CARTEL REGULATION 2022

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LEXOLOGY
Getting the Deal Through

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

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

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

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

LEXOLOGY
Getting the Deal Through

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Foreword

A Neil Campbell
McMillan LLP

This 22nd edition of *Cartel Regulation* is the most current and comprehensive source of information about cartel laws and enforcement around the world.

Anti-cartel provisions are a core pillar of every competition law regime. This reflects the broad consensus that certain types of competitor coordination are so unlikely to have pro-competitive or efficiency-enhancing benefits that they can safely be prohibited and penalised without a case-specific assessment of anti-competitive effects.

The global pandemic prompted competition law enforcement agencies to reassess their mandates and priorities. Many agencies signalled a willingness not to enforce cartel laws against competitor collaborations that have legitimate positive health objectives. However, in most cases this has been accompanied by clear warnings that attempting to use covid-19 as a cover for conduct that is not in the public interest would not be accepted and that cartel laws will continue to be enforced rigorously in such situations.

The evolving digital economy is another central preoccupation for competition agencies around the world. While much of the focus relates to unilateral conduct and market power, there is also increasing attention to new forms of competitor agreements, including collusion that may be facilitated or implemented through algorithms. The gathering and analysis of increasingly large and diverse amounts of electronic evidence is another challenge for cartel enforcement.

A third overriding theme is the apparent decline in the use of immunity, amnesty and leniency regimes in many jurisdictions. The cumulative deterrent effects of large penalty and damage exposures in an increasing number of jurisdictions may be contributing to some reductions in cartel activity. But the complexity, time and costs for cooperating parties, particularly in cases involving multiple jurisdictions, may also be reducing the attractiveness of these programmes. Many agencies are responding by reinvigorating their bid-rigging detection, whistle-blower, electronic evidence gathering and other monitoring and enforcement mechanisms.

Despite the 'soft convergence' globally regarding the importance of cartel enforcement, there are significant differences between regimes. Cross-border cases are particularly complex due to differences in institutional design, enforcement processes, legal standards, and sanctions and remedies. The criminal liability and vast civil damages exposures in some jurisdictions add further challenges for parties under investigation and their advisors, as well as for enforcement agencies. The extent and depth of inter-agency coordination are increasing, but remain more constrained and less frequent than in merger reviews.

Cartel Regulation 2022 provides a detailed explanation of how cartel regimes work in practice, including recent developments over the past year and an overview of future changes expected in each jurisdiction. In addition to the in-depth coverage provided for 29 of the most active jurisdictions, *Cartel Regulation 2022* also includes new chapters for Belgium and Costa Rica.

The deskbook is structured to provide consistent presentation and ready access to the relevant information about each subject in each jurisdiction. The country profiles include overview material on the legislation and enforcement institutions, information about the jurisdictional and substantive coverage of the regime, and detailed discussions regarding the design and operation of immunity and leniency programmes as well as contested proceedings and penalties. The increasing scope for private, collective or class actions by affected direct or indirect purchasers, and how they interface with agency proceedings, are addressed as well. The 2022 deskbook also summarises changes in laws and enforcement policies arising from the coronavirus pandemic.

The chapters in *Cartel Regulation 2022* have been prepared by leading experts in each jurisdiction. We sincerely appreciate their efforts to provide the most up-to-date and thorough reports on their regimes, which include practical advice on how enforcement works and tips for 'getting the fine down'. I would also like to thank the *Lexology Getting the Deal Through* team for all the work they do to produce this excellent annual volume, especially during this year's challenging conditions.

Argentina

Miguel del Pino and Santiago del Río
Marval O'Farrell Mairal

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

The Antitrust Law created a new antitrust authority, the National Competition Authority, a decentralised and separate body within the Executive Branch.

The new antitrust authority will include three divisions:

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

However, as this new Authority is not fully operational, the double-tier system comprising the Antitrust Commission and the Secretary of Trade of the Ministry of Production continues to be the enforcement authority.

Changes

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

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

There is a new bill, approved by the Senate on 4 February 2021, and is expected to be analysed by the House of Representatives during its ordinary sessions of 2021. There is a high level of uncertainty regarding when the bill will be discussed in the House of Representatives, as it has not been set out in the official agenda at the time of writing.

The bill sets out to eliminate the controversial and superfluous section 29 of the current Antitrust Law, which stipulates that the Antitrust Tribunal can authorise the execution of agreements that may be deemed to restrict competition, provided those agreements are not detrimental to the general economic interest.

In addition, and given the Senate's modifications, the bill now proposes to eliminate the leniency programme.

Substantive law

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

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

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

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

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

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

There is a bill that sets out to eliminate section 29, and is expected to be analysed by the House of Representatives during its ordinary sessions of 2021.

Joint ventures and strategic alliances

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

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

Under section 4 of Antitrust Law No. 27,442 (the Antitrust Law), all of its provisions apply to any individual or corporation, public or private, for-profit or not-for-profit, engaged in economic activities within all or part of the country and those engaged in activities abroad so long as their actions and agreements affect Argentina.

Extraterritoriality

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

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

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

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

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

Export cartels

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

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

Industry-specific provisions

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

No, there are not.

Government-approved conduct

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

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

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

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

- the name and domicile of the claimant;
- a specific description of the claim's purpose;
- the facts that support the claim;
- a summary of the applicable law; and
- evidence for analysing the claim.

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

If the explanations are regarded as conclusive or if there is not enough evidence for the claim, the docket may be archived. Otherwise, the Antitrust Commission must continue the investigation and formally notify the alleged infringers, who must file their defence and offer the evidence to be produced within 20 business days.

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

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

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

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

Also, anyone filing a false or scam claim may be subject to the penalties provided under Antitrust Law No. 27,442 (the Antitrust Law).

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

Investigative powers of the authorities

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

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

Interplay between jurisdictions

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

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

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

Burden of proof

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

According to section 2 of Antitrust Law No. 27,442 (the Antitrust Law), hard-core cartels are presumed to be anticompetitive by themselves. For this to be the case, there is a reversal of the burden of proof, and defendants must demonstrate that the cartel was not implemented or had no effect. Also, they must demonstrate the lack of damages to the general economic interest.

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

Circumstantial evidence

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

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

Appeal process

18 | What is the appeal process?

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

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

- the imposition of sanctions;
- the cessation or abstention of an anticompetitive practice;
- the conditioning or rejection of the approval of a transaction;
- the rejection of the claim;
- the rejection of the application of the Leniency Programme; and
- the cessation or abstention of conduct to prevent damage, or to reduce its magnitude, its continuance or aggravation.

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

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

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

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions in Antitrust Law No. 27,442 (the Antitrust Law).

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

Civil and administrative sanctions

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

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

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

If both are applicable, the highest will be imposed. However, if none of them is applicable, the fine could be up to 200 million Adjustable Units. All the amounts set out by the Antitrust Law are fixed in Adjustable Units, adjusted on an annual basis. The latest update of the Adjustable Unit stands at 55.29 Argentine pesos.

The fine amount is calculated considering:

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

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

The fine can also be set up jointly with the directors, managers, administrators and supervisory members of the infringing company or its parent company that had caused the anticompetitive conduct either by their action or inaction.

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

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

Guidelines for sanction levels

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

There are no guidelines regarding penalties.

Compliance programmes

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

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

Director disqualification

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

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

Debarment

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

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

Parallel proceedings

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

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

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

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

The Antitrust Commission is not part of the proceedings generated by the private action unless expressly requested by the court. If, however, the Antitrust Commission has investigated the anticompetitive practice and issued an opinion, courts have relied on the findings of the regulator, and have only focused on the link between the already proven conduct and the claim for damages rather than retracing the investigation.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

According to section 62 of Antitrust Law No. 27,442 (the Antitrust Law), any individual or legal entity suffering damage from any conduct or act prohibited under the Antitrust Law has the right to file a private action for damages under the civil law provisions.

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

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

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

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

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

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

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

Class actions

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

Under section 43 of the Argentine Constitution, class actions may be submitted by the affected person, the ombudsman and associations authorised by law. Both active and passive legitimation in these cases are quite broad and cover both victims and consumer associations.

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

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

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

COOPERATING PARTIES

Immunity

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

Antitrust Law No. 27,442 (the Antitrust Law) establishes the Leniency Programme, setting out two different scenarios for infringing parties; namely, an exemption scenario and a reduction scenario, both based on a race-to-the-door structure.

For the full exemption to apply, the petitioner must:

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

There is a bill that sets out to eliminate the leniency programme, expected to be analysed by the House of Representatives during its ordinary sessions of 2021.

Subsequent cooperating parties

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

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

Going in second

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

The Antitrust Law includes a 'leniency plus' provision, meaning that those parties not complying with the Leniency Programme requirements, but during the proceedings disclose or recognise another different coordinated conduct, can obtain an exemption on the latter, and a one-third reduction of the sanction or fine that would otherwise be applicable for being part of the first anticompetitive conduct.

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

Approaching the authorities

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

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

Cooperation

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

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

Confidentiality

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

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

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

Settlements

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

Before the Antitrust Commission issues its final decision, the alleged infringer may commit itself to the immediate or gradual cessation of the actions for which it is being investigated or to the amendment of the aspects related to it. The commitment must be approved by the Antitrust Commission for the procedure to be suspended. The Antitrust Law also provides that the docket will be archived if, after three years of the fulfilled commitment, there is no relapse.

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

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

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

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

DEFENDING A CASE

Disclosure

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

Under Antitrust Law No. 27,442 (the Antitrust Law), all the dockets pending before the Antitrust Commission are secret, and only the parties can access them.

