's effect. To counterbalance the broader scope of the reformed cartel offence, the Reform Act has introduced new exclusions and defences. The exclusions provide that no offence will be committed where:

- in a case where the arrangements would affect the supply of a product or service in the UK, customers are given relevant information regarding such arrangements prior to purchasing the product or services;
- in the case of bid-rigging arrangements, the person requesting bids is given relevant information regarding the arrangements before the bids are made; or
- in any case, if relevant information about these arrangements is published in a specified manner.

Relevant information includes the names of the relevant undertakings, the nature of the agreements between them, and the products or services (or both) to which the agreements relate. The Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 specifies that relevant information is published if it is advertised once in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

Similarly, the defences provide that an individual shall not be convicted:

- in a case where the arrangements would affect the supply of a product or service in the UK but the defendant did not intend that the nature of the arrangements would be concealed from customers before they acquired the product or service;
- if, at the time of making the agreements, the defendant did not intend the nature of the agreements to be concealed from the CMA; or
- if, before making the agreements, the defendant took reasonable steps to ensure that the nature of the agreements was disclosed to professional legal advisers to obtain advice about the making or implementation of the agreements.

Note that arrangements or agreements made before the new cartel offence came into force on 1 April 2014 remain subject to the previous version of the offence, which requires an element of dishonesty.

The CMA has published guidance relating to the exercise of its prosecutorial discretion in relation to the criminal cartel offence (see *Cartel offence prosecution guidance* (CMA9)). The CMA intends to apply the Full Code Test, as set out in the Code for Crown Prosecutors, in deciding whether or not to prosecute the offence. This is composed of the evidential stage and the public interest stage. If the evidential stage is passed (ie, the CMA considers that there is sufficient evidence against a suspect to provide a realistic prospect of conviction), the CMA will go on to consider whether a prosecution is in the public interest. In doing so, it will pay particular attention to:

- the severity of the offence;
- the level of culpability of the suspect;
- the impact on the community; and
- whether prosecution is a proportionate response.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

The Competition Act excludes from the scope of the Chapter I prohibition certain agreements relating to the production of, or trade in, agricultural products. Certain types of public transport ticketing schemes are also exempt (pursuant to a block exemption expiring in February 2026). In addition, the Competition Act excludes agreements that are subject to competition scrutiny under other legislation (the Broadcasting Act 1990 and the Communications Act 2003). Provision is also made for other non-industry-specific exclusions. The Secretary of State may exclude further categories of agreement if satisfied that there are exceptional and compelling public policy reasons for exclusion. There is no blanket exemption for government-sanctioned activity or regulated conduct – such conduct must be assessed in accordance with any sector-specific legislation or, if there is none, the Competition Act.

Application of the law

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

Both article 101 and the Chapter I prohibition apply to agreements and practices between undertakings as defined in EU case law. An undertaking includes any natural or legal person engaged in commercial or economic activity, whatever its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit-making organisations.

In contrast, the criminal cartel offence only applies to individuals.

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 Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Article 3(1) of EC Council Regulation No. 1/2003 provides that, where the CMA applies national competition law to agreements or practices that may affect trade between member states, it must also apply article 101 TFEU. In practice, the CMA will usually apply both article 101 TFEU and the Chapter I prohibition in parallel (although an undertaking will not be penalised twice for the same anticompetitive conduct).

In accordance with the EC Notice on Cooperation within the Network of Competition Authorities (2004/C 101/03), the CMA can be considered well placed to act in a particular article 101 TFEU case if the following three criteria are all met:

- the agreement or practice has substantial, direct, actual or foreseeable effects on competition within the UK, is implemented within or originates from the UK;
- the CMA is able effectively to bring an end to the entire infringement; and
- the CMA can gather, possibly with the assistance of other national competition authorities (NCAs), the evidence required to prove the infringement.

The criminal offence under the Enterprise Act only applies to an agreement outside the UK if it has been implemented in whole or in part in the UK.

Export cartels

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

As described in question 7, the Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.

INVESTIGATIONS

Steps in an investigation

9 What are the typical steps in an investigation?

The CMA published updated guidance on its investigation procedures in Competition Act cases with effect from 18 January 2019 (see *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8)*). The updated guidance does not implement any significant changes to the CMA's processes; the changes are intended to facilitate procedural efficiencies and reflect current investigation and decisional practice.

The key stages in an investigation are set out below.

The sources of the CMA's investigations

The CMA obtains information about possible competition law breaches through a number of sources:

- its own research and market intelligence functions;
- other workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network (ECN) or the EC;
- individuals with 'inside' information about a cartel who apply for leniency; and
- complaints.

What the CMA does when it receives a complaint

The CMA decides which cases to investigate on the basis of the principles laid out in its publication *Prioritisation principles for the CMA* (CMA16). These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation.

The CMA Enforcement Directorate is responsible for investigating and enforcing suspected civil cartel infringements of the Competition Act and criminal cartel and consumer law infringements.

Once the CMA has decided to take forward a case within the Enforcement Directorate, it may gather more information from the complainant, the company or companies under investigation and any third parties on an informal basis. On the basis of the information it has gathered at that time, if the CMA considers that it has reasonable grounds for suspecting that competition law has been breached, it can open a formal investigation.

Opening a formal investigation

The decision to open a formal investigation depends on whether the legal test that allows the CMA to use its formal investigation powers has been satisfied (ie, there are reasonable grounds for suspecting that competition law has been breached) and whether the case continues to fall within the CMA's casework priorities.

When the CMA opens a formal investigation, the case is allocated a designated case team (responsible for the day-to-day running of the case), including a Project Director (directs the case and is accountable for delivery of high-quality timely output) and a senior responsible officer (SRO) (responsible for authorising the opening of the formal investigation and taking certain other decisions including, where the SRO considers that there is sufficient evidence, authorising the issue of a statement of objections).

Once the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter, setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable and key contacts. The CMA will also generally publish a notice of investigation on its website, containing basic details of the case, a brief summary of the suspected infringement and the industry sector involved. The CMA will also outline the administrative timetable for the case. It may include the names of any businesses it is investigating. CMA guidance notes that it would not generally expect to publish the names of the parties under investigation other than in exceptional circumstances (eg, where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation and the CMA therefore considers it appropriate to publish details of the parties).

The CMA will keep parties under investigation (and any complainants) updated about the progress of the investigation, either by telephone or in writing. Parties under investigation will also have an opportunity to meet with representatives of the case team at 'state of play' meetings, at which the CMA will update the party of the progress it has made and its provisional thinking.

The CMA's formal powers of investigation are set out in question 10.

Investigation outcomes

CMA investigations can be resolved in a number of ways. The CMA may:

- close an investigation on grounds of administrative priorities;
- issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law;
- accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments fully address the competition concerns; or

- issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law – after allowing the parties under investigation to make representations, if the CMA still considers that they have committed an infringement, the CMA may issue an infringement decision against them and impose fines or directions to bring the anticompetitive conduct to an end (enforceable by court order).

Infringement decisions are generally extensive and detailed (eg, the non-confidential version of the OFT decision in the Tobacco Chapter I infringement case runs to 715 pages). A non-confidential version of the decision will be published on the register kept at the CMA and on the CMA's website.

If the decision is taken to prosecute an alleged criminal cartel offence under the Enterprise Act, the case will be tried either in a magistrates' court or before a jury in the crown court.

Investigative powers of the authorities

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

Information requests

Where the CMA has reasonable grounds for suspecting that an agreement or concerted practice falls within article 101 TFEU or the Chapter I prohibition, it may, by written notice, require any person (not only the alleged cartel members but also third parties) to provide specified documents or information that it considers 'relates to any matter relevant to the investigation'. This is the power that the CMA will rely on most frequently. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents). The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is a criminal offence, punishable by fine and/or imprisonment, to provide false or misleading information, or to destroy, falsify or conceal documents.

The Reform Act has also given the CMA the power to require individuals connected to a business which is a party to an investigation to answer questions (in the form of a compulsory interview) during an article 101 TFEU or Chapter I investigation, similar to the power under the Enterprise Act for criminal investigations. Any information obtained by virtue of the exercise of this power will not be able to be used against that person in a criminal prosecution, except in certain limited circumstances. Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation; however, the CMA's starting point is that it will generally be inappropriate for a legal adviser acting only for the undertaking to be present at the interview.

Dawn raids

In addition, the CMA may at the outset of or during an article 101 TFEU or Chapter I investigation, conduct announced or unannounced on-site investigations to:

- require the production of any relevant document or information (including relevant information that is held on a computer and accessible from the premises);
- take copies of, or extracts from, any document produced;
- require an explanation of any such document; and
- if a document is not produced, require a statement as to where it can be found.

The procedure for, and scope of, an on-site investigation or 'dawn raid' differs according to whether the investigation is made with or without a court-obtained warrant, and whether the premises concerned belong to a person being investigated or to a third party.

The type of on-site investigation described above may be carried out at any business premises without a warrant.

In addition, where certain conditions are met, the CMA has a power of entry in respect of both business and domestic premises with a warrant issued by the CAT or by a judge of the High Court (or of the Court of Session in Scotland). Where a warrant has been issued, reasonable force may be used to obtain entry. The warrant will specify the kind of documents in respect of which the authorised officer may search the premises and take copies and extracts. The officer has available to him or her those powers that apply in the case of entry without warrant and can, in addition, take away originals of documents and retain them for three months if copying on the premises is not practicable, or if taking them away appears necessary to prevent their disappearance. The investigating officer can also take any other steps necessary to preserve the existence of documents. The officer can also take away copies of computer hard drives, mobile phones, mobile email devices and other electronic devices. The CMA can exercise similar powers of investigation when assisting a EC investigation in the UK and when carrying out an inspection in the UK on behalf of the EC or another NCA.

Powers of investigation under the Enterprise Act

The CMA may only commence a formal investigation in respect of an alleged criminal cartel offence under the Enterprise Act where there are reasonable grounds for suspecting that such an offence has been committed. Although it is likely that a criminal cartel investigation will initially be led by the CMA in cooperation with the SFO, the SFO may, at a later stage in the investigation, decide to carry out additional inquiries using its powers of investigation under section 2 of the Criminal Justice Act 1987. These powers are broadly equivalent to the CMA's powers of investigation under the Enterprise Act. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents).

Power to require information and documents

For the purposes of a criminal cartel investigation, the CMA may by written notice require the person under investigation or any other person, at a specified time and place, to:

- answer questions or otherwise provide information related to the investigation (including in the form of a compulsory interview);
- produce documents related to the investigation (the CMA may take copies of such documents or extracts from them and may require an explanation of them); and
- if such documents are not produced, provide a statement as to where they are.

Where individuals are required to participate in a compulsory interview, they are entitled to seek legal advice but will face criminal sanctions if they fail to answer all questions put to them (or provide false or misleading answers). However, the information obtained under a compulsory interview cannot be used against that person in a criminal prosecution except in certain limited circumstances.

Alternatively, when investigating a potential criminal cartel offence, the CMA may conduct a voluntary interview under caution. In this case, the interviewee will be given the standard criminal caution before being questioned and is again entitled to legal advice: interviewees may refuse to answer some or all of the questions but their answers (or failure to answer) may be given as evidence in court.

Power to enter premises under a warrant

For the purposes of a criminal investigation and on specified grounds, the CMA may apply to the CAT or to the High Court (or in Scotland, the procurator fiscal may apply to the sheriff) for a warrant. Where a warrant has been issued, a named officer of the CMA, accompanied by other named CMA officers and specified persons (such as IT experts) will be authorised to:

- enter and search premises, using such force as is reasonably necessary;
- take possession of relevant documents (including original documents) or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation of a relevant document or to state, to the best of his or her knowledge and belief, where it may be found; and
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away.

CMA officials also have the power, on giving written notice to the occupier of the premises, to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized (eg, where there is a large bulk of material or where special technical equipment is needed to separate material that the CMA would be entitled to take, such as a computer hard drive). At the time of writing, the UK government has concluded its consultation on the Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 (Draft Warrant Rules), which prescribe the procedure to be followed on an application by the CMA (or one of the sectoral regulators with concurrent powers) to the CAT for a warrant to enter premises. The Draft Warrant Rules draw on existing practice directions dealing with warrant applications under the Competition Act and the Enterprise Act, but are tailored to the particular procedures of the CAT and will be adapted for application outside England and Wales. The final rules are still to be published.

Surveillance and access to communications data

The CMA can authorise directed surveillance (such as the watching of business premises) and covert human intelligence sources (informants) in cartel investigations under both the Competition Act and the Enterprise Act (ie, in relation to both civil and criminal cartel investigations).

The Enterprise Act also gives the CMA additional powers of surveillance solely to investigate the criminal cartel offence. These powers enable the CMA to carry out intrusive (covert) surveillance in respect of residential premises and private vehicles and to interfere with property for the purpose of covert installation of surveillance devices. The CMA is also authorised to obtain access to communications data (such as records of telephone numbers called) in criminal investigations under the Enterprise Act.

Use of evidence obtained under the Competition Act and the Enterprise Act

Any information obtained from an individual by the CMA using its compulsory interview powers under the Enterprise Act will not be used as evidence in a Competition Act investigation against the undertaking that employs that individual. However, information provided during a voluntary interview under caution in the course of a criminal investigation may also be used in a Competition Act investigation.

Any statement obtained from an individual by the CMA using its compulsory powers of investigation under the Competition Act cannot be used in a criminal prosecution against that person except in certain limited circumstances.

Original documents seized by the CMA or SFO during a criminal investigation under the Enterprise Act may also be used by the CMA in proceedings against undertakings under the Competition Act. Equally, any documents obtained by the CMA using its powers of investigation under the Competition Act may be admissible in a subsequent criminal prosecution of the cartel offence under the Enterprise Act (subject to the rules regarding the standard of evidence used in criminal prosecutions). In addition, the CMA can use its powers under the Enterprise Act to obtain original versions of documents copied during a Competition Act investigation.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The CMA cooperates extensively with the EC and with the NCAs in the other member states through the ECN (see the European Union chapter). These arrangements may be expected to change post-Brexit.

The CMA has a memorandum of understanding with the authorities in Scotland in respect of cooperation in criminal cartel cases over which Scottish courts may have jurisdiction.

In addition, the Enterprise Act permits the CMA, in certain circumstances, to disclose confidential information to agencies in other jurisdictions to facilitate the performance of their respective enforcement functions. This takes into account existing mutual assistance arrangements relating to competition law enforcement such as those in force between the UK and each of the United States, Australia, Canada and New Zealand.

As noted in question 2, UK competition law is enforced by both the competition regulators (the CMA) and sectoral regulators. Under the Reform Act, sectoral regulators are required to consider whether their cartel powers are more appropriate than their sector-specific powers to promote competition. The Reform Act also requires the CMA and sectoral regulators to work more closely in competition cases. The CMA has published a guidance document, *Regulated industries: Guidance on concurrent application of competition law to regulated industries (CMA10)*, which sets out the proposed arrangements for cooperation between the CMA and the sectoral regulators in connection with the enforcement of competition law.

Interplay between jurisdictions

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

If a cartel has an effect on trade within the UK and on trade between EU member states, it may be caught by both article 101 TFEU and the Chapter I prohibition. In these circumstances, Council Regulation No. 1/2003 requires the CMA to apply article 101 TFEU in parallel with the Chapter I prohibition (see the European Union chapter).

In cases where the EC is investigating an infringement of article 101 TFEU involving a potential criminal cartel offence in the UK under the Enterprise Act, the CMA and the EC will cooperate to coordinate their investigations.

When the CMA is investigating a suspected infringement of article 101 TFEU in the UK on its own behalf or on behalf of the EC or another NCA, the UK rules on legal professional privilege will apply. However, when CMA officials assist the EC in its investigations, the EC's privilege rules (which do not extend to in-house lawyers or non-EU qualified lawyers) apply.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

See questions 9 and 16.