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

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

Representing employees

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

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

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

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

Taxes

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

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

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

International double jeopardy

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

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

Getting the fine down

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

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

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

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

UPDATE AND TRENDS

Recent cases

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

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

As a result of the criminal investigation, the Antitrust Commission initiated an investigation on bid-rigging allegations and requested the involved parties to provide explanations. The Antitrust Commission has decided to deepen the investigation and to produce evidence.

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

Regime reviews and modifications

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

As reported above, there is a new bill expected to be analyzed by the House of Representatives during its ordinary sessions of 2021.

With respect to the leniency programmme, the amended version of the Bill including the Senate's modifications now proposes to eliminate the leniency programme itself. It remains to be seen whether the House of Representatives will approve or reject this amendment.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

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

Changes

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

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

- clarifies that cartel conduct must take place in 'trade or commerce' (ie, within Australia or between Australia and places outside Australia);
- repeals the per se prohibition on exclusionary provisions and expands the definition of 'output restriction' in the prohibition against cartel conduct to cover restrictions on acquisition (in addition to restrictions on production, capacity and supply); and
- amends the joint venture (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 that a party wishing to rely on the exception must prove the relevant matters 'on the balance of probabilities' (previously, a party only needed to produce evidence of 'a reasonable possibility' that relevant matters exist, in which case the onus would switch to the ACCC or prosecution).

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

Substantive law

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

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

A cartel provision is a provision that has:

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

To establish criminal liability, the elements of the offence must be proven to the criminal standard of beyond reasonable doubt. It is not necessary to show dishonesty or that the parties knew it was cartel conduct or illegal. The prosecution must, however, prove that:

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

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

Joint ventures and strategic alliances

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

Extraterritoriality

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

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

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

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

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

Export cartels

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

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

Industry-specific provisions

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

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

The ACCC has only made one class exemption to date, which allows eligible small businesses to collectively negotiate with customers or suppliers. The ACCC requires that businesses complete and submit a one-page notice form before they can benefit from the exemption.

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

Government-approved conduct

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

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

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

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

INVESTIGATIONS

Steps in an investigation

11 What are the typical steps in an investigation?

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

Parties to the alleged conduct will usually be asked to provide information, produce documents and appear before the ACCC to answer questions. The ACCC may do this on a voluntary basis but will more typically use its evidence-gathering powers under section 155 of the Competition and Consumer Act 2010 (Cth) (CCA).

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

- refer the matter to the CDPP for possible criminal prosecution (serious cartel offences);

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

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

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

Investigative powers of the authorities

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

The ACCC has broad investigatory powers under the CCA. Obstruction or inciting the obstruction of an ACCC investigation is a criminal offence.

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

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Australian Competition and Consumer Commission (ACCC) regularly coordinates with international agencies, including assisting 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 broad discretion to disclose protected information (ie, information provided to the ACCC in the course of an investigation) to foreign regulators and does not require a waiver to disclose the information. In practice, the ACCC usually requests a waiver from an immunity applicant before disclosing their information to a foreign regulator.

Interplay between jurisdictions

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

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

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

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

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

- If the respondent does not admit liability and contests the matter, the case will go to a civil trial on liability. The usual pretrial steps will be undertaken, including 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).

Criminal proceedings are commenced when the Commonwealth Director of Public Prosecutions (CDPP) lays charges and a court attendance notice or summons is sent to the defendant and filed with the court. From there:

- A pretrial committal process takes place before a magistrate. The committal process differs between jurisdictions in Australia. In some jurisdictions, the magistrate decides if there is sufficient evidence for the matter to proceed to a criminal trial. In other

jurisdictions, the matter can proceed to trial on the basis of a prosecution certification. In either case, at the end of the committal, a defendant will enter a formal plea of guilty or not guilty. During the committal process, the CDPP will provide the defendant with a brief of evidence containing both material on which the CDPP proposes to rely and other material relevant to the defence.

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

Burden of proof

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

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

Circumstantial evidence

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

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

Appeal process

18 | What is the appeal process?

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

The Australian Competition and Consumer Commission 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, the defendant may appeal:

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

SANCTIONS

Criminal sanctions

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

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

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

- A$10 million;
- three times the total benefits that have been obtained and are reasonably attributable to the commission of the offence; or
- where the benefits cannot be determined, 10 per cent of the corporate group's annual turnover connected to the supply of goods and services in Australia in the preceding 12 months.

The court can also impose injunctions.

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

- In 2017, Japanese cargo shipping liner NYK 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.
- In 2020, Wallenius Wilhelmsen Ocean AS, a Norwegian-based global shipping company, pleaded guilty to criminal cartel conduct and in 2021 was fined A$24 million.

Criminal charges have also been laid against:

- Australia and New Zealand Banking Group, Citigroup and Deutsche Bank, as well as five senior executives from the banks; and
- Vina Money Transfer, a money transfer business, as well as five individuals involved in the business.

Civil and administrative sanctions

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

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

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

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

The highest penalty imposed under the cartel laws was a A$46 million penalty paid by Japanese-based automotive parts supplier Yazaki Corporation in 2018, which was increased on appeal from an original penalty of A$9.5 million. The ACCC's action followed similar enforcement actions against Yazaki and other cartel participants by competition regulators in the United States and Japan.

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

Guidelines for sanction levels

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

Civil penalties

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

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

Criminal penalties

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

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

Compliance programmes

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

In Australia, one of the factors relevant to the court's decision to impose civil penalties for an infringement of the Competition and Consumer Act 2010 (Cth) (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 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 into 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 that was actively implemented and whether the implementation was successful (ie, whether the contravention was an isolated incident). That is, was the compliance policy 'one to which mere lip-service' was paid. Other relevant factors include:

- whether the programme was regularly updated and involved employees attending training at 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

23 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 Commonwealth Director of Public Prosecutions can seek the imposition of a disqualification order.

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

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

Debarment

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

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

Parallel proceedings

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

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

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

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

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

The Australian Competition and Consumer Commission (ACCC) can also take a form of representative proceeding on behalf of private parties who have suffered loss or damage as a result of cartel conduct.

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

Class actions

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

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

In Australia, a class action can be commenced if:

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

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

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

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

COOPERATING PARTIES

Immunity

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

The Australian Competition and Consumer Commission (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 Commonwealth Director of Public Prosecutions (CDPP)), the ACCC is the sole point of contact for applicants seeking civil or criminal immunity. Annexure B to the Prosecution Policy of the Commonwealth sets out the CDPP's policy when considering an application for immunity from criminal prosecution for serious cartel offences.

Civil immunity

The criteria for conditional civil immunity are:

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

Generally, the ACCC will not grant conditional immunity if, at the time an application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the Competition and Consumer Act 2010 (Cth) (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 the applicant a written undertaking that grants conditional immunity subject to the applicant providing ongoing cooperation through the criminal proceedings. Once these conditions are fulfilled by the immunity applicant, the immunity becomes final.

Subsequent cooperating parties

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

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

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

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

Going in second

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

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

A party is eligible for amnesty plus if it:

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

Approaching the authorities

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

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

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

Cooperation

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

To be eligible for criminal or civil immunity, the applicant must cooperate and provide full, frank and truthful disclosure in making the application and in any subsequent investigation or court proceedings. An immunity application should be made as soon as possible but can be made after the ACCC has commenced an investigation. An application for criminal immunity is made to the ACCC at the same time as the application for civil immunity and the ACCC is responsible for both the civil and criminal investigations.

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

Confidentiality

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

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

granted in relation to documents that are commercially sensitive or prejudicial to the interests of the party, or both.

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

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

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

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

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

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

Settlements

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

Civil offences

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

Criminal offences

In criminal cases, the defendant can admit to cartel conduct and, together with the CDPP, file an agreed statement of facts and admissions with the court. However, unlike in civil cases, it is not appropriate that the defendant, ACCC and CDPP propose a fine to the court. The defendant is permitted to make submissions to the court as to the appropriate penalty range and the prosecution can respond to the range proposed and indicate whether in the prosecution's submission it would be open to the court to impose a sentence within that range, or whether imposing a sentence within that range might lead to appellable error. However, the appropriate penalty is a matter for the court in its discretion. The court will take into account a range of factors in sentencing, including:

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

Deferred prosecution agreements are not used in Australia, at least in a cartel context. While there is currently a bill before the Federal Parliament to establish a deferred prosecution agreement regime in Australia in relation to a specific set of serious corporate criminal offences, it is not intended to apply to cartel offences. In August 2020, the Australian Law Reform Commission provided feedback on this proposal as part of its report into Australia's corporate criminal responsibility regime and recommended some revisions.

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

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

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

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

DEFENDING A CASE

Disclosure

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

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

In criminal proceedings, the prosecution owes a duty of disclosure to the court, not to the accused. However, common law principles require that defendants are entitled to know the case against them, including the evidence that will be adduced in support of the charges and any other material that may be relevant to the defence. These principles are supplemented by a range of state and territory legislation, which requires the prosecution to disclose certain material to defendants. The Commonwealth Director of Public Prosecutions' (CDPP) '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.

Representing employees

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

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

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

Civil penalties

A company must not indemnify a person against a civil liability or legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Criminal penalties

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

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

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

Taxes

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

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

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

International double jeopardy

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

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

Getting the fine down

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

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

- an early guilty plea by the contravener;

- cooperating and assisting the authorities with their investigation; and
- implementing a compliance programme with appropriate anti-trust compliance structures, guidelines and systems so as to prevent the repetition of any similar anticompetitive conduct.

UPDATE AND TRENDS

Recent cases

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

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

On 30 May 2019, the Federal Court ordered PT Garuda Indonesia Ltd (Garuda) to pay a penalty of A$19 million for its collusive arrangement on fees and surcharges for air freight services, ending the ACCC's long-running case against Garuda, which commenced in 2009. Garuda appealed the A$19 million penalty but withdrew its appeal in April 2021.

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

Criminal cartel charges against another member of the cartel, Wallenius Wilhelmsen Ocean AS (WWO), were laid in August 2019, and WWO entered a guilty plea in the Federal Court on 18 June 2020. In February 2021 WWO was fined A$24 million.

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

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

On 13 May 2020, the ACCC commenced civil proceedings against Delta Building Automation Pty Ltd and its sole director, Timothy Davis, for alleged bid rigging in late 2019. The ACCC alleges the accused met with a competitor and attempted to fix the price of their respective bids in response to the National Gallery's building management system tender.

On 2 June 2021, a jury in the Federal Court unanimously acquitted Country Care Group, a manufacturer of healthcare equipment, as well as its managing director and a former employee of eight criminal cartel charges. This was the first competition law matter heard by a jury in Australia. The trial lasted 11 weeks. Criminal proceedings were commenced in February 2018 in relation to conduct that allegedly amounted to bid rigging and price fixing in the market for mobility aids.

In August 2021, criminal charges were dropped against:

- the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), as well as a divisional branch secretary; and
- a senior executive from Citigroup, in relation to the alleged banking cartel.

Regime reviews and modifications

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

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

Under the revised policy, the applicant will be required to enter into a cooperation agreement that sets out the 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.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Cartel Act 2005 and the Competition Act 2002.

Relevant institutions

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

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

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

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

Changes

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

There have been recent changes to the relevant legislation (ie, to the Cartel Act 2005 and the Competition Act 2002). The Austrian Cartel and Competition Law Amendment Act 2021 entered into force on 10 September 2021. Some of the changes have been made to implement EU Directive 2019/1 (the ECN+ Directive). With regard to cartel legislation, there have been some (minor) changes to the rules governing the investigative powers of the Austrian Federal Competition Authority, sanctions and the leniency program.

Substantive law

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

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

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

Joint ventures and strategic alliances

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

Cooperation between undertakings in the framework of joint ventures and strategic alliances is generally subject to the Austrian and EU cartel laws.

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

The Cartel Act applies to legal entities and to individuals acting as sole entrepreneurs.

Individuals may also be held accountable to the extent that the conduct in question constitutes a criminal offence (eg, bid rigging).

Extraterritoriality

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

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

Export cartels

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

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

Industry-specific provisions

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

There are no industry-specific infringements.

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

There are no sector-specific cartel offences.

Government-approved conduct

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

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

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

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

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

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

Investigative powers of the authorities

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

Interplay between jurisdictions

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

There is a significant interplay with a number of different jurisdictions, in particular with other European Union member states, and especially with Germany, for which cross-border coordination plays an important role. Such interplay impacts investigations, in particular their time frames, as the agencies endeavour to coordinate their actions to avoid putting at risk the effectiveness of the respective investigations. There is also intense cooperation with the EU Commission (within the framework and based on article 22 Regulation 1/2003) with respect to assistance in carrying out inspections.

Regarding the enforcement of cartel law in cross-border cases, the Cartel Court recently decided in a sugar cartel case, that – because of the ne bis in idem principle – the Court lacked jurisdiction to decide on or fine a cartel member that had already been subject to a decision of Germany's Federal Cartel Office. The BWB appealed this decision, and the Austrian Supreme Cartel Court has referred the matter to the European Court of Justice for a preliminary ruling (case C–151/20 – *Nordzucker and others*).

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

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

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

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

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

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

Burden of proof

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

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

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

Circumstantial evidence

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

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

Appeal process

18 | What is the appeal process?

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

The appeal can be based on questions of law. Appeals based on facts are rarely allowed; only in cases where there are serious doubts as to the correctness of the facts underlying the decision of the Cartel Court are such appeals permitted. This criterion is interpreted very narrowly by the Supreme Cartel Court.

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

SANCTIONS

Criminal sanctions

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

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

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

Civil and administrative sanctions

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

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

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

Guidelines for sanction levels

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

There are no guidelines in place for penalties. However, the Cartel Act establishes some basic criteria, which are relevant for the calculation of the fine, including:

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

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

Compliance programmes

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

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

Director disqualification

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

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

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

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

Debarment

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

According to section 78(1) of the Austrian Federal Procurement Act, undertakings are to be excluded from public procurement proceedings in the event of a final conviction for specific criminal offences, which could raise doubts about the company's reliability. This decision is to be taken by the respective contracting (public) institution, which after an infringement must assess whether the company in question is reliable. In this respect, the company must prove that it has implemented appropriate self-cleaning measures to be admitted to public procurement procedures in the future.

Parallel proceedings

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

Competition and criminal law enforcement agencies regularly pursue the same conduct (and cooperate in their investigations), although with a different focus. Whereas criminal law enforcers focus on the prosecution and sanctioning of the individuals involved, competition law agencies may only pursue and sanction undertakings for their involvement in cartel activities. It is being debated, but has not yet been subject to a Supreme Court decision, whether an undertaking's involvement in cartel activities that qualify as infringements of cartel and criminal law, may – in light of the ne bis in idem principle – be pursued and sanctioned by both cartel law enforcers (based on the Cartel Act 2005 and the Competition Act 2002) and criminal law enforcers (based on criminal law, in the framework of corporate criminal liability).

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

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

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

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

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

Class actions

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

No class actions in the strict sense may be brought in Austria. However, potential claimants may be able to accumulate their claims (eg, by way of assignment of claims to special purpose claims vehicles).

COOPERATING PARTIES

Immunity

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

An immunity and leniency programme operated by the Federal Competition Authority (BWB) is available for companies under Austrian competition legislation. Only the company which is 'first in' to cooperate within the framework of the leniency programme may benefit from full immunity, provided that all other conditions are fulfilled. If the company is not the first company to file such a request, it may qualify for a reduced fine under the leniency programme. With regard to the potential benefits for leniency applicants in private litigation, the relevant provisions of EU Directive 2014/104 (the Damages Directive) have been transposed into national law (the Cartel Act 2005). Accordingly, the specific leniency documents (in particular the leniency statement) are protected from production or disclosure in private litigation. Also, there are benefits in terms of limitations to joint and several liability.

Subsequent cooperating parties

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

Subsequent cooperating parties (ie, the second, third and further applicants) will generally not qualify for full immunity, but may still qualify for a reduction of fines if they provide evidence constituting a 'significant added value' and all other general conditions under the Austrian leniency programme are met. According to the Federal Competition Authority's *Leniency Manual*, the following reductions can be granted:

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

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

Going in second

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

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

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

Approaching the authorities

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

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

Cooperation

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

All leniency applicants (irrespective of their position) are required to fully and genuinely cooperate throughout the whole procedure to benefit from the programme (ie, full immunity or a reduction in fines). The cooperation obligation includes, among other things, an obligation to present all available evidence and information and to treat the leniency application in strict confidence.

Confidentiality

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

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

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

Settlements

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

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

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

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

DEFENDING A CASE

Disclosure

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

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

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

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

Representing employees

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

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

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

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

Taxes

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

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

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

International double jeopardy

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

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

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

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

Getting the fine down

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

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

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

UPDATE AND TRENDS

Recent cases

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

The Federal Competition Authority (BWB) and the criminal law enforcement agencies are investigating a major cartel case in the construction sector that dates back to 2017. At the end of October 2020, and subsequently in April and July 2021, the BWB issued several announcements on its website that it had filed applications with the Cartel Court to impose fines on various companies following these investigations. At the end of September 2021, the BWB communicated on its website that, following settlement talks, a major Austrian construction company committed to pay a fine of €62.35 million and the BWB will file a corresponding request with the Cartel Court, which needs to adopt the formal decision for the imposition of a fine. Once imposed, this will be the biggest fine ever imposed in Austria against a company in antitrust proceedings.

Regime reviews and modifications

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

There have been recent changes to the relevant legislation (ie, to the Cartel Act 2005 and the Competition Act 2002). The Austrian Cartel and Competition Law Amendment Act 2021 entered into force on 10 September 2021. Some of the changes have been made to implement EU Directive 2019/1 (the ECN+ Directive).

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

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

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

The Competition College decides on the merits of cartel cases that are neither closed nor settled by the IPS.

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

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

Changes

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

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

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

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

Joint ventures and strategic alliances

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

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

Non-concentrative alliances are agreements that fall under antitrust rules and, in particular, under article IV.1 CEL.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

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

Individuals engaged in cartel activities acting in relation to the business activity of the undertaking may be held liable for antitrust infringements. Fines ranging from €100 to €10,000 may be imposed on individuals. Individuals may apply for immunity from fines. Individuals can only be fined if the Belgian Competition Authority (BCA) found that the undertaking concerned infringed article IV. 1 CEL or article 101 Treaty on the Functioning of the European Union (TFEU).

Extraterritoriality

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

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

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

On 27 July 2015, the BCA adopted provisional measures imposing on a professional association, the Fédération Equestre Internationale (FEI), the provisional suspension of an exclusivity clause (contained in its World General Regulation) in several EU member states and in countries outside the EU (among others, the United States, China, Mexico and Qatar). This decision has been confirmed by the Brussels Court of Appeal (see Case 2015/MR/1, *Fédération Equestre Internationale*, judgment of 28 April 2016). The parties reached a settlement in January 2017. Following a new complaint in 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 Belgian territory (or part thereof).

Industry-specific provisions

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

There are no industry-specific infringements, defences or exemptions in Belgian law.