Burden of proof

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

In its judgment in *Napp* (2002) [CAT 1], the CAT confirmed that, throughout the procedure, the burden is on the OFT (now the CMA) to prove its case according to the normal civil standard (balance of probabilities) but that, given the seriousness of the penalties for infringement of the Competition Act, strong and convincing evidence would be required. In criminal cartel cases, the onus will be on the prosecution to prove its case according to the normal criminal standard (beyond reasonable doubt).

Circumstantial evidence

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

Yes. This has been confirmed by the CAT in various cases including in *Napp*, where the CAT stated that it would be permissible to rely on inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts.

Appeal process

16 | What is the appeal process?

Decisions of the CMA and the sectoral regulators made under the Competition Act may be appealed to the CAT, an independent judicial tribunal, on a point of law or fact or as to the amount of any fine. An appeal to the CAT in respect of a decision made under the Competition Act is a full appeal on the merits of the case. There is a further right of appeal from judgments of the CAT, either on a point of law or as to the amount of any fine, to the Court of Appeal (or the Inner House of the Court of Session in Scotland). Permission must be granted either by the CAT or the Court of Appeal. Further appeal lies to the Supreme Court (formerly the House of Lords) on a point of law of general public importance. Permission must be granted by the Court of Appeal or the Supreme Court. Appeals to and from the CAT may be made by any party to an agreement in respect of which the CMA has made a decision, and by third-party applicants who can show a sufficient interest in relation to any such decision (although third-party applicants cannot appeal the quantum of any fine imposed). Interested parties may also apply to intervene in appeal proceedings in the CAT. Appeals from the CAT to the Court of Appeal (and subsequently the Supreme Court) may additionally also be made by the CMA or the relevant sectoral regulator who is a party to the proceedings at the CAT (or the Court of Appeal).

Appeals to the CAT are initiated by filing a notice of appeal, containing details of the parties and the case, summarising the issues in dispute and stating the relief sought. The notice must be filed with the CAT registrar within two months of the appellant being notified of the decision. The CAT registrar will then send the notice to the respondent (eg, the CMA), who will have six weeks to file a defence. Once a notice of appeal has been served on the respondent, the CAT will normally convene a case-management conference to fix the timetable for the case and deal with other procedural issues. The CAT aims to deal with the more straightforward cases in nine months, although more complex cases may take longer.

In respect of criminal cartel offences, there is a right of appeal to the higher courts under the normal rules governing criminal cases. It is also possible to challenge procedural issues, either by way of an application to the CMA's Procedural Officer or by an application to the High Court for judicial review.

SANCTIONS

Criminal sanctions

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

Any individual found guilty of committing the criminal cartel offence under the Enterprise Act may be imprisoned for up to six months and receive a fine of up to the statutory maximum (up to £5,000 for offences committed before 12 March 2015 and unlimited for offences committed on or after 12 March 2015) if tried and convicted in a magistrates' court, and may be imprisoned for up to five years and receive an unlimited fine if tried and convicted in the crown court. In addition, an application may be made for the disqualification of a company director in certain circumstances (see question 18). Criminal sanctions may also be imposed on individuals who fail to comply with or frustrate CMA or SFO criminal cartel investigations under the Enterprise Act. The offences and sanctions range in severity, with the most serious (falsification, destruction or concealment of relevant documents in the knowledge that an investigation is being, or is likely to be, carried out) attracting a prison sentence of up to five years and an unlimited maximum fine if tried and convicted in the crown court.

The longest sentence that a court has imposed so far on a defendant convicted of the cartel offence is two-and-a-half years, in the *Marine Hose* cartel case (*R v Whittle & Others* [2008] EWCA Crim 2560 (14 November 2008)). The case was highly unusual in that the defendants had entered into plea agreements with the US authorities. Under these plea agreements, the defendants' US sentences were reduced by the number of days of imprisonment to which they would be sentenced in the UK. As part of these agreements, the defendants had committed not to seek terms of imprisonment in the UK shorter than those provided for in the US plea agreements. The crown court initially imposed sentences of three years on two of the defendants and two-and-a-half years on the third defendant. The defendants appealed, seeking sentences that were no longer than their respective US terms of imprisonment. On appeal, the Court of Appeal suggested that the extensive cooperation of the defendants with the authorities was a significant mitigating factor that could warrant a reduction of the sentences beyond that which was sought by the defendants. However, the Court of Appeal was constrained by the absence of submissions to reduce the sentences below the levels of the US plea agreements. It therefore reduced each of the sentences to a level equivalent to that of the US plea agreements: two-and-a-half years, two years and 20 months respectively.

In June 2014, the CMA announced that an individual who had been charged under the cartel offence for dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage had pleaded guilty. In September 2015, this individual received a six-month suspended sentence (suspended on the condition that the defendant completed 120 hours of unpaid work and did not commit any offence punishable by imprisonment for the next 12 months). The individual was not subject to a fine and was not disqualified from serving as a director owing to mitigating factors (eg, no previous convictions; not motivated by personal gain; cooperated with the authorities to a 'very substantial degree'). Two other individuals who had pleaded not guilty in relation to the same investigation were acquitted following a trial in June 2015.

More recently, in March 2016, an individual pleaded guilty to dishonestly agreeing with others to divide supply, fix prices and divide

customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products. In September 2017, the individual received a two-year suspended sentence and a six-month curfew order. The individual was also disqualified from acting as a company director for seven years. The CMA determined that there was insufficient evidence to charge any further individuals with the cartel offence in this case.

In all of the above cases, the applicable cartel offence was as it existed before April 2014. There have been no cases under the new cartel offence (introduced by the Reform Act in April 2014 (see question 4)).

Criminal sanctions (fines and, in certain cases, imprisonment for up to two years) also exist for failing to comply with or frustrating a CMA investigation under the Competition Act. Under the Reform Act, the criminal offences for failing to comply with certain CMA investigative powers have been replaced with civil penalties, but criminal liability still attaches to certain frustrating actions, including obstructing an officer in the exercise of powers to enter premises, destroying or falsifying documents, and providing false or misleading information.

There are no criminal sanctions under the Competition Act for cartel activity itself in the UK (although the CAT has confirmed (in *Napp*) that the scale of the civil fines that may be imposed for breaches of the Competition Act is such that cartel proceedings should be treated as criminal proceedings for the purposes of the procedural right to a fair trial under article 6(1) of the European Convention on Human Rights).

Civil and administrative sanctions

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

On making an infringement decision under the Competition Act in respect of a breach of article 101 TFEU or the Chapter I prohibition, the CMA may impose a fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its last business year. In addition, the CMA or the relevant sectoral regulator may apply to the High Court (or Court of Session in Scotland) for the disqualification of a company director in certain circumstances (see below for further details). Directors may be disqualified for up to 15 years.

Fines are levied in the majority of cases in which the CMA finds that there has been a breach of the article 101 TFEU or Chapter I prohibition, although disqualification of directors is less common. Nevertheless, the CMA decides each case on its facts: the nature and the level of the sanctions imposed on parties to cartel arrangements are determined by the nature of the anticompetitive arrangements between the parties, the impact of these arrangements on consumers, whether the parties have applied for leniency and, if so, the conditions under which they have applied.

Recent and notable penalties include:

- £58.5 million on British Airways for its role in an alleged trans-atlantic passenger air transport fuel surcharge price-fixing agreement with Virgin Atlantic in April 2012.
- £2.8 million on Mercedes-Benz and four of its dealers for market-sharing, price coordination and exchange of commercially sensitive information, with the object of restricting competition for sales of vans and trucks in March 2013.
- £44.99 million on GlaxoSmithKline (GSK) and two suppliers of generic medicines for entering into a series of agreements that delayed generic entry of the drug paroxetine in February 2016 (the CMA also found that GSK's conduct infringed the Chapter II prohibition). (This case has been appealed to the CAT. The CAT has referred a number of legal questions to the CJEU before handing down its final judgment.)
- £2.8 million collectively on three suppliers of furniture parts (drawer fronts and drawer wraps) for entering into an agreement to share the market and coordinate commercial behaviour (in particular, pricing practices) through bid rigging and the exchange of confidential commercially sensitive information in March 2017.
- £3.4 million on CPL and Fuel Express for rigging competitive tenders for the supply of household fuels (including coal, fire logs and charcoal) to national supermarkets, and associated exchange of confidential pricing information in March 2018.
- £7 million on Fourfront, Loop, ThirdWay Interiors, Oakley and Coriolis for bid rigging by colluding to deliberately submit low bids so as to allow a pre-selected company to win a contract in March 2019.

Under the Reform Act, there are now civil penalties for failing to comply with or frustrating a CMA investigation under the Competition Act. In March 2019, the CMA fined guitar manufacturer, Fender, for concealing documents related to a cartel investigation, marking the first time the CMA has punished a company for breaching its legal obligations during a search.

Under the Company Directors Disqualification Act (as amended by the Enterprise Act), the court must make a competition disqualification order (CDO) on the application of the CMA or a sectoral regulator if the following two conditions are satisfied:

- an undertaking which is a company of which that person is a director commits a breach of competition law (including, for these purposes, a breach of the Chapter I prohibition and a breach of article 101 TFEU); and
- the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of a company.

As regards this second condition, the court must have regard to the following considerations:

- whether the director's conduct contributed to the breach of competition law;
- whether, even if his or her conduct did not contribute to the breach, he or she had reasonable grounds to suspect that the conduct of the company constituted a breach of competition law and he or she took no steps to prevent it; and
- whether he or she did not know but ought to have known that the company's conduct constituted such a breach.

Moreover, the court may have regard to the individual's conduct as a director of a company in connection with any other breach of competition law.

New CMA guidance on the circumstances in which it and sectoral regulators will exercise their powers to apply for a CDO (see *Guidance on Competition Disqualification Orders, CMA 102*) was published and came into effect on 6 February 2019 (replacing the CMA's previous guidance *Director Disqualification Orders in Competition Cases, OFT 510*). The CMA guidance states that the CMA will consider whether a company, of which a person is a director, has committed a breach of competition law. Other factors the CMA may take into account include:

- the nature and seriousness of the breach of competition law. The CMA (or sectoral regulator) is more likely to consider an application for a CDO to be appropriate in cases involving serious breaches, such as those in which a financial penalty has been imposed;
- the duration of the breach of competition law;
- the impact or potential impact of the breach of competition law on consumers;
- the conduct of the undertaking during the CMA's investigation; and
- any previous breaches of competition law committed by the undertaking.

The CMA must also assess the individual's suitability to be a director and the current guidance states that, in deciding whether to seek a CDO against a particular individual, the CMA will consider:

- the nature and extent of the director's responsibility for, or involvement in, the breach whether by act or omission. The CMA (or sectoral regulator) will consider whether: the director's conduct contributed to the breach; the director's conduct did not contribute to the breach but the director had reasonable grounds to suspect there was a breach and took no steps to prevent it; or the director ought to have known of the breach. The CMA and sectoral regulators do not expect directors to have specific expertise in competition law. However, they do expect all company directors to appreciate the importance of complying with competition law and, more specifically, that price-fixing, market-sharing and bid-rigging agreements are likely to breach competition law;
- whether the director has been involved directly or indirectly in previous breaches of competition law;
- the conduct of the director during the CMA's investigation into the breach of competition law and whether the director co-operated with the CMA; and
- the deterrent effect of a CDO on the market, and more widely.

The guidance notes that these factors are not-exhaustive and the CMA retains full discretion when deciding whether to investigate the conduct of a director and whether to apply for a CDO.

The CMA will not apply for a CDO against any current or former director of a company that has benefitted from leniency in respect of the activities concerned, unless the director: (i) has been removed or otherwise ceased to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency; or (ii) the director fails to co-operate with the leniency process by failing to maintain continuous and complete co-operation throughout the CMA's investigation. Provided the applicable conditions have been met, the CMA will also not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel activities specified in that letter.

The maximum period of disqualification under a CDO is 15 years. During the disqualification period, it is a criminal offence for the individual to be a director of a company, act as a receiver of a company's property, in any way (whether directly or indirectly) be concerned with or take part in the promotion, formation or management of a company without the leave of the court or act as an insolvency practitioner. In addition, details of a CDO will be entered in a public register.

Instead of applying for a CDO, the CMA or sectoral regulator may accept a competition disqualification undertaking (CDU). In this case, the person giving the CDU undertakes for a specified period (not exceeding 15 years) not to perform any acts that would breach a CDO, as listed above. Breach of a CDU has the same consequences as breach of a CDO but engaging with the CMA voluntarily through the CDU process may result in a shorter period of disqualification than under a CDO. As with a CDO, details of a CDU will be entered in a public register. For example, in April 2018, the CMA secured undertakings from two individuals involved in fee-fixing arrangements between a group of estate agents. The individuals were disqualified from acting as company directors for three-and-a-half years and three years, respectively.

While only three directors had been disqualified between 2003 and 2016, in recent years, the CMA has shown an apparent desire to use its powers more frequently. There have been 11 directors disqualified in 2019 so far. In May 2019, the CMA secured the disqualification of three former directors for a combined total of nine-and-a-half years for their roles in an office design cartel involving coordination of prices on competitive tenders. In July 2019, a further three directors were disqualified for their involvement in the same cartel.

Additionally, where an individual company director has been convicted of the criminal cartel offence under the Enterprise Act and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director. In September 2017, an individual involved in cartel activity in the supply of precast concrete drainage products received a two-year suspended sentence, a six-month curfew order, and was also disqualified from acting as a company director for seven years.

Guidelines for sanction levels

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

According to the CMA's guidance on penalties, which was revised in April 2018, any financial penalty imposed in respect of an article 101 TFEU or a Chapter I infringement will be calculated according to the six-step approach set out below. The Competition Act requires both the CMA and the CAT to 'have regard' to this penalty guidance.

Step 1: calculation of the starting point

The starting point will be calculated with regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking (ie, the turnover of the undertaking in the relevant market in the last business year).

Price-fixing or market-sharing agreements and other cartel activities are considered among the most serious infringements of article 101 TFEU and the Chapter I prohibition. The relevant turnover is that of the undertaking in the relevant product and geographic markets affected by the infringement in the last full financial year before the infringement ended. This may include turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or the NCA is given. The starting point will not exceed 30 per cent of the relevant turnover.

The starting point will be assessed by reference to: (i) the nature of the infringement; (ii) the extent or likelihood of harm to competition in the circumstances of the case; and (iii) the need for deterrence. The starting point will generally be between 21 and 30 per cent for the most serious types of infringement. A starting point between 10 and 20 per cent is more likely to be appropriate for certain less serious object infringements, and for infringements by effect. These principles will not prevent the CMA from applying a starting point of below 10 per cent (this may occur where the CMA has made a downwards adjustment to reflect the particular circumstances of the case).

Step 2: adjustment for duration

The starting point may then be increased (or, exceptionally, and only in the case of infringements lasting less than one year, decreased) to take account of the duration of the infringement, provided that it is not multiplied by more than the number of years of the infringement. Part years may be treated as full years.

Step 3: adjustment for aggravating and mitigating factors

Aggravating factors include:

- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action (including missing deadlines);
- the role of the undertaking as a leader in, or instigator of, the infringement;
- the involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;

- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);
- infringements which are committed intentionally rather than negligently;
- retaliatory measures taken or commercial reprisals sought by the undertaking against a leniency applicant; and
- failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct.

Mitigating factors include:

- the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with competition law (the mere existence of compliance programmes is not sufficient, but compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law);
- termination of the infringement as soon as the CMA intervenes (unless the CMA directs otherwise); and
- cooperation which enables the enforcement process to be concluded more effectively or speedily than would otherwise be the case.

Step 4: adjustment for specific deterrence and proportionality

The penalty figure may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again in the future, having regard to the undertaking's size and financial position, and any other relevant circumstances (eg, an increased penalty may be warranted where an undertaking has significant turnover outside the relevant market). The penalty figure may also be increased under this head to take account of any gain made by the undertaking from the infringement. The CMA will then assess whether, in its view, the overall penalty proposed is proportionate and appropriate in the round.

Step 5: adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

The overall penalty figure may not exceed 10 per cent of the worldwide turnover of the undertaking in the previous business year. The penalty will therefore be adjusted if necessary to ensure that it does not exceed this maximum. If a penalty has already been imposed by the EC or by another member state in respect of the same agreement or conduct, the CMA must take that penalty into account.