Government-approved conduct

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

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

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Investigation and Prosecution Service (IPS) of the Belgian Competition Authority (BCA) is in charge of investigating cartels. It may initiate an investigation following a complaint, ex officio or at the request of a ministry, or regulators in charge of supervising an economic sector while taking into account the priorities of the BCA.

If the IPS considers that the information gathered is not sufficient to continue investigating the case, it closes the file. In such a case, if the investigation was following a complaint, the BCA can only close the case by a reasoned decision concluding that the complaint is inadmissible or ungrounded, or prescribed by time limitation (article IV.44 Belgian Code of Economic Law (CEL)). The IPS can also drop a complaint by a reasoned decision in view of the available resources and the priorities. This decision shall be notified by registered letter to the complainant, indicating that the file can be consulted at the BCA's premises. The complainant may bring an appeal to the president of the BCA within a month against the decision to close the case.

If the IPS considers that the information gathered is sufficient to continue investigating the case, the IPS may ask the companies whether they are interested in initiating discussions on settlement proceedings. In the event that no settlement is reached or possible, the IPS prepares a statement of objections indicating the antitrust objections and defining the infringement. The statement of objections is sent to the companies (and individuals) concerned. They should reply to the statement of objections within two months and may access the non-confidential

version of the case file. The written phase of the investigation is then closed. Based on the replies or in the absence thereof, the IPS submits a draft decision to the president of the BCA. The draft decision is also notified to the parties. In the draft decision, the IPS states the objections, defines the infringement and proposes a decision to be taken by the Competition College. The parties are also allowed to access the non-confidential version of the case's file. They should submit their written observations within one month. The hearing before the Competition College shall take place within two months of submission of the written observations. The Competition College decides on the merits of the case within one month after the hearing.

Investigative powers of the authorities

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

Members of the IPS may conduct unannounced inspections with the prior authorisation of an examining judge (dawn raids). In this case, they can access the premises of the undertakings, transport means and any other location where relevant information may be found. Members of the IPS can also access the 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, in both 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 under either 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 result in the imposition of fines or penalties.

The members of the IPS may hear any witness, both orally and in written and draft minutes of any statement made by any witness or of any infringement or fact (which constitutes prima facie evidence).

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Belgian Competition Authority (BCA) is a member of the European Competition Network, the European Competition Authorities, the International Competition Network and the Competition Committee of the OECD.

Interplay between jurisdictions

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

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

This cooperation helps the BCA to collect evidence in different jurisdictions. On the other hand, it enables the cartel participants to claim a reduction of the fine on the basis of the non bis in idem principle, should a neighbouring NCA previously penalise the company according to the same facts (see the BCA Decision of 28 February 2013 in Case 13–10–06 *Meel* and the judgment of the Brussels Court of Appeals of 12 March 2014 in Case 2013/MR/6 *Brabomills*). The guidelines on the calculation of fines adopted by the BCA on 25 May 2020 also provide that the amount of a fine may be increased where the companies continue or repeat the same or a similar infringement after the European Commission, an NCA of a neighbouring country of Belgium (as listed above), or the NCA of the United Kingdom makes a finding of an infringement of article 101 Treaty on the Functioning of the European Union.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

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

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

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

Burden of proof

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

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

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

Circumstantial evidence

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

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

Appeal process

18 | What is the appeal process?

Decisions adopted by the Competition College may be appealed to the Market Court within 30 days of the date of their notification. An appeal may be lodged by:

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

The IPS cannot appeal the decisions of the Competition College.

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

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

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

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

SANCTIONS

Criminal sanctions

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

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

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

Civil and administrative sanctions

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

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

The BCA's Competition College may impose fines of up to 10 per cent of the worldwide consolidated turnover (depending on whether the infringement took place before or after the entry into force of New Belgian Competition Act (3 June 2019)). Upon a request from the BCA's Investigation and Prosecution Service, the Competition College may impose daily penalties of up to 5 per cent of the average daily turnover in the case of non-compliance with the relevant decision.

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

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

Guidelines for sanction levels

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

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

According to the BCA's 2020 guidelines, the BCA shall apply the European Commission's guidelines on the method of setting fines. However, the BCA's guidelines contain adjustments concerning the value of sales to take into account, and the leniency and settlement programmes.

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

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

The final amount of the fine shall not, in any event, exceed 10 per cent of the worldwide consolidated turnover in the preceding business year of the company or association of corporate undertakings participating in the antitrust infringements.

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

Compliance programmes

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

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

Director disqualification

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

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

Debarment

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

Public authorities may debar from a public procurement procedure an applicant or a tenderer who participated in cartel activities (less than three years ago). The debarment may occur at any stage of the procedure. The debarment is not automatic and is not available if the applicant or tenderer has demonstrated to have adopted measures to prove its reliability (such as self-cleaning measures).

Parallel proceedings

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

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

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

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

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

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

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

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

Class actions

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

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

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

The mechanism is based on both opt-in and opt-out systems. For consumers living in Belgium, they should express their willingness not to participate in the collective action (an opt-out mechanism). For consumers not based in Belgium, they should express their willingness to be part of the collective action (an opt-in mechanism). However, in both cases, the consumers should express their interest to participate in the collective action regarding physical and 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 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 on either an agreement or a judicial decision.

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

COOPERATING PARTIES

Immunity

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

The Belgian leniency programme is set out in article IV.54 of the Belgian Code of Economic Law (CEL) and the Leniency Guidelines of the Belgian Competition Authority (BCA) of 6 May 2020. The leniency programme is only applicable to cartels (including hub-and-spoke infringements).

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

For companies and associations of corporate undertakings that apply first, full immunity (Type 1) from fines is available. Type 1 can be obtained in two types of situations (Type 1A and Type 1B) and provided that the applicant has not coerced another company or association of

corporate undertakings to participate in a cartel and complies with the obligation to cooperate.

Immunity type 1A is granted if:

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

Immunity type 1B is granted if:

- the applicant is the first to submit information and evidence that enables the BCA to establish an infringement;
- the BCA did not have sufficient evidence to find an infringement in connection with the cartel; and
- no undertaking or association of undertakings is already granted full immunity (Type IA) in connection with the same infringement.

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

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

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

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

Subsequent cooperating parties

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

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

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

Going in second

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

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

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

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

Approaching the authorities

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

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

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

Cooperation

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

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

An individual who participated in a cartel can apply for immunity from fines. The standard for obtaining immunity is high but not as high as for companies. In the event that an individual did not apply for immunity, he or she can only be prosecuted and found guilty if a company is also prosecuted and found guilty for the same offences.

Confidentiality

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

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

Settlements

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

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

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

Corporate defendant and employees

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

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

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

Dealing with the enforcement agency

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

Companies or individuals willing to file an application for immunity or leniency can contact the Competition General Prosecutor to schedule a meeting. Immunity or leniency applicants must provide:

- the identities of the cartel participants;
- the products concerned and the affected territories;
- the nature of the cartel activities; and
- its estimated duration.

The leniency or immunity application is deemed to be submitted at the meeting with the Competition General Prosecutor.

Leniency or immunity applicants shall be required to submit a corporate statement containing:

- the name and address of the leniency applicant and of the other companies that participated in the cartel;
- name and functions of the employees involved in the cartel activities; and
- a detailed description of the alleged cartel arrangement, including, for instance:
  - its aims, activities and functioning;
  - the product or service concerned;
  - the geographic scope;
  - the duration of and the estimated market volumes affected by the alleged cartel; and
  - the specific dates, locations, content of and participants in an 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 transcribe the content of the oral application. The applicant is entitled to verify the accuracy of the transcription.

Leniency applicants may request to obtain a marker from the Competition General Prosecutor. Such a request can be made orally or by a written application and should include:

- the name and the address of the applicant;
- the reasons for requesting a marker;
- the participants in the cartel;
- the products concerned;
- the affected territories;
- the nature of the cartel; and
- its duration.

The Competition General Prosecutor shall adopt a decision regarding the marker request and provide the applicant with a deadline within which additional information should be provided (the first deadline is usually two weeks).

Following receipt of the leniency or immunity application (and when the investigation is sufficiently advanced if the Competition General Prosecutor has decided to open proceedings), the Competition General Prosecutor submits a draft 'opinion' to the Competition College.

If the Competition College considers that the full immunity application meets all the requirements, it decides to provisionally grant full immunity. Conversely, if it decides that the full immunity application does not meet all of the requirements, it may decide to provisionally grant partial immunity from fines.

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

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

DEFENDING A CASE

Disclosure

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

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

Representing employees

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

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

Multiple corporate defendants

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

Counsel may represent multiple companies involved in cartel activities, provided there are no conflicts of interest.

Payment of penalties and legal costs

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

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

Taxes

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

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

International double jeopardy

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

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

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

Getting the fine down

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

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

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

UPDATE AND TRENDS

Recent cases

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

In two decisions adopted in 2019, the Belgian Competition Authority (BCA) imposed a fine of more than €1 million on the Professional Organisation of Pharmacists for infringement of article IV.1 Belgian Code of Economic Law (CEL) and article 101 Treaty on the Functioning of the European Union (TFEU). In the first decision, the BCA decided that the Professional Organisation of Pharmacists adopted exclusionary measures against MediCare-Market, which is a retailer of both medicines and health products. The Professional Organisation of Pharmacists attempted to prevent MediCare-Market from engaging in pharmacy and healthcare activities, including through disciplinary and judicial proceedings. The BCA noted that the prices of medicines in Belgium were particularly high and that the Professional Organisation of Pharmacists could not invoke public service obligations to justify anticompetitive practices. The BCA found that the Professional Organisation of Pharmacists engaged in restriction of competition by object, while it nevertheless concluded that the practices under scrutiny had adverse competition effects.