Step 6: adjustment for leniency or settlement discounts and/or approval of a voluntary redress scheme

The CMA will reduce the penalty where an undertaking has entered into a leniency or settlement agreement with the CMA. In exceptional circumstances, the CMA may reduce the penalty where the undertaking is unable to pay the proposed amount owing to financial hardship. On 14 August 2015, the CMA published the final version of its guidance on its new powers under the Consumer Rights Act 2015 (the Consumer Rights Act) to approve voluntary redress schemes (CMA40). The CMA may take any voluntary redress schemes established by the infringing party (see question 32) into account when assessing the level of the fine to be imposed and grant a fine reduction (likely to be up to 20 per cent of the penalty that would otherwise have been imposed). Where the CMA applies discounts at this step, these discounts will be applied consecutively.

Parties will have the opportunity to make written and oral representations in response to the draft penalty statement that will be issued by the CMA before it makes any infringement decision.

The sentencing limits in respect of the criminal cartel offence are set out in the Enterprise Act (see question 17). The UK courts have sentencing guidelines regarding criminal offences generally, which also apply to the cartel offence. The sentencing limits in respect of the criminal cartel offence under the Enterprise Act are binding.

Compliance programmes

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

The fact that adequate steps have been taken with a view to ensuring compliance with competition law is a mitigating factor that can be considered in determining penalties for breaches of competition law (see question 19). The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10 per cent. The mere existence of compliance programmes is not sufficient in and of itself to be a mitigating factor, but compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking. This will be expected to include appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities, including making a public statement regarding a commitment to compliance on the undertaking's relevant website(s) and conducting periodic review of its compliance activities, and reporting that to the CMA.

The undertaking will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand.

Director disqualification

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

See question 18.

Debarment

22 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Automatic debarment from government procurement procedures is not available as a sanction for cartel infringements. Under the Public Contracts Regulations 2015, there is the possibility of discretionary debarment by the contracting authority where it has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. For discretionary debarment, the period during which the economic operator may be excluded is three years from the date of the relevant event.

An exclusion from the tendering process may also be possible under the EU rules on public procurement with regard to grave professional misconduct (article 57(4)(c) Directive 2014/24/EU) (see the European Union chapter).

Parallel proceedings

23 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 and administrative sanctions can be pursued in respect of the same conduct, although as noted above the criminal offence applies only to individuals and the Chapter I prohibition applies only to undertakings (see question 6).

PRIVATE RIGHTS OF ACTION

Private damage claims

24 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 actions for damages for breach of the Chapter I prohibition or article 101 TFEU may be brought in the High Court. In addition, under section 47A of the Competition Act, the CAT may hear claims for damages in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition or of article 101 TFEU ('follow-on' action) or in cases where no such decision has been reached but there is an alleged infringement ('stand-alone' action). The possibility of bringing a 'follow-on' action is intended to create a quicker and cheaper route for aggrieved persons – both consumers and businesses – to obtain compensation. Representatives may also bring damages actions before the CAT on behalf of groups of named and identifiable consumers (see question 25).

For both the High Court and the CAT, claims may be brought by any individual or business who has suffered loss as a result of an infringement of competition law. This includes both direct and indirect purchasers, as well as other parties who have suffered loss.

Where an action for damages is brought in a UK court in respect of a breach of the Chapter I or article 101 TFEU prohibition, the court is bound by a prior decision of the CMA, EC or CAT that the relevant provision has been infringed, provided that any period for appeal has expired. Similarly, under EC Council Regulation No. 1/2003, a UK court cannot take a decision that runs counter to a prior EC decision relating to the same agreement or practice.

In April 2014, the Supreme Court considered the issue of whether it was possible to bring a private action where some, but not all, of the parties to a cartel had appealed against a decision of the EC (*Deutsche Bahn AG v Morgan Crucible Co Plc* [2014] UKSC 24). The Supreme Court held that, as a successful appeal by an addressee of a EC decision would deprive an addressee who had not appealed of a potential contributing party, it might be appropriate to adjourn the determination of the contribution proceedings until all appeals by other addressees had been determined. However, it remained the case that, as against a non-appealing addressee, the EC decision that there had been a cartel involving all addressees stood, even though some of them might appeal successfully. As a result, a non-appealing addressee might, at least theoretically, find itself carrying full civil liability (without any fellow cartel members from which it might seek contribution) in respect of a cartel. However, if there really was no cartel, it might be difficult for a claimant to prove that it had suffered any loss caused by the conduct.

The UK government has implemented a raft of measures, including the encouragement of alternative dispute resolution and changes to the role of the CAT. The Consumer Rights Act widens the CAT's scope and improves its operations, by:

- enabling the courts to transfer competition law cases from the High Court to the CAT and vice versa (irrespective of whether such cases are stand-alone, follow-on, or hybrid cases involving both stand-alone and follow-on aspects);
- harmonising the limitation periods for the CAT with those of the High Court;
- enabling the CAT to grant interim and final injunctions; and
- introducing a fast-track procedure for simpler private claims in the CAT.

Following the introduction of the Consumer Rights Act, the CMA issued its guide to competition law redress in May 2016 (*Competition law redress: a guide to taking action for breaches of competition law, CMA55*).

In 2014, the CJEU ruled that another species of damages, known as umbrella damages, must also be available if the cartel has inflated the price of a good or service and, in light of this, a non-cartelist has raised its prices as well. In those circumstances, a party that has paid a non-cartelist an inflated price can claim umbrella damages from the cartelists. The amount of the umbrella damages will be the difference between the inflated price and the competitive price of the good or service in question.

The level of damages that may be recovered is assessed by reference to the victim's loss. Damages are therefore usually calculated by reference to what is necessary to restore the victim to the position in which he or she would otherwise have been had the infringement not occurred. A defence or a reduction in the damages otherwise payable is available where the defendant can show that the claimant has avoided or mitigated its loss by passing on the loss (eg, in a chain of purchasers in which prices have been increased down the chain). In *Sainsbury's v MasterCard* [2016] CAT 11, the CAT noted that the pass-on 'defence' is in reality not a defence and simply reflects the need to assess damages in a way that ensures that a claimant is not overcompensated. Part 2 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) clarifies that the burden of proving that an overcharge has been passed on lies with the defendant.

The UK government has previously rejected the idea of introducing treble damages. Section 36 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) provides that exemplary damages cannot be awarded by a court or a tribunal in competition proceedings. The Consumer Rights Act also explicitly provides that exemplary damages will not be available in collective actions. As regards costs awards, in the High Court, the general rule is that the losing party must pay the winning party's costs. There is no general rule on costs in the CAT; the 'loser pays' principle is not necessarily the starting point (although it is often applied in practice) and the CAT may make any order it thinks fit in relation to costs. Section 47C of the Competition Act (inserted by the Consumer Rights Act) does, however, make special provision in relation to the costs of collective proceedings: any unclaimed part of aggregated damages in opt-out collective proceedings may be used by the class representative to pay legal costs or expenses.

Class actions

25 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?

Section 47B of the Competition Act provides that a representative action can be brought before the CAT on behalf of two or more consumers by any person who proposes to be the representative in those proceedings. The regime applies to both follow-on and stand-alone cases, and

is available to both consumer and business complainants. Schedule 8 of the Consumer Rights Act amends the Competition Act to introduce a new collective proceedings regime, which covers both opt-in and opt-out actions.

In the new 'opt-out' collective action regime, affected consumers are automatically included in a claim and have to take positive steps to exclude themselves from it (should they wish to do so). The regime covers both follow-on and stand-alone cases and is available to both consumer and business complainants. The opt-out aspect of a claim only applies to UK-domiciled claimants, but non-UK claimants are able to opt in to a claim.

Collective proceedings must be commenced by a person who will act as the representative of the claimants. The CAT may authorise a person to act as representative whether or not that person is also a class member. However, proceedings may only be commenced if the CAT grants a collective proceedings order following a hearing to certify the representative claimant. The collective proceedings order authorises the person bringing the proceedings to act as representative, it provides a description of the class of persons whose claims may be included in the proceedings and it specifies whether the proceedings are to continue on an opt-in or opt-out basis. A collective proceedings order is only granted if:

- the CAT considers that it is just and reasonable for the person bringing the proceedings to act as the representative (whether or not they are a claimant); and
- the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

If an opt-out action results in the award of damages to the class of claimants, any unclaimed damages will not be returned to the defendants. Rather, these unclaimed sums will be paid to the Access to Justice Foundation (an organisation that supports pro bono legal assistance). Defendants will be free to settle on other terms, subject to the approval of the CAT judge.

In addition, the Consumer Rights Act provides for an opt-out collective settlement regime to allow for rapid settlement of opt-out cases in relation to which a collective proceedings order has been made. Under this system, a representative of those who have suffered loss and a potential defendant can jointly apply to the CAT, providing agreed details of the claims to be settled and the proposed terms of the settlement. The CAT can approve such mutually agreed settlement agreements on an opt-out basis if it is satisfied that the terms of the relevant agreement are just and reasonable.

The CMA has published guidance relating to taking action for breaches of competition law (see *Competition law redress: A guide to taking action for breaches of competition law* (CMA55)).

An application for the first UK class action was made in May 2016 in relation to the CMA's finding of an infringement in the market for mobility scooters. This application was adjourned by the CAT in March 2017 on the basis that the claimant's proposed methodology for estimating consumer losses was inadequate. However, the claimant was given the opportunity to amend her application using new economic evidence to estimate consumer losses on a new basis. The class action was subsequently abandoned. A second application for a class action was made in September 2016 in relation to the EC's decision regarding interchange fees charged by MasterCard. The CAT dismissed this class action in July 2017 on the basis that it would not be possible to estimate the loss to each individual consumer in a practicable manner, and refused the claimant permission to appeal. However, the Court of Appeal subsequently granted the claimant permission to appeal (at the same time denying MasterCard permission to appeal to the Supreme Court). At the time of writing, MasterCard has been granted permission to appeal by the Supreme Court. The class action applications made to the CAT relating to the EC's 2016 *Trucks* cartel decision have been postponed until the ruling in the *MasterCard* class action is given.

COOPERATING PARTIES

Immunity

26 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 CMA's immunity programme is set out in the OFT-published document *Applications for leniency and no-action in cartel cases* (OFT 1495; published July 2013 (and adopted in full by the CMA)). This provides different types of protection to an applicant depending on its position in the queue and whether an investigation has already commenced, as set out below.

The CMA published an information note in November 2017, explaining that the CMA will now be the single port of call for all leniency applications, including those in regulated sectors. The ultimate decision to grant leniency will be made by the authority to which the case has been allocated (in accordance with the Concurrency Regulations). Previously, applicants had the option of applying to the CMA or the sectoral regulator under a 'single queue system'. The new approach is designed to streamline the process.

Type A immunity

Available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation into such activity. Type A immunity provides automatic immunity from civil fines for an undertaking, and criminal immunity for all current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification.

Type B immunity

Available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation into such activity. In such circumstances, the CMA retains discretion regarding whether to provide civil immunity to the undertaking and criminal immunity to current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification. Type B immunity will no longer be available where the CMA has sufficient information to establish an infringement, where another undertaking has been granted Type B immunity, or when the CMA already has, or is in the course of gathering, sufficient information to bring a successful criminal prosecution.

Type B leniency

Where the CMA decides not to grant Type B immunity to an undertaking, it may still provide a reduction from any financial penalty imposed under the Competition Act. There is no limit to the level of reduction that may be granted under Type B leniency. The CMA will consider whether it is in the public interest to grant immunity (from criminal sanctions) on a blanket or individual basis. Cooperating individuals should also avoid director disqualification.

Type C leniency

Available to undertakings which are not the first to apply but provide evidence of cartel activity before a statement of objections is issued (provided such evidence genuinely advances the investigation). Recipients of Type C leniency may be granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the Competition Act. The CMA may exercise its discretion to award immunity from

criminal prosecution for specific individuals. Cooperating individuals should also avoid director disqualification.

In addition to fulfilling the criteria above, an undertaking must fulfil the following conditions to be granted Type A or Type B immunity or leniency:

- accept that it participated in cartel activity in breach of law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

To be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except the non-coercion condition, which does not apply.

When it comes to vertical agreements, the CMA's leniency policy only applies to vertical price fixing such as resale price maintenance (although leniency is in principle also available for vertical behaviour that facilitates horizontal cartel activity). This is justified on the basis that other vertical restrictions on competition are visible on the market and are therefore, over time, self-detecting.

Subsequent cooperating parties

27 | 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?

See question 26.

Going in second

28 | How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 26.

Any reduction in the financial penalty in these circumstances is discretionary and will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the CMA's possession, the evidence provided by the undertaking and the overall level of cooperation provided. The guidance on leniency and no-action notes that Type C leniency will generally involve discounts in the range of 25 to 50 per cent, although it is possible that low value or late applications may gain awards of less than 25 per cent. Blanket criminal immunity will not be granted in Type C leniency cases, but the CMA will consider whether it is in the public interest to grant immunity on an individual basis.

Immunity or amnesty plus

The leniency programme under the Competition Act provides an incentive for applicants to come forward with information about other cartels they may be involved in. If an undertaking is cooperating with an investigation in respect of one cartel activity and comes forward with information such that it obtains total immunity from (or a reduction in) fines in relation to a completely separate cartel activity (on the basis that it is the first undertaking to come forward with evidence regarding that second cartel activity), it will also receive a reduction in the fine imposed in respect of the first cartel (over and above the reduction it would have received for its cooperation in relation to the first cartel alone). The additional reduction granted in relation to the first market because of the successful application in the second market is known as 'leniency plus'. However, the guidance on leniency and no-action makes clear that leniency plus should be regarded as a secondary benefit and, as such, reductions to financial penalties granted under leniency plus are unlikely to be high. An example was in 2011 in the context of the dairy retail price initiatives investigation, when the OFT granted Asda a 10 per cent discount on the basis that it had been granted total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.

Approaching the authorities

29 | Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If an undertaking or individual wishes to apply for leniency, it is advisable to approach the CMA as soon as possible to secure the benefits of being the first to come forward as described above. In particular, type A immunity is only available before the CMA has commenced an article 101 TFEU or Chapter I investigation. The CMA will not accept leniency applications from undertakings after it has issued a statement of objections in relation to the reported cartel activity. Similarly, the CMA will not accept leniency applications from an individual after that individual has been charged with a cartel offence in relation to the reported activity. Additionally, financial incentives are offered to individuals to come forward with information about cartels – the CMA offers to pay up to £100,000 to individuals in return for information that helps the CMA to identify and take enforcement action against cartels (this is separate from the leniency-immunity programme).

While it is preferable to approach the CMA as soon as possible to be the 'first in', there may be some disadvantages to seeking leniency or immunity that need to be considered carefully before approaching the CMA:

- It is not possible for an undertaking to know for sure whether it will be the first to provide the CMA with evidence of the existence and activities of a cartel (although it is possible to seek confirmation as to whether Type A immunity is available on a confidential, no-names basis provided that the legal adviser making such contact with the CMA can confirm that he or she has instructions to apply for Type A immunity if it is available).
- Similarly, it is not possible to know in advance whether the information being provided to the CMA is new, or indeed what the precise state of the CMA's existing knowledge is (although, as noted above, it is possible to seek confirmation as to whether Type A immunity – and, if not, Type B immunity – is available).
- The CMA does not (and cannot) provide immunity from third-party damages actions (see question 24).

Any undertaking considering an approach to the CMA ought first to assess carefully its exposure risk, not only in the UK but in all jurisdictions in which the cartel is active, thus recognising the impact of the likely cooperation that will occur between competition authorities. The exposure assessment will need to take account of the degree of consumer detriment that has resulted from the cartel, the impact of the cartel on the relevant market and the likelihood that the CMA will otherwise discover the existence of the cartel, either independently or through a third party. Account will also need to be taken of the exposure of individuals to criminal prosecution under the Enterprise Act if they do not secure leniency. Before conducting internal investigations into

possible cartel conduct, undertakings should refer to the CMA guidance on leniency and no-action, which sets out guidelines designed to ensure that internal investigations do not prejudice any subsequent CMA investigation or enforcement action. The undertaking should ensure, before approaching the CMA, that it is able to prove positively that it has withdrawn from the cartel, and also that it can provide a sufficiently complete document trail to meet the stringent conditions for leniency.