On 8 January 2020, the Market Court confirmed that the Professional Organisation of Pharmacists had infringed articles IV.1 CEL and 101 TFEU but held that the BCA had misapplied the rules on the calculation of the fines. The BCA indeed applied the cap of 10 per cent of the turnover of the undertaking by adding the turnover of the members of the Professional Organisation of Pharmacists. According to the Market Court, the provisions of Book IV CEL that were applicable at that time did not allow for this approach. The Court thus upheld the BCA's decision, while inviting the BCA to recalculate the fine. On 26

March 2021, the BCA consequently imposed a revised fine of €245,000 on the Professional Organisation of Pharmacists for infringement of articles IV.1 CEL and 101 TFEU.

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

Following an investigation by the BCA for an alleged behaviour consisting of resale price maintenance and the restriction of online sales, cosmetics company Caudalie offered commitments to the Chief Prosecutor to meet the BCA's competition concerns. In a decision of 6 May 2021, the BCA accepted Caudalie's commitments and made them binding, while imposing a fine of €859,310.

Caudalie appealed the BCA's decision before the Market Court and further requested that the Market Court suspends the BCA's decision to the extent that it had made the commitments binding, pending a judgment on the merits of its appeal. Caudalie argued that:

- Article IV.52(1)7° CEL was the only legal basis allowing the BCA to accept commitments. However, the BCA's infringement decision was based on article IV.52(1)2° CEL. These two provisions being mutually exclusive, the BCA could not provide for commitments in its decision.
- It had offered commitments under the condition that the BCA would close its investigation without finding an infringement. Thus, by including Caudalie's commitments in an infringement decision, the BCA altered Caudalie's commitment proposal.

The Market Court found both claims to be, prima facie, serious enough to justify the annulment of the BCA's decision. As a result, on 30 June 2021, it suspended the application of the commitments included in the BCA's decision, pending a ruling on the merits of Caudalie's application for annulment (for which a hearing is scheduled for 3 November 2021).

Regime reviews and modifications

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

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

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

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

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

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

Brazil

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

In the criminal sphere, cartels are prosecuted by federal or state criminal prosecutors, who are completely independent of 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 Congress that may introduce some changes to the Antitrust Act to stimulate private damages claims (eg, introducing a 'double damage' policy, longer civil statutes of limitations and inverting the burden of proof for pass-on defences). Furthermore, CADE's General Superintendency published an ordinance in September 2021 defining the rules for the online leniency marker application 'Click Leniency' to be enforced on 1 October 2021.

Substantive law

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

A cartel is a conduct that produces, or has the potential to produce, the effects listed in article 36 of the Antitrust Act, paragraph 3, 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 violations), regardless of fault, even if the effects are not achieved (ie, even if the anticompetitive effects are only potential), notwithstanding its form if it results in:

- limiting, restraining or in any way injuring free competition or free initiative;
- controlling the relevant market of goods or services;
- arbitrarily increasing profits; or
- exercising a dominant position abusively.

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

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

Based on article 36, paragraph 3, CADE classifies a 'cartel' as conduct that:

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

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

Joint ventures and strategic alliances

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

There is no generic exemption for joint ventures and strategic alliances. Article 36 of the Antitrust Act provides that an antitrust violation may be characterised regardless of its form. Therefore, any joint venture or strategic alliance that may result in potential anticompetitive effects in Brazilian territory is subject to CADE's prosecution. The Parties may submit the joint ventures and strategic alliances for CADE's clearance in advance.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

Extraterritoriality

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

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

In other words, international cartels that result or may result in direct or indirect effects within Brazilian territory are under the jurisdiction of the Administrative Council for Economic Defence (CADE), even if no illegal conduct is carried out in Brazil.

Export cartels

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

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

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

Industry-specific provisions

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

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

Government-approved conduct

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

There are no exemptions in the Antitrust Act.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

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

At the end of the fact-finding phase, defendants will be required to submit new statements within five working days (10 working days if there is more than one defendant represented by different attorneys). After that, the General Superintendency shall issue its recommendation (either for the condemnation or for the shelving of the case) and forward the records to CADE's Administrative Tribunal for a final decision.

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

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

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

Before the initiation of the administrative process, CADE's General Superintendent may carry out a confidential preparatory investigation.

Investigative powers of the authorities

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

CADE's General Superintendency is responsible for investigating 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 that amount if necessary to ensure its effectiveness (article 40 of Law No. 12,529/11).

However, the Brazilian Constitution guarantees the right against self-incrimination, in the sense that a witness may remain silent if the answer may result in self-incrimination. If the request for information (RFI) demands a written answer, the company or individual may also refuse to answer for fear of self-incrimination, but it is important to

submit a document in compliance with the defined deadline stating that it will remain silent, otherwise there is the risk of being punished by not complying with the RFI's deadline.

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

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

Interplay between jurisdictions

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

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

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

A cartel proceeding is adjudicated by the Administrative Tribunal of the Administrative Council for Economic Defence (CADE) after CADE's General Superintendency concludes the investigation. The General Superintendency is responsible for the administrative investigation and prosecution of antitrust violations and the Tribunal is responsible for the final adjudication in the administrative sphere.

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

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

Burden of proof

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

CADE's General Superintendency holds the burden of proof and must sustain the charge against the defendants. Such proofs can be collected through investigative powers of the authorities and through leniency or settlement agreements (TCCs) executed between the authority and individuals or companies involved in the antitrust violation. The standard of proof is defined case-by-case according to the market characteristics, the dynamics of the misconduct and the evidence gathered in dawn raids, leniency agreements and TCCs.

Circumstantial evidence

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

Yes, CADE uses circumstantial evidence to support condemnations.

Appeal process

18 | What is the appeal process?

CADE's Tribunal decision can be challenged before the federal courts. The scope of the appeal is broad and may regard due process, the merits of the case and the balance of the penalties. It is important to clarify that lawsuits in Brazil are not expeditious, usually lasting between five and 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.

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 the administrative decisions before the courts in all its aspects. This decision is not binding, and it is expected that this matter will be addressed by the Supreme Court's Full Bench in the future.

SANCTIONS

Criminal sanctions

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

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

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

Civil and administrative sanctions

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

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

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

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

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

Regarding civil liabilities, Law No. 12,529/2011 (the Antitrust Act) expressly recognises the independence between administrative and civil liabilities, meaning that a civil damages recovery lawsuit does not depend on a previous Tribunal's adverse decision. Civil damages recovery lawsuits (individual claims or class actions) can be filed as follow-on or standalone claims by any affected third parties, following articles 186 and 927 of the Brazilian Civil Code, which set a general obligation to the party at fault to indemnify the damages caused to others.

The complainant seeking civil damages compensation must prove:

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

Nonetheless, civil damages recovery lawsuits motivated by breach of the Antitrust Law remain uncommon in Brazil. There is a bill under discussion in Congress that once approved will introduce relevant changes on the Antitrust Law to incentivise private damages claims (eg, introducing a 'double damage' policy, longer civil statutes of limitations and inverting the burden of proof for the pass-on defence).

Guidelines for sanction levels

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

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

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

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

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

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

Compliance programmes

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

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

Director disqualification

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

The Antitrust Act foresees the possibility of CADE imposing, as an additional penalty, a professional limitation for individuals involved in a

cartel as follows: 'the prohibition of exercise a commercial activity in his own name or as a representative of the legal entity for a period of five years'.

Debarment

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

There are other penalties that may also be cumulatively imposed with fines. One of them is the prohibition on contracting with public financial institutions or participating in bids held by public bodies. If this specific ancillary penalty is imposed, it will be valid for no less than five years.

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

Parallel proceedings

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

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

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

Civil damages recovery is calculated by the extension of the effective damages suffered by the plaintiffs (which may be the direct or indirect purchasers). The civil courts accept the pass-on defence, as the right to recover is that of 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 Congress intends to include the double damages and to limit joint liability in relation to the beneficiaries of the leniency agreement and of defendants that executed leniency or settlement agreements.

Private damage claims in Brazil related to antitrust violations are still unusual and there are only a few cases under discussion in the civil courts.

Class actions

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

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

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

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

- the illegal act;
- the fault of the agent;
- the damage; and
- the causal link between the illegal act and the damage.

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

COOPERATING PARTIES

Immunity

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

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

A successful leniency application entitles the applicants to criminal immunity and also to full immunity against administrative fines by the Administrative Council for Economic Defence (CADE), or for the fines to be reduced by one-third to two-thirds if the General Superintendency already had prior knowledge of the reported violation. It also entitles individuals to full immunity against criminal antitrust 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 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 leniency in relation to the disclosed violation;
- it ceases participation in the disclosed violation;
- at the time of the leniency application the General Superintendency did not have enough evidence to guarantee the conviction of the applicant;
- it confesses its participation in the violation;
- it provides full and permanent cooperation with the investigation and respective administrative process, attending any investigation action when requested at its expenses; and
- the cooperation results in:
  - the identification of the other participants involved in the violation; and
  - information and documents that prove the disclosed violation.

The effects of a leniency agreement may be extended to other entities of the same economic group and its employees. However, this extension is not automatic and it is mandatory for these other entities and employees to adhere to the leniency agreement to be protected, also committing to all the listed obligations. It is also noted that, should leniency be originally proposed by an individual rather than a company associated with that individual, such a company cannot adhere to the terms of the agreement.