In a case involving cartel activity that may have an effect on trade between member states, the undertaking should also consider as a matter of urgency whether it is appropriate to make simultaneous leniency applications to the EC and other competition authorities within the ECN. An application for leniency to the CMA will not be considered as an application for leniency to the EC or another NCA within the ECN. The ECN Model Leniency Programme has been established to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Leniency Programme therefore sets out the treatment that an applicant can anticipate in any ECN jurisdiction once the alignment of all programmes has taken place. In addition, the ECN Model Leniency Programme aims to alleviate the burden associated with multiple filings in cases with which the EC is particularly well placed to deal by introducing a model for a uniform summary application system.

See question 34 regarding the availability of applying for a marker.

Cooperation

30 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 CMA has adopted the OFT's *Guidelines on applications for leniency and no action in cartel cases*, published in July 2013 (OFT 1495). These provide that all leniency applicants, whether they are applicants for immunity or leniency, have a duty to maintain 'continuous and complete' cooperation throughout the CMA's investigation and any subsequent proceedings (including criminal proceedings and defending civil or criminal appeals) by the CMA as a result of the investigation. The overall approach to the leniency process by an applicant must be a constructive one, designed to assist the CMA in effectively detecting, investigating and taking enforcement action against cartel conduct. This requires applicants to engage positively, proactively and in a timely manner with the CMA. In particular, leniency applicants must provide the CMA with all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel. They must also, where appropriate, make current and former directors, employees and agents available for interviews and use their best endeavours to ensure that relevant individuals respond completely and truthfully to the CMA and not attempt to falsely protect or implicate any undertaking in relation to any infringement or any individual in relation to a cartel offence. Failure to comply could lead to a loss of all protection under the leniency programme.

Furthermore, leniency applicants must accept that the activity in which they engaged amounts to cartel activity in breach of article 101 TFEU or the Chapter I prohibition, or, in the case of individual applicants, amounted to commission of the cartel offence. This will ultimately be reflected in the leniency agreement. The CMA will regard any of the applicant's representations following the issue of a statement of objections which amount to a denial of cartel participation as inconsistent with the grant of leniency.

See also question 26.

Confidentiality

31 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CMA will endeavour, to the extent that it is consistent with its statutory obligations to disclose information, and its obligations to exchange information with the ECN, to keep the identity of cooperating undertakings confidential throughout the course of the investigation until the issue of a statement of objections. These protections apply both to applicants for immunity and to other leniency applicants.

In practical terms, the rights of access to the file afforded to the undertakings under investigation and the eventual publication of a reasoned decision will normally result in the identity of an immunity applicant becoming apparent both to other members of the cartel and, more widely, to others operating in the industry and to the public. Details of a leniency application may also be disclosed during an appeal to the CAT in respect of the infringement decision. Similarly, the fact that an individual has received a no-action letter may become evident because of disclosure obligations during the prosecution of other participants in a criminal cartel offence.

Section 28 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) explicitly provides that a disclosure order may not be made in respect of leniency statements regardless of whether they have been subsequently withdrawn. The CMA's guidance also emphasises that the CMA will 'firmly resist' requests for disclosure of leniency materials.

The CMA's guidelines confirm that the CMA will not require the waiver of legal professional privilege as a condition for leniency either in civil or criminal proceedings. However, the CMA has decided that it will require a review of any relevant information in respect of which legal professional privilege is claimed by external independent counsel who will be selected, instructed and funded on a case-by-case basis by the CMA. While external independent counsel will be instructed by the CMA, the relevant information in respect of which legal professional privilege is claimed will not be provided to the CMA (unless independent counsel concludes that it is not privileged).

Settlements

32 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In March 2014, the CMA published guidance on its investigation procedures which includes the first formal guidance on the settlement process (the OFT had previously covered the issue only very briefly, in response to a consultation which took place in 2012). The CMA will consider settlement for any case falling under the Chapter I prohibition or article 101 TFEU as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. There is no 'right' to settle – the CMA retains broad discretion in determining which cases to settle. Should the CMA decide to proceed with settlement, at a minimum, it will require the settling parties to:

- make an admission of liability;
- cease the infringement immediately; and
- confirm that they will pay a penalty set at a maximum amount.

Settlement discussions can be initiated either before or after the statement of objections is issued. Businesses may wish to approach the CMA

during an investigation to discuss the possibility of settlement – the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in settlement decisions. Before the CMA case team can commence settlement discussions, the SRO will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. Once this is received, the settlement discussions themselves will be overseen by the SRO. There may, however, be exceptional circumstances where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision-maker on the case.

In exchange for settling a case, the CMA will grant settling parties a discount of up to 20 per cent (if settlement took place pre-statement of objections) or 10 per cent (if settlement took place post-statement of objections). The actual discount awarded will take account of the resource savings achieved.

The CMA's preference for resolving disputes flexibly, quickly and cost-effectively has been reflected in the CMA's decisional practice. The CMA agreed its first settlement under the formalised procedure in March 2015, in relation to its property sales and letting investigation, and granted a 10 per cent settlement discount. More recently, in March 2018, the CMA announced a settlement in relation to the household fuel bid-rigging investigation and granted a 20 per cent discount. In May 2017, the CMA announced a settlement in relation to online resale price maintenance for light fittings. While settlement occurred post-statement objections, a 20 per cent discount was permitted as the parties expressed a genuine willingness to enter into settlement discussions pre-statement of objections.

Finally, it should be noted that the Consumer Rights Act provides that the CMA is able to approve voluntary redress schemes, that is to say, binding commitments entered into by infringers to provide compensation (whether monetary or otherwise) to consumers.

Settlements can be judicially reviewed. The developments in relation to the settlements in the OFT's tobacco investigation provide an interesting insight. In that case, the OFT's case collapsed following an appeal by non-settling parties. Two settling parties who had not joined the appeal, Gallaher and Somerfield, sought to recover the fines levied against them. They pursued appeals against the OFT's decision using normal routes. However, their appeals were held to be out of time. In the meanwhile, the OFT announced that it would be returning the £2.7 million fine it had imposed on TM Retail, one of the parties investigated, together with a contribution to certain other costs. This was because TM Retail had been given assurances by the OFT that even if it entered into a settlement agreement, any successful appeal against the decision would allow it to claim its money back. Gallaher and Somerfield applied for a judicial review of the OFT's behaviour, alleging breach of the principles of fairness and equal treatment. They argued that the benefit of these assurances should be extended to them. They were unsuccessful. The High Court held that the OFT had made a mistake by giving the other party those assurances (as they were simply wrong in law), and that as a matter of principle mistakes should not be replicated where public funds are involved, even in the interests of fairness. Gallaher and Somerfield appealed to the Court of Appeal, which overturned the High Court's decision – it held that the OFT had breached the principle of fairness and equal treatment and ordered the authority to repay the penalties paid by Gallaher and Somerfield together with interest and costs. The case was appealed to the Supreme Court, which reinstated the High Court's decision in May 2018.

Corporate defendant and employees

33 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

See question 26.

Dealing with the enforcement agency

34 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An undertaking or individual wishing to take advantage of the CMA's leniency programme must contact the senior director of cartels and criminal enforcement at the CMA. The CMA is now the single port of call for all leniency applications. See question 26.

Where a leniency application under the Competition Act regime is made on behalf of an undertaking, this step has to be taken by a person who has the power to represent the undertaking for that purpose. However, an initial approach to the CMA may be made by the undertaking's legal advisers on a hypothetical 'no names' basis to secure a marker, provided that the adviser has instructions to apply for Type A immunity if the CMA confirms that it is available. The adviser must also ensure that there is a concrete basis for a suspicion that the undertaking has participated in cartel activity and the undertaking must have a 'genuine intention to confess'; that is, acceptance as a matter of law and fact that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I or article 101 TFEU prohibitions. If the CMA confirms that Type A immunity is available, the adviser must identify the undertaking and apply for immunity. A discussion of the timing and process for perfecting the marker will then follow. The undertaking can also apply for automatic individual immunity for all of its current and former employees and directors.

A similar approach may be made to obtain a marker for Type B immunity, although in Type B cases, it is possible to ask the CMA whether immunity is available without a requirement to make an immediate application if the CMA confirms that it is available. To perfect a marker for Type B immunity, the undertaking must add significant value to the CMA's investigation. An undertaking can explore on a no names basis whether the information it is likely to provide would genuinely advance the CMA's investigation. Again, where a marker in a Type B case has been perfected, the undertaking can also apply for automatic individual immunity in respect of all current and former employees and directors.

In the case of a separate application for a no-action letter, the approach to the CMA may be made by the individual concerned, by a lawyer representing the individual or by an undertaking on behalf of named employees where that undertaking is also seeking leniency from the CMA or the EC. The senior director of cartels and criminal enforcement will give an initial indication as to whether the CMA may be prepared to issue a no-action letter. The CMA will then interview the individual concerned before advising the applicant in writing whether it is prepared to issue a no-action letter. Again, the CMA may also advise on a no names basis whether a hypothetical scenario would be likely to lead to individual criminal prosecution.

DEFENDING A CASE

Disclosure

35 What information or evidence is disclosed to a defendant by the enforcement authorities?

Part 6 of Schedule 8A of the Competition Act (as introduced recently by the Damages Regulations) prohibits the court or CAT from granting a disclosure order in respect of cartel leniency statements (whether or not withdrawn), settlement submissions (if not withdrawn), competition authority investigation materials (prior to the day on which the competition authority closes the investigation to which those materials relate) and materials in a competition authority's file (unless the court or CAT is satisfied that no-one else is reasonably able to provide the documents or information).

As a general rule, the CMA and its staff cannot disclose information obtained under the Enterprise Act, Competition Act or certain other legislation (specified in Schedule 14 of the Enterprise Act) that relates to the affairs of a living individual, or to the business of an existing undertaking during the lifetime of such individual or the existence of such undertaking, unless such information has already been previously lawfully disclosed to the public. However, the following statutory information gateways in Part 9 of the Enterprise Act allow the CMA to disclose 'specified information' (information that the CMA obtains during the exercise of any of its functions) to the defendant where:

- the CMA has obtained the required consents;
- the disclosure is for the purpose of facilitating the exercise by the CMA of its statutory function; or
- the information is disclosed to any person in connection with the investigation of a criminal offence or any criminal proceedings in any part of the UK or for the purpose of deciding whether to commence or bring to an end such an investigation or proceedings.

Where the CMA discloses information to a defendant under the gateways listed above, there are restrictions on the further disclosure or use of the information by the defendant. It is a criminal offence to breach these restrictions.

Before making a disclosure, the CMA takes the following considerations into account:

- the need to exclude from disclosure, so far as practicable, information whose disclosure would be against the public interest;
- the need to exclude from disclosure business information or information relating to an individual's private affairs, where such disclosure would significantly harm the legitimate business interests of the undertaking to which the information relates, or the interests of the individual to whom the information relates; and
- the extent to which disclosure related to the private affairs of an individual or commercial information is necessary for the purpose for which the disclosure is being made.

To safeguard the right to a fair trial, the CMA must allow defendants reasonable time (typically six to eight weeks in practice) to inspect copies of disclosable documents on its file that relate to the matters contained in the statement of objections. The CMA's guidance on its investigation procedures clarifies that confidential information (ie, commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests, or information whose disclosure the CMA thinks is contrary to the public interest) and CMA internal documents are not disclosable.

Where documents are disclosable, the CMA will consider the best means to protect any confidential information (eg, it may redact, anonymise or aggregate confidential information or use confidentiality rings or data rooms). It will be a condition of access to a confidentiality ring or data room that information accessed and reviewed by any adviser is not shared with its client.

The CMA may disclose new documentary evidence or information relevant to the infringement received during settlement discussions; however, any admissions made during failed settlement discussions will not be disclosed.

Representing employees

36 | 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?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority. In addition, given the real possibility for conflicts of interest, separate representation is likely to be appropriate where individual employees face possible criminal prosecution under the Enterprise Act.

See question 10 in relation to representation of individuals being interviewed under the CMA's compulsory interview powers.

Multiple corporate defendants

37 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

Payment of penalties and legal costs

38 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no absolute prohibition on an undertaking paying the legal costs incurred by, or financial penalties imposed on, individual employees. However, company law provisions may restrict such payments in certain circumstances.

Taxes

39 | Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines or penalties imposed for a breach of the law are not tax-deductible in circumstances where the penalty is intended to punish. Where the payment is intended to compensate for damages caused by normal trading operations, it may be tax-deductible to the extent that it can be described as a loss connected with or arising out of trade (and wholly and exclusively so incurred).

International double jeopardy

40 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The CMA is required to take into account penalties imposed by the EC or by another EU member state when setting the amount of penalty in relation to that conduct. However, UK authorities are not required to take into account penalties imposed on economic operators by jurisdictions outside of the EU.

There are no rules specifically preventing international double jeopardy against individuals in relation to the cartel offence (see the *Marine Hose* cartel discussed in question 17).

In the context of private damages claims, the UK courts generally award compensatory damages only (ie, to cover the amount actually lost by the claimant as a result of the defendant's breach of competition law). If the claimant has already recovered damages for exactly the same loss in another jurisdiction, it will no longer be able to prove its loss in the UK courts so damages would no longer be available (avoiding double recovery).

Getting the fine down

41 | What is the optimal way in which to get the fine down?

Avoidance or reduction of an undertaking's exposure to fines as a result of its participation in a cartel is inevitably subject to one precondition: withdrawal from the cartel. Withdrawal needs to be managed, however, in such a way as to optimise the possibility of a fine reduction. There are three key points listed below:

- Internal investigation – the undertaking should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to assess its exposure fully, not only in the UK but in all jurisdictions in which the cartel is operating. Undertakings should note the section dealing with internal investigations in the CMA's guidance on leniency and no action (see questions 26 to 28).
- Paper trail – the documents and witness statements collected will provide the basis for an assessment by the undertaking, together with its external lawyers, of its ability to meet the often stringent conditions to benefit from the leniency programmes of the regulatory authorities. It is, however, important to avoid the creation of new documents that are not legally privileged.
- Whistle-blowing – where the decision is taken to 'blow the whistle' on the cartel, it will often be helpful to be able to demonstrate conclusively the undertaking's withdrawal from the cartel. Such withdrawal may, however, put the other members on notice that the undertaking may make an early approach to the CMA or other regulator for leniency. The undertaking should be prepared to act swiftly to make the most of this first-mover advantage to obtain a maximum reduction in fines. In exceptional cases, the CMA may direct that the applicant continues to participate in the cartel to protect the element of surprise of any forthcoming inspection or to obtain further evidence.

Compliance programmes may be considered as a 'mitigating factor' under the CMA's six-step approach to calculating financial penalties (see questions 19 and 20). The mere existence of a compliance programme will not be sufficient to prove that a party has taken the required steps to ensure compliance with competition law and thereby qualify for a fine to be reduced. However, if the party is able to demonstrate that its senior management has taken adequate steps to achieve a clear and unambiguous commitment to competition law compliance from the top down – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – this is likely to be treated as a mitigating factor, warranting a fine reduction of up to 10 per cent. The CMA's updated penalties guidance explains that the CMA will expect these 'appropriate steps' to include making a public statement on the undertaking's website regarding its commitment to compliance and conducting a periodic review of compliance activities, and reporting that to the CMA.