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

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

Subsequent cooperating parties

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

Full immunity in the leniency programme is granted only to the first applicant. However, companies and individuals that apply subsequently may execute settlement agreements (TCCs) with the authority, qualifying for a reduction in their administrative fine.

According to the TCC programme, the companies and individuals that are defendants in an administrative proceeding may settle an 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

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

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

Regarding the TCC programme, the main advantages are:

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

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

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

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

In practice, for individuals in management positions, the pecuniary contribution is usually defined as up to 5 per cent of the pecuniary contribution applied to the company. For individuals in non-managerial positions, it usually varies from 50,000 to 150,000 reais, but it can be higher to comply with the minimum law standards.

There is also a possibility of a higher reduction for TCC applicants called 'leniency plus'. Such an agreement consists of a 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 of which the General Superintendency had no prior knowledge.

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

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

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

Approaching the authorities

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

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

If the applicant does not have all the necessary information and documents on hand to formally submit the leniency application, it may request a marker 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.

In September 2021, CADE made available an online marker request at CADE's website, named 'Click Leniency' (*Clique Leniência* in Portuguese). Such electronic marker request is confidential and no information about the applicant will be available on CADE's website. The online marker request must contain the same information described above and it does not prevent the possibility of the applicant requesting a marker personally to the General Superintendency. The online marker request rules are effective from 1 October 2021.

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 that they arrived for the leniency agreement's proposal.

Cooperation

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

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

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

Confidentiality

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

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

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

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

After the Tribunal casts its final decision regarding the case, all documents will be public, except those specified 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.

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

Settlements

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

CADE may propose a TCC to the defendants of an administrative investigation. The negotiations shall be carried out either before the General Superintendency (within 60 days, extendable for another such period) or, if the case has already advanced to the Tribunal, with the appointed Reporting Commissioner (within 30 days, extendable for another such period).

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

If a CADE decision is challenged in the federal court, CADE's Tribunal may authorise CADE's Attorney General to terminate the lawsuit through a judicial agreement, which can substantially reduce the originally applied fine.

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

Corporate defendant and employees

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

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

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

Dealing with the enforcement agency

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

The leniency agreement application can be divided into four phases:

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

A TCC application can be divided into four phases:

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

DEFENDING A CASE

Disclosure

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

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

Representing employees

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

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

Multiple corporate defendants

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

This is possible if there is no conflict of interest.

Payment of penalties and legal costs

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

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

Taxes

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

Fines and other penalties imposed by the Administrative Council for Economic Defence and private damages awards are not tax-deductible.

International double jeopardy

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

The criterion to determine whether an anticompetitive violation falls under Brazilian jurisdiction is whether it has, or has the potential to have, direct or indirect effects within Brazil.

In this sense, the Brazilian antitrust and criminal laws are fully applicable to those situations, notwithstanding the existence of penalties imposed by other jurisdictions. Regarding private claims, a complainant cannot sue a defendant to recover the same damages more than once, owing to protection against double jeopardy.

Getting the fine down

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

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

UPDATE AND TRENDS

Recent cases

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

According to the Administrative Council for Economic Defence's (CADE) database available on its website, since September 2020 CADE has adjudicated 21 cases involving cartels, in which two of them related to international cartels that resulted in direct or indirect effects within Brazilian territory.

Such cases involved the following products:

- PVC products;
- bearings; and
- air and maritime freight.

In brief, the fines imposed on the companies were up to 65 million reais for each company. The fines imposed on the individuals related to those companies ranged up to 5 million reais. Considering the data from 2020 until May 2021, there were in total five leniency agreements, four adhesions to leniency agreements and two requests for leniency plus. Moreover, seven requests for settlement agreements (TCCs) were agreed and authorised by CADE. All of them were fully complied with.

Furthermore, in the past year, CADE has also:

- shelved six administrative proceedings because of lack of evidence; and

- declared the expiration period of the statute of limitation regarding companies and individuals in one administrative proceeding.

Regime reviews and modifications

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

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

- 'double damage' granted to the parties affected by the antitrust violation (ie, victims' compensation is double that of the damage sustained), with the exception of defendants that executed Leniency Agreements or TCCs, which will only be liable to pay single-damage payments;
- the interruption of the civil statute of limitation during CADE's investigation;
- the civil statute of limitation will start only after the publication of CADE's final decision in the Official Gazette;
- no joint civil liability for the defendants that executed TCCs;
- no presumption that an undertaking passed on increased costs to customers (passing-on) in cases of a cartel – the burden of proof to show that passing-on occurred is on the defendants;
- the possibility of the Federal Court granting injunctions to the affected parties in damage recovery lawsuits based on CADE's final decision; and
- the TCCs that contain the confession of participation in the investigated conduct shall include the defendants' obligation to submit themselves to arbitration to repair damage suffered when an affected party takes the initiative to request arbitration.

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

Furthermore, CADE recently published Ordinance No. 416 instituting the 'Click Leniency', which is effective from 1 October 2021. The main purpose of this ordinance is to establish rules for receiving and treating marker requests for negotiating leniency agreements electronically. Currently, the marker requests are personally submitted to the General Superintendency.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation on cartel regulation in Bulgaria is the Law on Protection of Competition (LPC) promulgated in the State Gazette 102/28 November 2008, as amended on 26 February 2021. The cartel regulation is modelled closely on EU competition law. The cartel prohibition contained in the LPC mirrors article 101 of the Treaty on the Functioning of the European Union (TFEU), excluding the 'effect on interstate trade' criterion. An English-language version of the LPC is available on the website of the Bulgarian competition authority, the Commission for Protection of Competition (CPC).

Relevant institutions

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

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

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

While conducting on-site inspections (dawn raids), the CPC may request police assistance.

The decisions of the CPC are subject to appeal before the Administrative Court for Sofia District.

Changes

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

In 2021, the LPC underwent its most substantial revision since its adoption in 2009. The revisions, which were formally triggered by the local implementation of Directive (EU) 2019/1 (ECN+ Directive) and Directive (EU) 2019/633 (Unfair Trade Practices in Agricultural and Food Supply Chain Directive), ended up introducing much wider reconstruction – in terms of both procedures and substantive competition regulations. For instance, the CPC is now empowered to establish priority areas in its agenda and reject certain cases if they fall short of the areas of priority (including in cartel cases); the area of merger control was aligned with the significant impediment of effective competition (SIEC) substantive test (instead of the historically applied dominance tests); and the unfair trade practices (which under Bulgarian law form part of the competition law, along with antitrust, merger control and dominance areas) have been significantly revisited.

The framework of cartels, although not directly amended, was still indirectly affected by amendments covering the enforcement of fines (at local level as well as in other EC member states through the enhanced collaboration within the ECN+ network) and attribution of liability to parent and associated companies as well as to economic or legal successors of the activity upon commercial reorganisations, expanding dawn raid procedures to the private homes, premises and vehicles of managers and other management or 'controlling body' members of the infringing companies and last but not least, by some modifications in the leniency procedures. In general, as a result of the adopted amendments, CPC competence is now extended to a stronger and more independent position in conducting cartel investigations and broader options for enforcing fines and other measures against infringing companies and their corporate groups.

Other more significant changes in recent years have concerned:

- in January 2018, an amendment and supplement (the Private Damages Amendment) to the LPC became effective, implementing into Bulgarian law the provisions of Directive 2014/104/EU on antitrust damages actions (the Private Damages Directive);
- as of 1 January 2019, amendments were made to the competent court to hear appeals against decisions and other acts of the CPC from the Supreme Administrative Court (SAC) to the Administrative Court for Sofia District. The amendment aimed to reduce the timeline of appeal procedures (which before SAC sometimes exceeded one year). These changes proved successful, as the duration and efficiency of appeal procedures have been significantly improved (the approximate duration of appeal procedures is now, on average, six months); and
- the LPC was also amended in April 2019 with a reference to the newly adopted Trade Secrets Protection Act (TSPA). The amendment prescribed that a CPC decision under the LPC provisions on trade secrets protection does not preclude the claimant from initiating separate court proceedings on the basis of the TSPA, thereby clarifying that LPC and TSPA procedures are independent of each another.

The CPC also updated its secondary legislation, including the methodology for calculation of sanctions, the leniency programme and its rules of application. As a brand new piece of secondary legislation, the CPC introduced its 'Rules for prioritising claims to commence proceedings for Chapter 9 and Chapter 12 of the LPC' (the Rules). The scope of this regulation covers proceedings initiated on grounds of prohibited

agreements (including cartels), resolutions and concerted practices. The Rules introduce the criteria under which the CPC can independently assess the claims and determine which one to pursue and which one to reject if it does not fall within the annual priorities that the Commission itself has outlined. They are expected to achieve a balanced ratio between different kinds of proceedings that the CPC has the authority to commence. The CPC has the power to decide which of the criteria has more significance in light of its priorities and to refuse whatever claim does not satisfy the criteria. The criteria contain considerations of:

- significant effect on competition in the relevant market (there is an explicit provision in article 4, paragraph 3 of the Rules that considers cartel activity to always satisfy the criteria for that category);
- significant effect on the wellbeing of consumers;
- strategic significance of the policy for application of the rules for protection of competition;
- likelihood of establishing an infringement;
- likelihood of the CPC's intervention having sufficient dissuasive effect;
- rational use of resources;
- influence upon the economic position of the supplier in cases where infringement under Chapter 7(b) is alleged; and
- annual priorities.