The CMA, in two decisions in March 2017 in relation to its *furniture parts* investigation, granted two furniture parts suppliers a 10 per cent reduction after they provided evidence that they had developed a competition compliance policy that would be distributed to every member of staff who might come into contact with other businesses in the course of his or her employment. They also provided evidence to show that senior managers, directors and sales teams had been trained in competition compliance, that appropriate employees would continue to receive competition compliance training on a regular basis, and that they had published a compliance plan on their websites. The reduction was granted on the condition that the two suppliers would provide an annual update to the CMA confirming their ongoing commitment to compliance activities for the next three years. In May 2017, the CMA also granted NLC a 10 per cent reduction in recognition of its constructive engagement with the CMA to introduce a comprehensive competition law compliance programme to which its board had fully committed. In particular, the CMA identified that NLC had provided it with evidence that the area sales managers and the board would be trained in competition compliance and that adherence to the competition law compliance policy would form an integral part of the NLC Group employment policy.

UPDATE AND TRENDS

Recent cases

42 | What were the key cases, judgments and other developments of the past year?

- The CMA published new guidance with effect from 18 January 2019 on the CMA's investigation procedures in Competition Act cases.
- The CMA published new guidance in February 2019 on competition disqualification orders for directors.

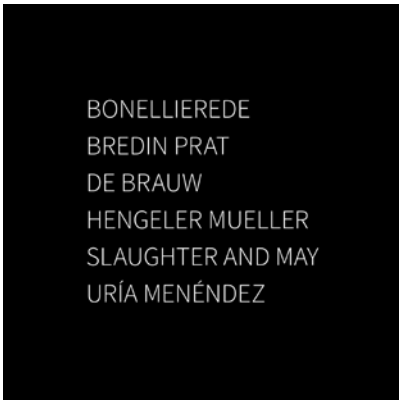
Regime reviews and modifications

43 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

A letter from Lord Tyrie to Greg Clark, Secretary of State for Business, Energy and Industrial Strategy (published in February 2019) and a report from the Digital Competition Expert Panel (published in March 2019) have both proposed changes that would impact the cartel regime. Lord Tyrie's letter highlights that the current whistle-blowing regime (which allows individuals to report their suspicions of cartel behaviour) is inadequate and whistle-blowers need a straightforward means of reporting wrongdoing, coupled with a strong motive to do so, in the form of better incentives and protections. The letter also proposes implementing civil fines (rather than criminal, where the bar to a successful prosecution is high) for providing false or misleading information, and suggests moving away from the 'full merits' standard of review currently applied by the CAT in appeals of Competition Act decisions. In addition, Lord Tyrie questions whether individual responsibility needs to be 'bolstered', including suggesting that responsibility for cartel prosecutions may sit more naturally with an agency that routinely brings criminal prosecution, such as the SFO. The UK Government is currently considering the CMA's competition regime and, at the time of writing, is expected to follow up with its proposals in the first quarter of 2020.

This chapter sets out the state of the law at the time of writing. The UK's withdrawal from the European Union may result in changes to cartel regulation within the UK. At this stage, it is difficult to predict with certainty how and when the legal framework may change. If there is no withdrawal agreement (or no future EU–UK relationship agreement at the end of a transition period provided for in a withdrawal agreement), the UK would become a 'third country' as regards the application of the EU competition rules and the UK's antitrust regime (including cartel regulation) would apply in parallel to the EU regime from Brexit

date. Secondary legislation prepared for a no-deal scenario provides that, post-withdrawal, the substantive legal provisions relating to cartel conduct in the Competition Act – which are substantially the same as the EU rules – would remain unchanged (beyond changes necessary to manage the UK's exit from the EU) (see question 4). However, the legal obligation for the CMA and courts to interpret UK competition law in line with EU law and decisional practice would essentially cease. Critically, it is expected that the CMA would run civil competition investigations in parallel with the EC. EC decisions that are made post-Brexit would cease to be legally binding in follow-on damages actions in the UK courts.



Lisa Wright
lisa.wright@slaughterandmay.com

Annalisa Tosdevin
annalisa.tosdevin@slaughterandmay.com

40 Square de Meeûs
1000 Brussels
Belgium
Tel: +32 2 737 9400
Fax: +32 2 737 9401
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

United States

Steven E Bizar 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. Additionally, the FTC may bring cases under the FTC Act challenging coordinated conduct that is beyond the scope of the Sherman Act, such as invitations to collude. On the state level, state antitrust and unfair competition laws prohibit substantially the same conduct as their federal counterparts and, depending on the state, may provide for criminal as well as civil enforcement.

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, Antitrust Division (DOJ) has the power to investigate and to civilly and criminally prosecute cartel activity in federal courts. The FTC enforces the FTC Act, but has only civil enforcement powers in FTC administrative proceedings or in federal court. Private plaintiffs may also sue in federal court for treble monetary damages and injunctive relief under the Sherman Act. State antitrust laws are enforced criminally and civilly by state attorneys general in state courts and civilly by private plaintiffs. State attorneys general may also enforce federal antitrust statutes.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

There have been no changes to the federal antitrust laws since 2004. A 2017 bill to provide anti-retaliation protections for antitrust whistleblowers passed in the US Senate and is pending in the House of Representatives.

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: (i) an agreement; (ii) between two or more competitors; (iii) that restrains trade; and (iv) that affects either domestic (interstate) commerce or import commerce. In the absence of such an agreement, unilateral conduct does not violate section 1 of the Sherman Act (though it may violate section 2 and other laws).

An 'agreement' under the Sherman Act need not be a formal written document. Agreements may be formed informally, through emails, instant messages, orally or even with a 'telling nod or wink'. The DOJ's practice is to establish the existence of an agreement in criminal cases through direct evidence, reflecting the higher standard of proof that applies in the criminal context. The law, especially as it pertains to civil enforcement, is more lenient. To establish an agreement in civil cases where the evidence is circumstantial, the US Supreme Court has held that the evidence must tend 'to exclude the possibility of independent action' and establish that the defendants 'had a conscious commitment to a common scheme' (*Monsanto v Spray-Rite Service Corp*, 465 US 752, 768 (1984)). Proof that defendants engaged in parallel conduct is insufficient, standing alone, to evince such a 'conscious commitment' (*In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383, 397–98 (3d Cir 2015)). Plaintiffs must also allege certain 'plus factors' to give rise to an inference of an agreement. Plus factors are 'proxies for direct evidence' because they tend to ensure that courts punish concerted actions as opposed to 'unilateral, independent' competitor conduct (*In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir 2004)). There is no definitive set of plus factors, although some decisions do contain lists of such factors (ibid at 360). The most important plus factor is traditional, non-economic (non-expert) evidence of a conspiracy (ibid at 361).

Information exchanges among competitors are not prosecuted criminally, but may be challenged in civil court if the anticompetitive effect of the exchange outweighs its procompetitive benefits. That said, evidence that competitors exchanged competitively sensitive information may constitute circumstantial evidence of an underlying cartel. For this reason, competitors should exercise caution during business discussions not to discuss competitively sensitive topics such as pricing, production levels, capacity, margins and the status and details of customer negotiations or bids. The scope of information that is competitively significant varies by industry and companies should seek legal guidance about the scope of information that could give rise to antitrust liability if shared with a competitor.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

5 Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are numerous statutory and judicially created exemptions and immunities from the antitrust laws. Congress has to varying degrees expressly exempted certain industry practices and activities from antitrust liability, usually in heavily regulated sectors such as the transport, healthcare, telecommunications, energy, insurance and financial industries. The McCarran-Ferguson Act (15 USC section 1013) is one example of such legislation, exempting state law-regulated insurance business that does not involve any agreement to 'boycott, coerce, or intimidate'. Courts have also created various industry-specific exemptions, including the well-known 'baseball exemption'.

Other exemptions and immunities apply more broadly, but generally share the characteristic that they seek to avoid disruption of an existing regulatory scheme. The 'filed-rate doctrine' or 'Keogh doctrine', for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161–65 (1922). Similarly, the 'political question doctrine' removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Similarly, a series of court decisions beginning with *Parker v Brown*, 317 US 341 (1943) have exempted state governments from antitrust liability for conduct that, if engaged in by a private actor, would certainly be considered anticompetitive. This 'state action doctrine', or 'Parker doctrine', may also extend to private actors in certain limited circumstances, when their conduct is taken in furtherance of an express regulatory scheme in accordance with state policy, and is subject to state supervision.

Under the 'Noerr-Pennington doctrine', another court-created immunity, competitors are generally not liable under the antitrust laws for joint petitioning of government entities (*United Mine Workers v Pennington*, 381 US 657, 661, 670 (1965), *Eastern RR Presidents Conference v Noerr Motor Freight*, 365 US 127, 135-36 (1961)).

Internationally, the 'foreign sovereign compulsion doctrine' may provide a defendant with antitrust immunity if it can establish that it was compelled to violate US antitrust law because it was impossible to comply with both US antitrust law and the law of a foreign jurisdiction simultaneously.

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, while civil enforcement actions (both government and private) are generally brought solely against corporations. 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. Courts have strictly interpreted import commerce to capture only 'transactions in which a good or service is being sent directly into the United States, with no intermediate stops' (*Minn-Chem, Inc v Agrium, Inc*, 683 F.3d 845, 854 (7th Cir 2012)). The Ninth Circuit has likewise interpreted import commerce to capture only 'transactions that are directly between the plaintiff purchasers and the defendant cartel members' (*US v Hsiung*, 778 F.3d 738, 755 (9th Cir 2015)).

Alternatively, if the conduct does not involve 'import trade or import commerce', the defendant's foreign conduct falls outside the scope of US antitrust law unless it satisfies both prongs of the FTAIA's 'domestic effects' exception (ie, the foreign conduct has a 'direct, substantial, and reasonably foreseeable effect' on US domestic or import commerce, or on the export commerce of a US-based exporter, and that effect 'gives rise to' the plaintiff's claims (*F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 162 (2004); 15 USC section 6(a)).

Courts are split on the degree of 'directness' required to satisfy the domestic effects test. The Ninth Circuit has held that an effect is 'direct' only if it 'follows as an immediate consequence of [defendants'] activity' (*US v LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir 2004)). Thus '[a]n effect cannot be 'direct' where it depends… on uncertain intervening developments' (ibid at 681). The Second and Seventh Circuits and the DOJ have interpreted directness more broadly, applying a 'proximate cause' standard. See *Minn-Chem, Int v Agrium Inc*, 683 F.3d 845, 859–61 (7th Cir 2012) (en banc); *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816, 817–20 (7th Cir 2015); *Lotes Co v Hon Hai Precision Indus Co*, 753 F.3d 395, 410 (2d Cir 2014). While these standards are different, these differences may be of little practical distinction in most cases.

Courts have yet to define standards that would satisfy the 'substantiality prong' of the FTAIA. At least one court has remarked, however, that Congress intended to permit antitrust claims only where the alleged 'anticompetitive conduct has… a quantifiable effect on the US economy' (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F Supp 2d 953, 964 (NDCA 2011)). Finally, courts have held that plaintiffs must demonstrate that the requisite 'direct effect' on US commerce was 'foreseeable' to an objectively reasonable person making practical reasonable judgments (*Animal Science Products, Inc v China Minmetals Corp*, 654 F.3d 462, 471 (3d Cir 2011)).

Civil plaintiffs must further establish, as an additional element of their Sherman Act claim, that this 'direct, substantial and reasonably foreseeable' effect on US domestic commerce 'gave rise to' their claims (*Motorola Mobility v AU Optronics Corp*, 775 F.3d 816, 818 (7th Cir 2015)). Moreover, because each sale to the plaintiff represents a 'separate accrual' of a claim, the 'give rise to' prong of the FTAIA must be satisfied for each transaction for which plaintiffs seek damages. In assessing whether a claim regarding a particular transaction satisfies the 'give rise to' prong of the FTAIA, courts have generally used a proximate cause standard.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

See question 7. Under its current interpretation, the FTAIA limits the scope of Sherman Act claims to anticompetitive conduct that affects either import commerce or has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. Export cartels are thus beyond the scope of the Sherman Act.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

The existence of a cartel typically comes to light when a participant applies for leniency and provides evidence of criminal activity (see question 26). Many leniency applications are now triggered as a result of corporate compliance programmes. Other common sources of information for the enforcement agencies include existing investigations or litigation in related industries, whistle-blowers, tips from customers or competitors, or even publicly available evidence of suspicious market behaviour. Evidence of cartel behaviour has also been uncovered during merger control investigations conducted pursuant to the Hart-Scott-Rodino Act.

In a criminal investigation, the DOJ presents evidence to a grand jury, whose purpose is to determine whether there exists sufficient evidence to indict the targeted company or individuals. An indictment is simply a finding of sufficient evidence to proceed to trial, not a finding of guilt. The bar the grand jury must meet in order to return an indictment is low and defence counsel is excluded from the grand jury process. The DOJ therefore generally will obtain any indictment it seeks from a grand jury. Defendants facing criminal antitrust charges have the right to a trial by jury, where the DOJ must prove guilt beyond a reasonable doubt.

The grand jury has broad investigatory powers that are separate from those of the DOJ (see question 10). A grand jury may subpoena the production of documents and the testimony of witnesses. Witnesses may be served with a grand jury subpoena anywhere in the US (Fed R Crim P 17(e)). While witnesses have the right under the Fifth Amendment to the US Constitution to refuse to testify if their testimony would potentially incriminate them, the DOJ may compel testimony by granting the witnesses immunity, thereby removing the risk of self-incrimination.

Prior to indictment, the DOJ will identify certain targets of the investigation, including corporations and individuals whom it considers to be potential defendants based on the existence of substantial evidence linking the target to the crime. Individual targets typically obtain individual outside counsel once they become aware of their status. Targets have the right to meet the DOJ to try to avoid indictment through a proffer of cooperation and testimony or by offering counterevidence of their own. Targets also have the right to testify on their own behalf before the grand jury, though in practice this is uncommon, given the exclusion of defence lawyers from the grand jury.

Civil investigations do not involve a grand jury. Instead of subpoenas, the federal or state enforcement agency will generally issue civil investigative demands (CIDs) to obtain documents or sworn written or oral testimony from targets of the investigation, as well as from third parties. The evidence resulting from CIDs may form the basis of a civil lawsuit in federal court (by the DOJ or FTC) or in an FTC administrative proceeding before an administrative law judge.

Cartel investigations, either civil or criminal, follow no set timeline and may linger for a number of years before proceeding to any enforcement action or termination.

Investigative powers of the authorities

10 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The antitrust enforcement agencies have far-reaching, though not unlimited, investigative powers. As described in question 9, the DOJ has at its disposal the broad investigative powers of the grand jury. Through a grand jury subpoena, testimony and documents may be obtained from witnesses throughout the US. Additionally, upon a finding of probable cause by a federal judge, the DOJ may obtain warrants permitting it, through the FBI, to search for and seize physical evidence located on private premises, including documents and electronic devices, or to place wiretaps allowing it to audit and record private phone calls between suspected cartel participants. Because much of the necessary evidence is in the possession of the cartel participants, the DOJ often grants immunity to key individual witnesses in exchange for cooperation and testimony.

In the case of witnesses located outside the US, the agency may initiate a border watch. If an individual on a border-watch list were to voluntarily enter the US, immigration and border control authorities may detain the individual and will automatically notify the DOJ. There is no requirement of a warrant or showing of probable cause to place an individual on a border-watch list, which is not public and not formally disclosed to defence counsel. If the individual enters the US and is not detained, the DOJ's practice is to conduct a drop-in interview, whereby lawyers and agents may appear unannounced, often at the person's hotel or workplace, and request to speak with the individual. Although cooperation with the interviewers is voluntary, individuals often are not aware of their rights and resisting the pressure exerted by the authorities in such situations may be difficult. There also exists the risk that physical evidence, such as documents and electronic devices, may become vulnerable to search or seizure at the US border, where border control authorities enjoy extensive investigative powers. Foreign companies under investigation by the DOJ should therefore carefully consider the circumstances under which executives may travel to the US.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | 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 globe. In its most visible form, this cooperation includes the coordinated raids of global cartel participants, but cooperation behind the scenes is increasingly common. For example, pursuant to bilateral mutual legal assistance treaties (MLATs), US agencies share information with foreign counterparts. The US has MLATs with approximately 80 jurisdictions that create a channel for the taking of testimony, the provision of documents or other physical evidence, and executing searches and seizures. Pursuant to these MLATs, investigators may exchange evidence, where possible under law, as well as theories of the case.

In addition to MLATs, the US has entered into bilateral antitrust cooperation agreements (ACAs) and memoranda of understanding (MOUs), which are less formal than MLATs and do not generally bind the agencies to provide information or evidence, but facilitate cooperation between the agencies. The US has entered into ACAs with, among others, Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The DOJ and FTC have bilateral MOUs with corresponding agencies in China, India and Russia, which serve a similar function to the ACAs.

The US and the individual agencies participate in a number of organisations or international cooperative efforts whose aim is to increase and facilitate cooperation among antitrust authorities and to promote greater procedural and substantive convergence among the global antitrust regimes, including the International Competition Network, the Competition Committee of the Organisation for Economic Cooperation and Development and the United Nations Conference on Trade and Development.

Interplay between jurisdictions

12 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Because the DOJ's subpoena powers extend only as far as the US border, relationships with foreign enforcers are critical to its ability to collect evidence located overseas. Particularly in recent years, the DOJ has increased its scrutiny of foreign cartels, and frequently relies on information shared among international agencies in preparing to prosecute foreign defendants. This is particularly true for (but is not limited to) the jurisdictions with which the US has entered into MLATS, ACAs or MOUs, as further described in question 11.

Where provided for by treaty, the DOJ may seek extradition of individuals from foreign jurisdictions. Extradition had been largely theoretical in antitrust cases, because most treaties contain a dual criminality requirement, but the risk of extradition has increased over time as more jurisdictions around the world have criminalised cartel conduct. In 2014, the DOJ successfully extradited an Italian national from Germany on a charge of participating in a conspiracy to rig bids, fix prices and allocate market shares for sales of marine hose sold in the US and elsewhere.

The DOJ may also place an individual target of a grand jury investigation on INTERPOL's red notice list. Where extradition is not possible, and such individuals decline to voluntarily surrender to US jurisdiction, listing on a red notice will expose the individual to detention and extradition at the borders of the 190 participating countries. Obtaining a red notice requires the issuance of a valid national arrest warrant, but not proof that the individual is guilty of any crime. There is no time limit on a red notice, so in effect listing on a red notice may indefinitely confine individuals to their home countries. Some commentators have criticised the DOJ's use of red notices as a violation of due process rights, because it amounts to the imposition of a sanction without a trial.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by courts of law. Criminal cases that proceed to trial are heard in federal court, where the defendant may demand trial by jury. Civil cases may also be heard in federal court, or, where the FTC is the enforcing agency, in administrative proceedings before an administrative law judge. Cases brought by state regulators under both federal law and state law may be heard in federal court, but purely state prosecutions are heard in state courts alone.

In practice, the vast majority of cartel prosecutions are resolved prior to trial by way of a plea agreement (see question 32). In the civil context, nearly all litigations are resolved by way of a dispositive motion or by way of settlement.

Burden of proof

14 | 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

15 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In the criminal context, the DOJ's practice is to establish the existence of an agreement through direct evidence. Federal law, however, does permit civil plaintiffs to use circumstantial evidence to establish the existence of an agreement. See question 4.

Appeal process

16 | What is the appeal process?

Defendants have the right to appeal a guilty verdict in a criminal trial. Both plaintiffs and defendants have the right to appeal adverse rulings in civil cases. The government may not appeal an acquittal of a criminal defendant because of the constitutional prohibition of double jeopardy.

In the federal court system, trial takes place at the district court level. Appeals from the trial decision are taken to the federal circuit Court of Appeals for the geographic region in which the trial court sits. Appellate courts give great deference to trial courts' findings of fact, overturning them only when they are clearly erroneous. Questions of law, by contrast, are reviewed de novo, meaning the appellate court considers the law as if for the first time. The right to appeal is generally lost unless timely asserted, and the windows in which appeals must be noticed are extremely short. For civil litigants, the deadline to appeal is usually 30 days from entry of the judgment or order appealed from; for criminal defendants, the deadline is 14 days from the date of entry of judgment, or from the filing of the government's notice of appeal, whichever is later (Fed R App P 4(a)(1)(A), 4(b)(1)(A)). From the circuit court, appeals are taken to the US Supreme Court. Supreme Court review is discretionary, and only a very small proportion of cases seeking review every year are ultimately heard.

SANCTIONS

Criminal sanctions

17 | What, if any, criminal sanctions are there for cartel activity?

Both corporations and individual defendants face severe sanctions for cartel activity under the US antitrust laws, including high financial penalties and, for individuals, prison time. For corporations, the Sherman Act imposes a maximum fine of US$100 million per offence. For individuals, the maximum is US$1 million, plus up to 10 years in prison. There is no minimum fine for either corporations or individuals, nor is there a minimum prison term.

The US$100 million cap has been surpassed in practice, however. The Alternative Sentencing Act (18 USC section 3571) may permit penalties to exceed the statutory maximum. A defendant may be fined up to twice its gross pecuniary gain from the criminal conduct, or twice the victim's gross pecuniary loss. At least one federal district court has held that if a fine in excess of the US$100 million cap is sought, the government must prove the pecuniary gain or loss beyond a reasonable doubt (*US v*

AU Optronics Corp, No. C 09-00110 SI, 2011 WL 2837418, at *4 (NDCA 18 July 2011)). In that case, the judge imposed a fine of US$500 million. Total annual criminal penalties exceeded US$1 billion for four years in a row, from 2012 to 2015, and topped US$3.6 billion in 2015 alone. These levels then dropped sharply in 2016 to US$399 million, largely because of the conclusion of several major investigations during the prior year.

Prison sentences for individuals do not in practice approach the statutory maximum of 10 years. Few individuals take the risk of a criminal trial, preferring to accept a reduced sentence in exchange for a guilty plea and a cooperation commitment. Prison sentences averaged 22 months between 2010 and 2016.

Civil and administrative sanctions

18 | What civil or administrative sanctions are there for cartel activity?

The DOJ may seek equitable injunctive remedies for cartel activity via civil actions (15 USC section 4), but has no power to seek civil fines. 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 FTC is similarly limited to equitable remedies, including injunctive relief and disgorgement.

Guidelines for sanction levels

19 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Federal Sentencing Guidelines (the Guidelines) apply to both individual and corporate violators of the antitrust laws. The Guidelines are not binding on federal judges (*US v Booker*, 543 US 220, 226–27 (2005)), though 'respectful consideration' to the Guidelines must still be given (*Pepper v US*, 562 US 476, 490 (2011)). The full text of the Guidelines is available at www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

In recommending the appropriate prison sentence for an individual defendant, the Guidelines assign a 'base offence level' to a crime. For antitrust violations, the base offence level is 12, which results in a starting range of 10 to 16 months' imprisonment. The Guidelines further recommend increases to the base offence level when the specific antitrust offence is bid rigging, or when the affected volume of commerce exceeds certain thresholds starting at US$1 million. The judge may then consider aggravating or mitigating factors in adjusting the time up or down, such as whether the individual abused a position of trust, or participated in the obstruction of justice (Guidelines, sections 3B1, 3C1). With respect to individual criminal fines, the Guidelines suggest beginning amounts corresponding to 1 to 5 per cent of the affected volume of commerce but no less than US$20,000. The judge may then consider aggravating or mitigating factors in setting the fine, considering the extent of the defendant's participation in the cartel and the role he or she played, and whether and to what extent the defendant personally profited from the scheme, including through bonuses, promotions, or other career enhancements. Individuals who lack the ability to pay the fine are sentenced to community service, which the Guidelines recommend should be 'equally as burdensome as a fine' (Guidelines, section 2R1.1, application note 2).

For convicted corporations, the Guidelines recommend a 'base fine' equal to 20 per cent of the affected volume of commerce. This 'base fine' is then multiplied according to a 'culpability score', which is calculated based on factors including the firm's previous criminal history, whether 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-bargain process.

Compliance programmes

20 | 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

21 | 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 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

22 | 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 prior to conviction or civil judgment. A contractor may be suspended for the duration of an investigation and any associated legal proceedings on suspicion of or

indictment for antitrust violations, unless proceedings have not been initiated after a period of 18 months (ibid).

Unless they have previously been convicted, contractors must receive notice and an opportunity to be heard prior to being debarred. Suspension requires notice but may be imposed prior to being heard (ibid at sections 9.406-3, 9.407-3). The debarring official may impute the conduct of the contractor's officers, directors, shareholders, partners, employees, other associated individuals or joint venture partners to the contractor, and its conduct may likewise be imputed to them (ibid at sections 9.406-5, 9.407-5).

Parallel proceedings

23 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 the course of 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

24 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 pursuant to state antitrust and unfair competition laws. The Supreme Court further limited the standing of indirect purchasers to assert antitrust claims in *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519 (1983) (AGC). In AGC, the court established a balancing test to determine standing:

- the directness of plaintiff's injury;
- the existence of more direct victims of the antitrust violation;
- the potential for duplicative recovery; and
- the likelihood that apportionment of damages would be overly complex or speculative.

Purchasers that acquired the affected product from competitors of the cartel members who are not themselves members of the cartel do not have 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 pursuant to the Class Action Fairness Act of 2005.

Section 4 of the Clayton Act provides for a private right of action to enforce section 1 of the Sherman Act. The Clayton Act entitles successful antitrust plaintiffs to treble damages, calculated based on the amount of overcharge the plaintiff paid as a result of the cartel activity, and also to compensation for their attorneys' fees and associated costs of litigation. Defendants in private civil suits face joint and several liability, meaning that a single defendant could find itself responsible for the total damages for the entire cartel, trebled, plus attorneys' fees and costs. While damage claims and even awards against defendants may be enormous, particularly in the context of class actions, no individual plaintiff may recover more than its actual damages, trebled. Civil trials are rare and settlements are common because of the in terrorem effect that results from the prospect of treble damages and joint and several liability. Recent class action settlements routinely exceed US$100 million. The largest antitrust settlement in history, in the *Visa-Mastercard Antitrust Litigation*, was US$27 billion.

The Clayton Act does not provide a remedy for successful defendants to recover their costs of litigation.

Class actions

25 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 majority of private civil antitrust lawsuits are brought as class actions pursuant to rule 23 of the Federal Rules of Civil Procedure. In a class action, a representative plaintiff or group of plaintiffs sues on behalf of all similarly situated plaintiffs. Classes and subclasses of plaintiffs may be defined based on geographic location, product purchased or characteristics of the plaintiffs themselves. The class format allows for enormous efficiencies for plaintiffs, enabling them to establish liability for the entire class at once, to avoid inconsistent findings of fact or adjudications of law, and to define a clear process for establishing damages for each individual plaintiff. Where individual damages are small and not worth the cost of litigation, the efficiencies of the class format allow victims of cartel behaviour the possibility of recovery when it would otherwise have been infeasible.

Rule 23 sets forth the standards for courts to assess whether a claim may be adjudicated on a class-wide basis. To qualify for class treatment, plaintiffs must plead and prove the following rule 23 factors:

- numerosity (that the class is so numerous that joinder of every individual plaintiff is impracticable);
- commonality (that there are questions of law or fact common to the class);
- typicality (that the claims or defences of the class representatives are typical of the class); and
- adequacy of representation (that the class representatives will adequately represent the interests of the class).

In addition, plaintiffs must prove that common questions of law and fact will predominate over any individual questions and that the class action device is a superior method for adjudicating the dispute. In many antitrust class actions, the key issue for class certification is demonstrating whether plaintiffs can establish injury and damages on a class-wide basis. The class certification phase is a significant bar for plaintiffs to clear, requiring the court to rigorously assess expert opinions as well as factual evidence gleaned from discovery, often resulting in multi-day evidentiary hearings. See *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir 2008).

Participation in the class is not compulsory. Certain putative class members may elect to opt out and pursue their own claims parallel to the class, usually cooperating with class counsel on certain discovery or drafting efforts that jointly benefit them, but with the power to diverge from the class in issues of strategy, discovery, other litigation processes and settlement. Such opt-out plaintiffs are usually individuals

or corporations with large damages, who do not wish to defer to or be bound by decisions or settlements made by class counsel on behalf of the rest of the class.

COOPERATING PARTIES

Immunity

26 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 DOJ's leniency programme. If the application is granted, the applicant receives full immunity from criminal prosecution. Applicants that satisfy the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub L No. 108-237, 118 Stat. 661 (22 June 2004), may also become eligible for benefits in private civil cases, including reduction from treble to single damages, and the elimination of joint and several liability. The requirements under ACPERA include cooperation with plaintiffs in civil actions.

To obtain leniency, an applicant must ordinarily be the first to report illegal activity to the government, prior to the commencement of an investigation (Type A leniency). This 'first in' requirement is true for both individuals and corporations. The applicant must not have been the ringleader of the cartel, must have promptly and effectively terminated its participation in the cartel, must fully disclose all relevant facts regarding the illegal activity and fully cooperate with the government investigation, and must make restitution to victims. Further, the DOJ must determine that granting leniency would not be unfair to others. Even if an investigation has already begun, obtaining leniency may still be possible for a first-in applicant as long as all other requirements are met and the DOJ does not already have evidence that warrants a conviction (Type B leniency).

For individual applicants who do not meet all the requirements, leniency may still be possible at the discretion of the DOJ, but it is usually more limited.

Further details about the DOJ's leniency programme may be found at www.justice.gov/atr/leniency-program.

Subsequent cooperating parties

27 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 the Guidelines, however, cooperation is a mitigating factor that judges may consider in sentencing. Similarly, the DOJ has the discretion to treat cooperating parties with greater leniency during an investigation or the plea-bargain process.

The DOJ also has the discretion to enter into non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). In practice, NPAs and DPAs are rarely used in the cartel context because of the existence of the DOJ's leniency programme. In rare instances, however, applicants who were not 'first in' for leniency have received 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 (though 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

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

To receive amnesty under the DOJ's leniency programme, the applicant must be the first to file. There is no formal leniency available for subsequent cooperating parties. See question 27.

There is no significance to being 'second in', although in general the earlier a company begins cooperating with the government the greater the potential it has to receive a downward departure from the fine recommended under the Guidelines.

The DOJ's 'amnesty plus' programme is designed to create an incentive for later-cooperating parties to confess wrongful conduct outside the scope of the existing investigation. Under amnesty plus, if a later-cooperating party applies for leniency for one or more other cartels, that party, in addition to receiving full leniency for those separate cartel violations, would receive a considerable discount on any criminal fine assessed with respect to the initial cartel violation. This contrasts with the DOJ's 'penalty plus' policy, under which the government will seek fines and prison sentences at the upper end of the range recommended by the Guidelines if a company was aware of additional antitrust violations but chose not to report them.

Approaching the authorities

29 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 period of time (often 30 days, though this may be extended or shortened on a case-by-case basis) to allow the company to perfect its application. This process usually involves a rapid and comprehensive internal investigation, involving document collection and review and witness interviews.

The decision whether to seek amnesty is highly fact- and company-specific. If the evidence of criminal activity is unambiguous and the company is prepared to devote the considerable human and financial resources demanded of an amnesty applicant as part of its obligation to cooperate fully, seeking amnesty quickly may be advisable. If the evidence is ambiguous or weak, or the company judges that the risks and burdens of cooperation outweigh the potential benefits, amnesty may not be the company's strongest option. Given the government's high burden to prove criminal liability beyond a reasonable doubt, if strong defences (such as jurisdictional or statute of limitations defences, for example) exist, the better option may be to put the government to its proof.

If amnesty is unavailable, the company may face the decision whether to plead guilty or to take its risks at trial. As with the decision whether to seek amnesty, the decision whether to plead is highly defendant- and situation-specific, requiring consideration of the strength of the evidence, the strength of any available defences, and the risks associated with accepting a plea, which could expose the defendant to liability in follow-on civil cases.

Cooperation

30 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. Additionally, if a leniency recipient satisfies the ACPERA requirements (including cooperation with the civil plaintiffs), it may be eligible for reduced civil damages (single, rather than treble), and may avoid joint and several liability.