Substantive law

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

Article 15 of the LPC mirrors article 101 TFEU. The LPC prohibits horizontal and vertical agreements and concerted practices between undertakings, that is decisions of associations of undertakings that have the objective or effect of preventing, restricting or distorting competition in the relevant market. The law provides a non-exhaustive list of prohibited agreements, such as:

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

The LPC further defines cartels as:

> *[Agreements] or concerted practices between two or more undertakings to coordinate their competitive behaviour on the relevant market or to influence the relevant competition parameters through practices such as setting or coordinating purchase or sales prices or other trading conditions including intellectual property rights, setting production or sales quotas, sharing markets and customers, including manipulating public auctions or competitions (bid rigging), restrictions on imports or exports or anti-competitive actions against other competitors.*

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

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

Most recently, in the 2021 cartel case of the CPC against 33 construction companies for cartel infringement (bid rigging) in tender proceedings under the National Energy Efficiency Program (decision of the CPC No. 762 of 22 July 2021), similar to the previous 2019 cases of the CPC fining 24 construction companies for bid-rigging practices under the same programme (decisions of the CPC No. 1312 and 1313 of 5 December 2019), the CPC reaffirmed its approach that fixing of prices and market allocation are abusive by their very object and nature. In the 2019 bid-rigging cases, the CPC rejected the defence of some of the cartel participants that their cartel activity has only helped them to get in the short-listed candidates for the tender, but the cartel did not extend to the second stage of the tender where competitive prices were offered and thus, it did not produce actual abusive effects for the contracting authority. Further, in the context of the 2021 bid-rigging cases, the CPC also rejected the objection of some cartelists that they started internal collaboration only after they were already admitted at the first stage of the bidding process and entered into a framework agreement with the tender authority. Thus, they argued their collaboration could not have affected the tender authority's decision on which of the bidders would be selected for the tender. The CPC rejected the objections and clarified that bid rigging applies not only to whether a bidder will be initially admitted but also to all particular projects or bids and prices offered within the framework agreement.

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

The LPC provides a de minimis exemption for restrictive agreements, decisions and concerted practices that have an insignificant effect on competition (article 16 of the LPC). However, as recently confirmed by the CPC in the bid-rigging cartel cases (decision of the CPC No. 762 of 22 July 2021, decisions of the CPC No. 1312 and 1313 of 5 December 2019) the de minimis exemption is not applicable for cartel infringements as defined by LPC. Also, a cartel will usually not fall in the group exemptions for horizontal agreements – the CPC applies the same group exemptions for horizontal agreements as the EC (ie, group exemptions of certain categories of research and development agreements and specialisation agreements).

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

Joint ventures and strategic alliances

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

Joint ventures that do not meet the requirements developed in ECJ and EC practice, and the EC Jurisdictional Notice on Concentration, for

full-functioning joint ventures, are viewed as horizontal or vertical agreements under the general framework of article 15 of the LPC and article 101 TFEU. The EU test for full-functioning joint ventures aims to distinguish between joint ventures that will participate as separate market players apart from their parent companies (and hence, shall be reviewed under merger control regulations), and dependent joint ventures that will mainly serve the commercial needs of their parent companies (and thus, represent a form of horizontal agreement or a concerted practice between them). In the latter case, depending on the type and scope of arrangements between the joint venture parent companies and whether they meet the above definition for cartels (eg, by fixing prices or limiting output), certain joint ventures may also qualify as prohibited cartel activities.

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

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

Extraterritoriality

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

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

According to article 3(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty on the Functioning of the European Union (TFEU) (Regulation No. 1/2003), the Commission for Protection of Competition (CPC) has the authority to apply (and usually does so) article 101 TFEU in parallel with national anti-cartel provisions if the agreement or concerted practice may affect the trade between EU member states. As part of its standard review under a cartel case, the CPC will ex officio assess the applicability of article 101 TFEU to the case and, if applicable, will follow the EU acquis (including European Competition Network (ECN) cooperation procedures) regarding cross-border cartels.

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

Export cartels

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

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

Industry-specific provisions

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

Neither the LPC nor the secondary legislation provides for any industry-specific infringements, defences or exemptions in relation to cartel activity (the recent amendments of the LPC introduce such with respect to unfair trade practices, but for antitrust infringements). Thus, the general exemptions and defence strategies (group exemptions, proving pro-competitive effects, as discussed above) would apply. It is expected that the CPC will broaden the scope of possible exemptions at EU level for sustainability agreements. These, however, are still being discussed between the European Commission (EC) and national competition authorities (NCAs).

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

Government-approved conduct

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

Competition rules only apply to state actions – as well as the activities of public bodies (eg, agencies, public organisations) – if the latter constitute an economic activity and may qualify the state or public body as an 'undertaking' (ie, as an equal participant on the commercial scene). On the contrary, where a state or public body exercises its entrusted public powers and competencies, or executes a non-profit activity, they will not be treated as an undertaking and will not fall in the scope of the competition rules under the LPC or the TFEU. The CPC has already reviewed potential antitrust abuses by the National Health Insurance Fund (NHIF) and various other public authorities and organisations (most recently, the nationwide collective management organisations for IP and related rights MUSICAUTOR and PROFON). It conducted the assessment on a case-by-case basis, with respect to each particular activity conducted by the public body, and in some instances, the same public body (eg, NHIF) was found to be acting as an undertaking, while in others it was not. In the cases of MUSICAUTOR and PROFON, the CPC further clarified that it is not only the direct activity that is relevant for the assessment – namely, although MUSICAUTOR and PROFON were in general not allowed to generate profit for themselves, their activities were still found to be commercial in nature as they were ultimately benefiting

subjects (such as artists) who genuinely pursue profit in their work. The CPC decisions regarding MUSICAUTOR and PROFON as 'undertakings' was confirmed in the subsequent appeal proceedings.

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

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

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

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

A cartel investigation procedure is opened by the Commission for Protection of Competition (CPC) upon:

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

Most often the CPC initiates a cartel investigation based on sector inquiries conducted by the EC or upon written request by affected persons. Contracting authorities also notify the CPC about suspected bid rigging in public procurement tenders – in 2019–2021 the CPC started a number of bid-rigging cases based on notifications from public authorities and municipalities. One of 2020's most debated (but still pending) cartel investigations in the oil and petrol sector, regarding fixing wholesale and retail prices and output between the market's largest players, was initiated based on notification from prosecutors and media publications.

Although the CPC adopted and announced a leniency programme, the latter has only been used in the past one to two years, (for the first time in 2019 in a bid-rigging investigation where three of the cartelists applied for leniency). In 2021, again in the context of a bid-rigging investigation, two of the cartelists applied for leniency and were granted, respectively, full and partial immunity from the fine. The leniency programme was modified in 2021 to introduce the rules of Directive (EU) 2019/1 (the ECN+ Directive) and stimulate more undertakings to assist the cartel investigations.

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

The working group compiles information and sends questionnaires for information (eg, market and financial data relevant to the investigation of the undertaking in question). Addressees are given approximately one month to provide the requested information. The CPC does not disclose the exact behaviour it is investigating, but must inform those it contacts what the legal grounds for the investigation are; nor does it send a copy of the complaint. When the investigation has been initiated following a decision by the CPC, more information on the particular reasons can be obtained from the CPC decision itself, which is made publicly available on the CPC website. Confidential information is removed from the publicly available version of the decision.

During the investigation, the case handlers are authorised to obtain information from market participants, associations and state authorities. The CPC may also obtain evidence through on-site inspections (dawn raids) which can now be performed on an extended group of persons apart from the investigated undertaking, such as its managers. In certain complex cases, the CPC may appoint external experts to cover technical, financial or sector-specific questions. The cartel investigation is not limited in time. In practice, it may take between six months and two years.

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

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

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

Since cartels, as defined by the Law on Protection of Competition (LPC), are considered material infringements of the competition, the CPC is not allowed to approve commitments by the alleged infringers as in the case of other types of prohibited restrictive agreements.

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

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

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

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

Investigative powers of the authorities

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

The CPC has a wide range of investigative powers. During an investigation, CPC case handlers are authorised to request information and evidence from the defendant, any third party, state authority, EU competent authorities and, pursuant to the latest amendments under the ECN+

Directive, from any investigation and enforcement authority in an EU member state that might have information relevant to the investigation. Requested parties should cooperate and provide all data in their possession, even if the information contains trade secrets. The CPC is obliged to protect any confidential information and not to disclose it to other parties. The CPC may fine any legal or natural person who, without reasonable grounds, fails to comply with a formal information request.

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

To carry out a dawn raid at the premises of an undertaking under investigation, the CPC must obtain explicit authorisation from the Administrative Court in Sofia, based on which it may enter all of the undertaking's business premises, irrespective of their location and means (eg, offices and motor vehicles). With the local implementation of the ECN+ Directive, private homes and vehicles of the management, other relevant representatives and employees of the company could be inspected if there is reason to believe that business-related files may be found and subject to prior authorisation by the Administrative Court Region of Sofia. The CPC case handlers and other specified persons (such as IT experts) are authorised to:

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

Bulgarian law recognises attorney-client privilege in communications between undertakings with their external legal advisers (ie, if communication is properly and clearly marked as being subject to attorney-client privilege). However, advice from in-house legal counsel is not privileged and can be seized and used by the case handlers as evidence.

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

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

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

The CPC also cooperates with the EC and other EU member states' national competition authorities (NCAs), by receiving and rendering assistance and exchanging information under the procedure set forth in Regulation No. 1/2003 and the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive). Based on the ECN+ Directive and the amendments in the local legislation, the CPC may forward or request information obtained during the course of a cartel investigation to the European Commission (EC) and to EU member states' competition authorities (as an exception to the general rule that member states' confidential information collected by the CPC during the investigations shall not be disclosed and should only be used for purposes under the Law on Protection of Competition), may serve or request to be served in another EC member state procedural documents in the course of pending investigation, including statements of objection and final acts or decisions, acts on imposition and enforcement of fines and periodic penalties, assistance with the actual enforcement of fines and periodic penalties under a facilitated and unified recognition procedure, etc.