There are no formal requirements defining the level of cooperation expected of subsequent cooperating parties. Ordinarily, the DOJ will request desired documents or access to witnesses, and then the party's response will be the product of negotiation. If a party pleads guilty in exchange for a reduced sentence, cooperation requirements are usually set forth in the plea agreement.

Confidentiality

31 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The DOJ must keep confidential the identity of the applicant, the fact it has been granted amnesty, and the substance of any negotiations with the applicant or subsequent cooperating parties. Depending on the nature of the cartel and the parties involved, however, the identity of the leniency applicant often does not remain a secret, at least among the other defendants. Plea agreements, by contrast, and the cooperation provisions contained within them, are made public.

In the related civil litigation, both the fact of amnesty and the ordinary-course materials produced by the recipient may become discoverable. Parties usually negotiate strict protective orders limiting the use of such materials to the litigation, and designate documents with varying levels of confidentiality restrictions during discovery. If the case goes to trial, confidentiality of such materials will be determined on a document-by-document basis, though given the public interest in the adjudicative process, it is often impossible to prevent disclosure of all documents. Trials are typically open to the public.

Settlements

32 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Most criminal cartel prosecutions are resolved via plea agreement rather than at trial. The parties typically negotiate the scope of the defendant's agreement, often using the Guidelines as a starting point for negotiations. The negotiated agreement must be presented to the court for approval. Judges have discretion to approve or modify such proposed agreements, but usually defer to the DOJ's recommendation.

Corporate defendant and employees

33 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a corporate defendant receives immunity under the DOJ's leniency programme, current employees, officers and directors will also receive immunity if they admit any wrongdoing and continue to assist the government's investigation. The DOJ also has discretion to include specifically named former employees, officers and directors in the grant of immunity.

Where a company agrees to a plea bargain, its directors, officers and employees will similarly receive immunity from future prosecution, save for those who have been carved out of the plea. The DOJ's practice is to carve out a number of targets of the investigation who may be indicted for wrongful conduct associated with the violations set forth in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, though not always, higher-ranking executives who held pricing authority and actively promoted the cartel activity, whose prosecutions may serve as a warning to others. The DOJ may also choose to carve out individuals who attended cartel meetings and entered into the agreements on behalf of the company, against whom the documentary evidence is often the strongest. The DOJ generally seeks to prosecute individuals who were in a position to stop the illegal conduct, both because of their knowledge of the cartel and their position of authority. In the past year, the DOJ has indicted two CEOs in connection with its cartel enforcement activities.

Dealing with the enforcement agency

34 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

35 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The enforcement authority is required to disclose evidence or information favourable to a criminal defendant, including evidence that would tend to prove innocence, permit impeachment of government witnesses, or mitigating evidence that would tend to reduce a criminal sentence (*Brady v Maryland*, 373 US 83, 87–88 (1963)). In general, the DOJ provides to defendants the majority of its investigative materials anyway. Under certain circumstances, the government must also disclose any statements of its witnesses that relate to the subject matter on which the witness testified (Jencks Act, 18 USC section 3500).

Representing employees

36 | 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 the course of a government investigation, however, conflicts may arise that necessitate obtaining separate counsel for the individuals. This can occur when the DOJ identifies an individual as a target of the investigation, and the individual's interests and the company's interests diverge, each potentially having an incentive to place responsibility for the illegal activity on the other. It may also occur during the company's internal investigation or preparations for litigation, when previously unknown evidence of the individual's illegal activity emerges. The existence of conflicts is not unusual, and must continually be assessed on a case-by-case basis throughout the course of the investigation. Occasionally the DOJ will demand that an individual be provided separate counsel, either because a genuine conflict exists or as a strategic move to try to obtain greater cooperation from the individual. There may also be reasons apart from conflicts of interest in which it may be advisable to obtain separate counsel for an individual, especially if that person expresses that this is his or her desire. Ultimately, the decision whether separate counsel is necessary belongs to the lawyer and the clients, not the DOJ.

Multiple corporate defendants

37 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is generally inadvisable for counsel to represent multiple corporate defendants in a single civil case when those defendants are not part of a single corporate family. While it is common for counsel to represent both a parent and subsidiary company in a single litigation, because in general such entities share a unity of interest, such unity is far murkier or non-existent in the case of unaffiliated cartel participants. In practice such joint representations rarely occur. In the criminal context, joint representations may not satisfy the defendant's Sixth Amendment right to effective assistance of counsel.

Payment of penalties and legal costs

38 | 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

39 | Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Punitive payments to governments or their agencies or instrumentalities for violations of law, including fines and penalties, are generally not tax-deductible. These include payments settling potential liability for fines or penalties, or amounts forfeited as collateral posted in connection with proceedings where fines or penalties are possible. Compensatory damages paid to a government or government agency or instrumentality are usually not considered to be a fine or penalty.

Private damages awards or settlements may be considered business expenses under the tax laws – and therefore may be deductible, to an extent. It may also be possible to structure settlements in ways that maximise the ability of the payer to deduct or minimise the tax obligation incurred by the recipient. Understanding the tax implications of any penalty, settlement, compensatory damages award or other such payment will require the advice of a tax specialist.

International double jeopardy

40 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The DOJ does not recognise a principle of international double jeopardy, meaning that it does not consider the fact that another jurisdiction may have prosecuted a defendant for a crime as a bar to US enforcement. Generally speaking, however, the DOJ does in certain circumstances consider the enforcement actions taken by other jurisdictions in recommending fines or other sanctions. For example, the DOJ has recommended in some plea agreements that time served in the foreign jurisdiction be counted as time served toward a defendant's US sentence.

In civil cases, double recovery by a plaintiff is generally not permitted, and private damage awards will be reduced by amounts a plaintiff receives from other parties, including amounts paid in settlements. The principle of collateral estoppel may also bar a plaintiff from maintaining a claim in the US against a defendant against whom it obtained a judgment on the same facts in a foreign jurisdiction.

Getting the fine down

41 | 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, though such a decision may not always be advisable for all defendants (see question 29). Adopting an effective compliance programme is the surest method to uncovering cartel activity in real time, which can put the company in a position to apply first for leniency.

In general, however, because fines are set through settlement negotiations, the best way to secure a lower fine is to negotiate from a position of strength. This requires the development of a robust defence from the outset, preserving the company's right to contest the government's case at trial, while at the same time looking for opportunities to cooperate proactively with the government in exchange for a reduced fine.

UPDATE AND TRENDS

Recent cases

42 What were the key cases, judgments and other developments of the past year?

Apple Inc v Pepper **(US 2019)**
The Supreme Court clarified its ruling in Illinois Brick, holding that if no intermediary exists in the chain of distribution between the plaintiff purchaser and the defendant, that plaintiff is a direct purchaser who can pursue federal antitrust claims for damages regardless of who sets the price.

FTC v Shire ViroPharma **(3d Cir 2019)**
The Third Circuit Court of Appeals held that the FTC can only bring claims in federal court under Section 13(b) of the FTC Act where the FTC makes specific allegations that a defendant 'is violating, or is about to violate' the law, as opposed to past violations.

In re Qualcomm Antitrust Litigation **(N D Cal 2019)**
A Northern District of California Court issued an injunction against cell phone chipmaker Qualcomm requiring the company to cease its policy of requiring cell phone manufacturers to license Qualcomm's patents to purchasers of its chips on the grounds that the policy violated Qualcomm's obligation to license its patents on fair, reasonable and non-discriminatory terms.

Regime reviews and modifications

43 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 largest ongoing change to the immunity/leniency programme is the DOJ's recent update regarding effective compliance programmes. In July 2019, assistant attorney-general Makan Delrahim delivered a speech outlining a new model for crediting effective compliance programmes. Under the new regime, companies that are not the 'first in' and therefore not eligible for immunity can receive reduced sentences and fines as a result of having an effective compliance programme. The DOJ provided guidance along with the update to give companies further insight into how the DOJ will go about evaluating compliance programmes.

Additionally, in October 2019, the Senate passed legislation providing heightened protections for whistle-blowers who report antitrust violations. The Senate has passed similar legislation in the past, and the House has refused to take it up on any of the previous occasions. As a result, it is unclear whether the bill will become a law.

Finally, with ACPERA set to expire in 2020, the DOJ has started to hold hearings related to potential updates and recommended changes to the ACPERA framework. In April 2019, the DOJ held a roundtable on ACPERA where both defence and plaintiff's counsel weighed in with recommended changes. While no concrete changes have been suggested by DOJ at this point, any changes that are implemented will have some effect on the immunity/leniency programme.

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

Vietnam

Nguyen Anh Tuan, Tran Hai Thinh 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 or 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 (see question 5).

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 recent and significant change is the Competition Law 2018, which introduces, inter alia, 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 Penal Code 2015 (as amended), which came into effect on 1 January 2018, is another noteworthy development because for the first time it makes certain cartels criminally prosecutable and imposes criminal liabilities on commercial entities (see question 17).

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The Competition Law 2018 provides a non-exhaustive list of restrictive agreements and those that are illegal per se (articles 11 and 12 respectively). Accordingly, the prohibited cartels include:

Cartels	Strictly prohibited		Conditionally prohibited*	
	Horizontal	Vertical	Horizontal	Vertical
Bid rigging	Yes	Yes		
Removal of non-participants from the market	Yes	Yes		
Restriction of non-participants' market access or business development	Yes	Yes		
Price fixing	Yes			Yes
Allocation of market and/or customer	Yes			Yes
Quota fixing	Yes			Yes
R&D restriction			Yes	Yes
Agreements on refusal to trade			Yes	Yes
Agreements to limit the upstream/downstream market			Yes	Yes
Agreements to impose other businesses conditions on signing commercial contracts or forcing other businesses to accept obligations not directly related to the subject matter of the contract			Yes	Yes
Other restrictive agreements			Yes	Yes

* These cartels, whether horizontal or vertical, are only prohibited if they actually or potentially restrict competition.

'Restrictive agreement' is defined as an agreement in any form that has or is capable of having 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 (see also question 15).

For criminal cartel offences, see question 17.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

5 | 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?

Exemptions for certain prohibited cartels are also available under the Competition Law 2018. Accordingly, except for bid rigging, agreements to remove non-participants from the market or to restrict non-participants' market access or business development, illegal cartels are eligible for exemption for a maximum of five years if they are beneficial to consumers and satisfy one of the conditions provided in article 14 of the Competition Law 2018.

In addition, several industry-specific legislations, mainly in the banking and insurance sectors, also provide for industry-specific infringements and exemptions.

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 this Act, however, provides exemptions for insurers and insurance brokers with respect to, inter alia, reinsurance, co-insurance, loss assessment and information exchange for risk management.

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Competition Law 2018 applies to 'undertakings', which are defined as organisations and sole proprietorships conducting business activities, and include, inter alia, 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 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?

No. See question 7.

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

An NCC investigation can be initiated by whistle-blowers (via leniency programmes), 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 exists.

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.

Once the investigation is concluded, the NCC chairperson must establish a council comprising NCC members to decide on the case. The council may request the investigating body (ie, the Competition Investigation Agency) to conduct an additional investigation for a maximum of 60 calendar days if the evidence is found insufficient to ascertain a cartel violation or open 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.

Investigative powers of the authorities

10 | 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;
- (via its subordinate Competition Investigation Agency) collect information and conduct 'investigative measures'; and
- request other competent authorities to:
  - temporarily seize evidence, facilities used to commit the violation, licences or practising certificates; and
  - search vehicles, objects or premises.

Court orders are not required to invoke these investigative actions and interim measures.

INTERNATIONAL COOPERATION

Inter-agency cooperation

11 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The VCCA has engaged in various multilateral and bilateral cooperation programmes with international organisations and national competition watchdogs, ranging from ICN, UNCTAD, to OECD and Japan Fair Trade Commission. For the time being, these programmes mainly focus on competition policy making and enforcement experience.

Given the Competition Law 2018's widened scope of governance (see question 7), the NCC is expected to continue and reinforce co-operation on areas such as consultation and information exchange with its overseas counterparts to detect, investigate and prosecute any potential cross-border infringements.

Interplay between jurisdictions

12 | 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?

We 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 remains to be seen.

CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

See questions 2 (relevant authorities), 9 (typical investigation and adjudication proceedings by NCC) and 16 (appeal process).

Burden of proof

14 | 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 prosecutable. If the offence is established, the onus will shift to the defendant to establish a defence. The burden also falls on the undertaking seeking exemption under article 14 of the Competition Law 2018 (see question 5) 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 (i) they in fact incurred a loss or damage; and (ii) such loss or damage was caused by the illegal cartel activity. In the absence of such decision by the NCC, in addition to points (i) and (ii), 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 the 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

15 | 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 whistleblowers. However, circumstantial evidence alone may not be sufficient to establish the existence of a crime in a criminal proceeding or to conclude that there exists an anticompetitive agreement prohibited by laws.

Appeal process

16 | 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 in the following steps:

- Within 30 calendar days from the date of receipt of a decision resolving a competition case, 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 him or herself and the remaining NCC members (except for those already partaking in the council for dealing with the competition case).
- 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. This 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 owing to any suspension, adjournment or delay.

SANCTIONS

Criminal sanctions

17 | What, if any, criminal sanctions are there for cartel activity?

As from 1 January 2018, under article 217 of the Penal Code 2015, the following cartels are criminally prosecutable:

- restriction of non-participants' market access or business development;
- removal of non-participants from the market; and
- horizontal cartels with combined market share of at least 30 per cent:
  - price fixing;
  - allocation of market or customers;
  - quota restriction;
  - R&D restriction; and
  - agreements to impose on other businesses conditions on signing commercial contracts 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 are held criminally liable.

With respect to cartels (except bid rigging), primary penalties include:

Constituent elements	Primary sanctions	
	Individual	Corporate
The cartel (i) generates an illegal financial gain of between 500 million dong and 3 billion dong; or (ii) causes loss to another undertaking in the range of 1 billion dong to less than 5 billion dong.	• Fine from 200 million dong to 1 billion dong; or • Non-custodial sentence of up to two years; or • Imprisonment from three months to two years.	• Fine from 1 billion dong to 3 billion dong.
The cartel (iii) falls under either (i) or (ii) above and has been repeated; or (iv) falls under either (i) or (ii) above and was committed with sophisticated and elaborate means; or (v) generates an illegal gain of at least 3 billion dong; or (vi) causes a financial loss to another undertaking of at least 5 billion dong.	• Fine from 1 billion dong to 3 billion dong; or • Imprisonment of one year to five years.	• Fine from 3 billion dong to 5 billion dong; or • Suspension of business 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 dong to 200 million dong or prohibited from holding a position or practising for one to five years. Corporates may be fined from 100 million dong to 500 million dong or prohibited from conducting certain businesses, or mobilising capital for one to three years.

Regarding 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.

The leniency policy does not apply in case of criminal prosecution (see question 26).

The authors are not aware of any criminally prosecuted cartels.

Civil and administrative sanctions

18 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 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 administrative fine imposed cannot exceed the lowest level of criminal monetary fine (see question 17).

In addition to fines, the NCC may impose supplementary penalty (ie, confiscation of illegal gains) on or take remedial measure (ie, 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 Violations will come into effect on 1 December 2019), we have not seen any instance where a violator has been fined under new regulations.

As to past competition cases under the outdated 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 car insurance cartel, was concluded with a total fine (competition proceedings fees included) of 1.8 billion dong imposed on 19 businesses.

Guidelines for sanction levels

19 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, inter alia, general principles with respect to 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 (see question 18). The fine reduction or increase must not exceed the minimum or highest level of fine.

In respect of criminal competition violations, 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 personal background and characteristics.

Mitigating and aggravating factors applicable to administrative and criminal sanctions are as follows:

Factors (*)	Applicable to	
	Administrative sanctions	Criminal sanctions
Mitigating	The violator: • prevents or mitigates inflicted damage, or remedies or compensates for the consequences; • comes forward; arduously assists with the investigation; • is a first-time offender; • commits the offence under duress or due to dependency. Factors already taken into account when applying the leniency policy are not considered mitigating factors.	The violator: • prevents or mitigates inflicted damage; • remedies or compensates for the consequences; • does not or has not inflicted considerable damage; • arduously assists 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. For individuals: The violator: • commits the offence under duress; • turns themselves in; • expresses cooperative attitude or contrition; • makes atonement for their crime. For corporates: • The undertaking has made considerable contributions to social welfare.

Factors (*)	Applicable to	
	Administrative sanctions	Criminal sanctions
Aggravating	The violator: • plays a role in organising the offence; • reoffends; • takes advantages of situations of hardship (eg, war, natural disasters, pandemic) to commit the offence; • continues the offence despite the cessation request from the authority; • conceals the offence; • commits the offence on a large scale (eg, in terms of volume or value of goods).	The violator reoffends or commits dangerous recidivism. In addition, for individuals, abuse of one's power or position to commit the crime is also an aggravating factor.

* Only relevant factors are included.

The list of mitigating factors applicable to criminal sanctions is not exhaustive. The court may accept other factors when deciding on a sentence.

Compliance programmes

20 | 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

21 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Yes. See question 17.

Debarment

22 | 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

23 | 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

24 | 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. We 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

25 | 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 defendants and/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

26 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 the NCC's 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 (see question 6), 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 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.

As of the date of writing, there is 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

27 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?

As discussed in question 26, after the first whistleblower came forward, only two subsequent cartel participants are eligible for a reduced level of fine. The requirements for these parties are essentially the same as for the first whistle-blower.

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 provisions on mitigating factors (see question 19).

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See questions 26 and 27. Other than the policies mentioned above, there is no immunity plus or amnesty plus option, nor a penalty plus regime.

Approaching the authorities

29 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 (see question 26), applications should be filed as soon as possible before the NCC commences a cartel investigation, even if there is currently no formal marker system.

As a practical matter, applying for leniency, for various reasons, 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 cross-border cartel);
- 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 (see question 26), an undertaking should consider carefully if the cartel is criminally prosecutable (see question 17 for constituent elements).

Cooperation

30 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. The wordings of the Law suggest that leniency conditions apply the same to all applicants, regardless of the order in which they come forward. 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/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

31 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 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 the Draft Decree Guiding the Competition Law, all evidence must generally be publicly disclosed, except where it contains State, trade, professional or personal secrets. The latter three will not be unfolded 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.

Settlements

32 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The laws of Vietnam do not cover this issue. Article 86.2 of the Competition Law 2018, however, allows the investigating authority to stay an investigation if: (i) the complainant withdraws the file; and (ii) 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

33 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 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 (see question 26).

Dealing with the enforcement agency

34 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, we believe that leniency application should be made formally in writing.

DEFENDING A CASE

Disclosure

35 What information or evidence is disclosed to a defendant by the enforcement authorities?

All evidence must generally be publicly disclosed, subject to exceptions in certain cases (see question 31).

Representing employees

36 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

37 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Similar to the case in question 36, 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

38 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, corporations might reimburse employees but such amount would not be treated as tax-deductible expenses.

Taxes

39 Are fines or other penalties tax-deductible? Are private damages awards 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

40 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

41 | 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 (see question 19).

UPDATE AND TRENDS

Recent cases

42 | What were the key cases, judgments and other developments of the past year?

Currently, there are two draft decrees related to the Competition Law 2018: the Draft Decree Guiding the Competition Law and the Draft Decree on the Establishment of 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. 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 the introduction of a leniency programme, we anticipate that there will be many more cartel investigations and enforcement.

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

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.

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.
What is the maximum sanction?	For corporations: • A$10 000 000; • if the court can determine 'reasonably attributable' benefit obtained, three times that value; or • if the court cannot determine benefit, 10 per cent of annual turnover in preceding 12 months. For individuals: • up to 10 years in jail or fines of up to A$420,000 per criminal cartel offence; or • a pecuniary penalty of up to A$500 000 per civil contravention.
Are there immunity or leniency programmes?	Yes. The ACCC Immunity and Cooperation Policy sets out the ACCC's policies in relation to applications for both civil and criminal immunity from ACCC-initiated civil proceedings and criminal prosecution.
Does the regime extend to conduct outside the jurisdiction?	Where the cartel conduct occurs outside of Australia, the conduct only falls within the CCA if it is carried on by: • companies carrying on business within Australia; • Australian citizens; or • persons ordinarily resident in Australia.

Austria	
Is the regime criminal, civil or administrative?	The Austrian cartel regime is in essence a civil regime with certain specifics. The investigative phase before the Federal Competition Agency is governed by administrative rules. The proceedings before the Cartel Court follow special civil procedural rules.
What is the maximum sanction?	The Cartel Court may impose a fine of up to 10 per cent of the group's turnover in the previous business year. If the behaviour also qualifies as (severe) fraud, jail terms of up to 10 years may be handed down.
Are there immunity or leniency programmes?	Austria has had a leniency regime since 1 January 2006, which is being used increasingly.
Does the regime extend to conduct outside the jurisdiction?	Austrian competition law also applies to conduct carried out abroad as long as there is some effect on the domestic market.
Remarks	Austria is one of the jurisdictions where many private enforcement cases are pending.

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 company could not 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 cartels 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, an administrative maximum fine of 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, an administrative maximum fine of 2 billion reais. For individuals, the maximum criminal penalty is imprisonment 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 the exterritorial jurisdiction.

Colombia	
Is the regime criminal, civil or administrative?	The regime is administrative, criminal and civil. Administrative sanctions are imposed by the Superintendency of Industry and Commerce (SIC), while criminal and civil sanctions are imposed by criminal and civil courts, respectively.
What is the maximum sanction?	The maximum sanction for corporations represents 100,000 monthly minimum wages (approximately US$25 million for 2019), while the maximum sanction for individuals may be 2,000 monthly minimum wages (approximately US$510,000 for 2019). In the particular case of bid rigging, the maximum sanction is US$260,000, and an individual may face up to 12 years in prison.
Are there immunity or leniency programmes?	Yes. The first in to apply for the programme may obtain full exemption from the fine. The second applicant may obtain reductions between 30 and 50 per cent, depending on the utility of the information and evidence submitted. Subsequent qualified applicants may obtain reductions of up to 25 per cent, depending also on the utility of the information and evidence submitted. Additionally, the criminal law establishes the following benefits in bid-rigging cases: reduction by one-third of the term of imprisonment, reduction of 40 per cent of the fine imposed and reduction of the time period of debarment from government procurement procedures up to five years.
Does the regime extend to conduct outside the jurisdiction?	No, the regime applies to conduct that takes place in Colombia.
Remarks	The importance of granting broader powers to the SIC is currently widely discussed, allowing it to pronounce on private damage claims. The increase in fine levels in 2009 was very important in discouraging companies and individuals from engaging in anticompetitive practices.

Denmark	
Is the regime criminal, civil or administrative?	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. See question 17.
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. See questions 26 to 34.
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?	No penalties on individuals, but substantial fines may be imposed on undertakings. Although the regime is technically civil and administrative, arguably the size of the fines makes it criminal or quasi-criminal in nature for human rights purposes.
What is the maximum sanction?	10 per cent of worldwide group turnover.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes
Remarks	Fines imposed by the EC in cartel cases are high and the trend is towards even higher penalties. To complement the Fining Guidelines and Leniency Notice, the EC introduced a settlement procedure in 2008.

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.

Germany	
Is the regime criminal, civil or administrative?	The regime is mainly administrative, but criminal for offences such as bid rigging and fraud. Consequences under civil law (follow-on damages litigation) now play a very important role as well.
What is the maximum sanction?	The maximum fine is €1 million or, in excess of that, up to 10 per cent of the worldwide turnover generated (in the year preceding the fining decision) by the economic unit to which the infringing corporation belongs. The 10 per cent upper limit, however, only applies to corporations, not individuals.
Are there immunity or leniency programmes?	Yes. Between 2014 and 2018, the German competition authority (FCO) received 269 leniency applications.
Does the regime extend to conduct outside the jurisdiction?	The regime extends to conduct outside the jurisdiction as long as there is also an appreciable effect within Germany.
Remarks	A leniency programme was published by the FCO in 2006; new guidelines on administrative fines came into force in 2013.

Hong Kong	
Is the regime criminal, civil or administrative?	The regime in Hong Kong is a civil one. However, where proceedings are brought by the Commission seeking orders for pecuniary penalties, the applicable standard of proof required of the Commission is a criminal one – that is, proof beyond reasonable doubt – as this involves the determination of a criminal charge within the meaning of article 11 of the Hong Kong Bill of Rights.
What is the maximum sanction?	The maximum financial penalty that the Tribunal can grant for an infringement of the First Conduct Rule is up to 10 per cent of Hong Kong turnover of the relevant undertaking for each year of the infringement, up to a maximum of three years.
Are there immunity or leniency programmes?	Yes, the Commission's Leniency Policy provides immunity for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. In April 2019, the Commission also introduced the Cooperation and Settlement Policy to offer cooperation discounts for undertakings that are willing to cooperate but cannot benefit from the Leniency Policy.
Does the regime extend to conduct outside the jurisdiction?	Yes, the regime applies so long as the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if the agreement is made or given effect to, or the conduct otherwise takes place, outside Hong Kong.
Remarks	Following the first two judgments by the Tribunal this year, there can be no doubt that the Hong Kong competition regime is now fully active, and that any anticompetitive conduct occurring within Hong Kong will be subject to proper investigation and enforcement.

India	
Is the regime criminal, civil or administrative?	The regime is civil in nature.
What is the maximum sanction?	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 continuance of the cartel, whichever is higher, can be imposed.
Are there immunity or leniency programmes?	Leniency programme is available in terms of the Competition Commission of India (Lesser Penalty) Regulations 2009 read with section 46 of the Act.
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.

Indonesia	
Is the regime criminal, civil or administrative?	The enforcement of the ICL by the KPPU falls within the scope of administrative law. To date, there has been no criminal enforcement against alleged violation of the ICL by the police force and public prosecutor.
What is the maximum sanction?	25 billion rupiahs
Are there immunity or leniency programmes?	Not applicable
Does the regime extend to conduct outside the jurisdiction?	The ICL generally applies to any conduct occurring outside Indonesia if the defendant is established and is domiciled or has a direct or indirect subsidiary in Indonesia.
Remarks	Since the implementation of new regulations (ie, KPPU Regulation 1/2019 and SC 3/2019), it remains to be seen how these will apply in practice especially bearing in mind the drastic changes implemented by some of the provisions.

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: amount of damage; no triple damage.
Are there immunity or leniency programmes?	Yes, effective 4 January 2006. Amended as of 1 January 2010. 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.

Kenya	
Is the regime criminal, civil or administrative?	Kenya The Kenyan competition regime is both criminal and administrative, while the Constitution provides for the civil aspect. COMESA The COMESA regime is administrative and has a reference to offences though no penalties or mechanism is provided for enforcement of this criminal aspect.
What is the maximum sanction?	Kenya The CAK can impose a financial penalty of up to 10 per cent of the preceding year's gross annual turnover of the offender in Kenya. The courts may, on conviction of an offender, sentence a person to a term of imprisonment not exceeding five years or a fine not exceeding 10 million Kenya shillings. COMESA The CCC may impose a monetary penalty of US$300,000 provided this penalty does not exceed 10 per cent of the annual turnover of the entities concerned for the preceding business year.
Are there immunity or leniency programmes?	Kenya Kenya has a leniency programme. COMESA COMESA does not have a leniency programme.
Does the regime extend to conduct outside the jurisdiction?	Kenya Yes. The Kenyan competition regime prohibits any cartel conduct, regardless of where the activities take place, which has the object or effect of preventing, distorting or lessening competition in Kenya. COMESA Similarly, the COMESA competition regime may potentially capture cartel conduct outside COMESA that has the object or effect of prevention, restriction or distortion of competition within COMESA.
Penalties	Fines for failure to file, implementation before clearance or breach of conditions set by the Competition Council.

Korea	
Is the regime criminal, civil or administrative?	Administrative and criminal, with civil damages actions available.
What is the maximum sanction?	10 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 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 public inquiry. In January 2017, the IFT published the Guidelines on the Immunity and Reduction of Sanctions Programme.

Netherlands	
Is the regime criminal, civil or administrative?	The ACM both investigates and adjudicates on cartel matters in the public interest on the basis of administrative law procedures.
What is the maximum sanction?	The maximum fine is set by multiplying the cap of 10 per cent of a company's turnover by the numbers of years of the cartel infringement, subject to a maximum duration of four years. In the case of a repeated infringement, the maximum fine level will double. As a result, a maximum fine of 80 per cent of a company's turnover can be imposed on repeat offenders. Fines for individuals who oversaw and gave instructions regarding cartels have also increased from €450,000 to €900,000.
Are there immunity or leniency programmes?	A leniency programme has been in place since 2002 on the basis of a policy rule from the Minister of Economic Affairs.
Does the regime extend to conduct outside the jurisdiction?	The Act applies to all conduct that affects competition on part or the whole of the Dutch market. The place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.
Remarks	The Dutch cartel prohibition contained is a copy of article 101 TFEU, excluding the effect on interstate trade criterion.

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 authorities, and has to date entered into three such agreements in respect of competition law enforcement. The first cross-border enforcement cooperation agreement was signed on 22 June 2017 with the Japan Fair Trade Commission, while the second cross-border enforcement cooperation agreement was signed on 30 August 2018 with the Indonesian Commission for the Supervision of Business Competition. The third cross-border enforcement agreement, which is also the CCCS's first agreement with a foreign enforcement authority that covers both competition and consumer protection laws, was signed on 17 September 2019 with the Competition Bureau Canada.

Slovenia	
Is the regime criminal, civil or administrative?	The regime is a mix of administrative and criminal.
What is the maximum sanction?	Administrative 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. Criminal 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.

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 turnover of the undertaking concerned during the previous financial year.
Are there immunity or leniency programmes?	Yes, a system for immunity and leniency, largely similar to the EU 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?	For undertakings, the regime is civil and administrative. However, fines for hard-core restraints do also qualify as criminal sanctions inter alia in the meaning of the European Convention of Human Rights and investigations should in principle respect the respective procedural rights. For individuals, there are no direct criminal sanctions for cartel activities. However, individuals acting for an undertaking (but not the undertaking itself) and violating an amicable settlement decision, any other legally enforceable decision or a court judgment in cartel matters, or intentionally failing to comply or only partly complying with the obligation to provide information, may be fined.
What is the maximum sanction?	The maximum administrative fine for undertakings is 10 per cent of the consolidated net turnover generated in Switzerland during the last three business years (cumulative). The competition authorities may impose administrative sanctions on undertakings if they violate an amicable settlement, decision or judgment to their own advantage. The maximum criminal sanction for individuals is 100,000 Swiss francs.
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: (i) the nationality of the cartel members; (ii) where the cartel activity took place; or (iii) 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. 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?	All
What is the maximum sanction?	Fines: up to a maximum of 10 per cent of the infringing undertaking's worldwide turnover in the previous business year; individuals can receive unlimited fines. Imprisonment: a maximum custodial sentence of five years.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes, provided that the agreement is implemented (or is intended to be implemented) at least in part in the UK.

United States	
Is the regime criminal, civil or administrative?	The US regime has criminal, civil and administrative elements. Criminal actions are, by DOJ policy, reserved for per se violations of the antitrust laws, which generally include price-fixing agreements, bid rigging, and market allocation agreements.
What is the maximum sanction?	For corporations, the maximum criminal fine is the greater of (i) US$100 million, (ii) twice the gross gain from the offence, or (iii) twice the gross loss to victims of the offence. For individuals, the maximum criminal fine is US$1 million and up to 10 years' imprisonment. In civil litigation, there are no maximum damage awards, and private parties are entitled to recover treble their actual damages plus attorneys' fees.
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 ACPERA, 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 (i) import commerce or (ii) foreign commerce that has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. In civil actions, the plaintiff bears the additional burden of establishing that their claim arose from that direct, substantial and reasonably foreseeable effect.

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 guideline is available at present. There has been no prosecution under the new regime. The new competition watchdog has not been formally established as yet.

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