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

Interplay between jurisdictions

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

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

The CPC also informs member states' NCAs of any case that has cross-border effects and reviews information about the cases initiated by

member states' NCAs to check if they affect competition in the Bulgarian market, so that cases may be reallocated within ECN members. So far, no cases have been reallocated from or to other NCAs.

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

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

Burden of proof

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

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

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

Circumstantial evidence

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

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

Previously to this, the SAC, acting as the court of second instance, has accepted circumstantial evidence as sufficient proof where all such evidence, in its entirety, indicates the existence of an agreement or a concerted practice and where no other meaningful explanation for the undertakings' conduct exists (judgment of the SAC No. 11522 of 16 September 2013).

In the recent bid-rigging practice of the CPC (decision of the CPC No. 761 of 27 June 2019), the CPC undertook the same approach as the SAC and took into consideration the following circumstantial evidence for the existence of coordinated behaviour of the participants in a public procurement bid: the participant's offers were for the same amounts, were presented in the same way (eg, font, layout) and contained the same technical errors. In another recent bid-rigging case, the CPC investigated the historic behaviour of the alleged cartelists when participating in public bids and established a tendency of indirect collusion – namely, for a five-year period, whenever the two companies were bidding for the same tender or slot, the first one always offered the lowest price (significantly lower than the others) to win the bid and then withdrew from the tender, to the benefit of the second-ranked bidder, which was always the other company. The CPC accepted this circumstantial evidence as sufficient to open a cartel case against the two bidders.

Appeal process

18 | What is the appeal process?

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

The parties involved in a cartel investigation are entitled to submit appeals against CPC decisions within 14 days of receiving notification of the CPC's decision. Any third party that can prove it has a direct legal interest is also entitled to appeal a CPC decision within 14 days of its publication on the CPC website.

The appeal should be submitted through the CPC. The entire CPC file is provided to the Administrative Court for Sofia District. Any evidence and information marked as confidential are kept in separate files to which only the court's judges have access – where the access to confidential materials under the case file by public officials and any third parties is further tightened with the option of the ECN+ Directive procedural rules (for public officials, only those with need-to-know and for third parties partial access based on evidenced legal interest). The appellant, the CPC and all interested parties submit written statements regarding the appeal and are summoned to take part in oral hearings before the court. The court may appoint external experts on specific technical or financial issues. The Administrative Court for Sofia District has significant power of judicial review over the decisions of the CPC, and it may review both legal and factual questions, including the correctness and completeness of the facts established by the CPC, modification of the imposed fines, and review of the CPC's interpretation of the economic facts. Usually, the appeal procedure can take between three months and one year.

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

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

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

SANCTIONS

Criminal sanctions

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

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

Civil and administrative sanctions

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

Civil sanctions

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

Furthermore, cartel activity may give rise to private damages claims by the affected parties. The legal requirements, eligible parties

and the rules for quantification of the damages have been set forth in the LPC in line with the Private Damages Directive.

Administrative sanctions

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

Recent CPC decisions on cartel cases show that the CPC is inclined to impose sanctions of almost the maximum amount provided in the law. For example, in 2012 the CPC imposed the highest fine for horizontal anticompetitive cooperation at the total amount of 2,914,560 leva. The fine was imposed on three Bulgarian companies for bid rigging in a public procurement for the supply of air tickets. One of the participants was sanctioned with the highest fine ever imposed by the CPC on a particular undertaking for horizontal cooperation – 2,818,800 leva. However, in 2016 the SAC repealed this decision. In its recent decision fining 33 construction companies for bid rigging, the CPC imposed fines of up to 8 per cent of the turnover of the cartel participants (where the participant was formally an association of undertakings, the fine was imposed on its members).

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

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

Most frequently, the CPC imposes sanctions (between 0.01 and 1 per cent) on undertakings for non-cooperation (non-provision of requested information) during the investigations. In a recent case (decision of the CPC No. 619 of 5 June 2018) the CPC imposed a sanction of 1 per cent of the global turnover of a company for delaying the CPC inspection by five hours, restricting the CPC's access to some of the relevant digital files, providing a fake email address for the manager and attempting to manipulate the folders on the manager's computer during the inspection. The appeal court usually upholds such sanctions.

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

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

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

Guidelines for sanction levels

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

In 2009, the CPC adopted a methodology for calculating fines under the LPC. Since then, the methodology has been updated several times, with some major revisions introduced in 2021 (all of which aimed at increasing the level of the sanctions or the scope of parties that may be caught by them).

In general, fines for cartel activity are set by using a two-step approach – the basic amount of the sanction, which is then adjusted based on aggravating or mitigating circumstances. The basic amount is based on the value of sales of the products or activities affected by the cartel, depending on the gravity and duration of the infringement. According to the recent amendments in the methodology, cartels are considered a serious infringement and therefore the basic amount is up to 15 per cent of the value of sales of the affected products. After the amendments, the basic amount can be further increased from 10 to 100 per cent for each aggravating factor (where a 100 per cent increase is prescribed for second or repeated cartel infringement if the CPC or any other EC competition authority has already sanctioned the party). Mitigating circumstances may allow for a 10 per cent reduction of the fine (for each circumstance). The exact amount of the sanction cannot exceed the maximum amount of 10 per cent of the total turnover of the undertaking for the preceding financial year (ie, not limited to the turnover from the infringing activities).

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

- commission of the same or similar violation (second or repeated violation), established by the CPC, another national competition authority of an EU member state or the EC;
- refusing cooperation, hindering the CPC during its investigation or opposing the investigation;
- the undertaking played the role of ringleader (ie, initiated, led or incited the breach or exercised coercion – undue influence – upon another undertaking to participate in the infringement). In that case, the basic amount of the sanction can be increased by 10 per cent;
- paying or offering to pay 'compensation' or 'damages' to other enterprises to include them in the violation;
- affecting competition of related or neighbouring markets; and
- other factors, depending on the facts of the case, taken on a case-by-case basis.

In a recent bid-rigging case, the CPC increased the fine of the leader of the cartel by the maximum possible percentage due to an aggravating circumstance.

The mitigating factors that the CPC should consider include:

- terminating an infringement immediately after the start of an investigation (this is a new mitigating circumstance, adopted with the 2021 amendments);
- passive behaviour of the undertaking or the association, playing a limited role in the violation or adopting the strategy of 'follow the leader';
- effectively cooperating with the CPC outside the scope of the leniency programme and the obligation for cooperating pursuant to the LPC;
- taking appropriate measures for restricting the detrimental consequences of the infringement such as voluntarily providing adequate compensation to the ill-affected parties for any damages the breach has caused; and
- other factors, depending on the case.

In a recent case (decision of the CPC No. 761 of 27 June 2019), the defendants tried to claim as a mitigating circumstance that they ended the infringement before the CPC intervention. However, this argument was rejected by the CPC, as at that time early termination was not yet recognised as a separate mitigating factor. Since the latest changes, alledged cartel participants will now be able to invoke this circumstance. Most recently, the CPC accepted as a mitigating factor the passive behaviour of some participants in the cartel and granted a 10 per cent reduction of the fine.

In the determination of the amount of the sanction, other factors, such as the duration of the cartel and its effectiveness, are also taken into consideration by the CPC. To ensure that the sanctions will have sufficient dissuasive effect upon the fined undertaking, the new methodology for calculation of fines introduces a cap of 25 per cent added to the basic amount of the sanction in cases when the undertakings have an additional source of income that exceeds the turnover of the fined business by 100 per cent or whenever the income generated due to the infringement of the LPC exceeds the sanction calculated by the CPC by 100 per cent.

In addition, with the latest amendments, the CPC may now engage a broader scope of related entities in the sanctioning process. Namely:

- the CPC would be able to impose sanctions on the parent companies of a local infringer (if they have had the power and opportunity to control the infringing entity, regardless of whether they used that power in the particular case);
- the CPC would be able to hold members of a trade association responsible for payment of the fine imposed to the association for competition breaches; moreover, in calculation of the fine to the association, the CPC will take into account the worldwide turnovers of all of its members (thereby leading to potentially very significant fines);
- the CPC may hold responsible and seek payment of a fine from any subsequent acquirer or successor of shares of an infringer, or assets or business activity used for the infringement; and
- the CPC will be offered support within the ECN with the enforcement of fines outside Bulgaria.

Compliance programmes

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

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

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

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

Director disqualification

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

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

Debarment

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

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

Parallel proceedings

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

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

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

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

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

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

Class actions

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

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

COOPERATING PARTIES

Immunity

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

The Law on Protection of Competition (LPC) sets out the legal basis for granting full or partial immunity to an undertaking that participated in a secret cartel. The legislative rules are further developed in a leniency programme and Rules for Application of the Leniency Programme, adopted by the Commission for Protection of Competition (CPC) in 2011 and recently amended in 2021 to align with the ECN+ Directive principles and rules for leniency.

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

If the conditions for the above first option are not present, the cartel participant may still apply for full leniency provided that it presents sufficient evidence to the CPC (not previously available) allowing it to prove the cartel infringement and the CPC has not yet granted conditional immunity to another undertaking.

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

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

Subsequent cooperating parties

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

The CPC Leniency Programme allows the CPC to grant partial leniency (ie, a fine reduction) to a cartel member after a cartel investigation has begun, despite an immunity application being made by another cartel member. Partial leniency can only amount to between 30 and 50 per cent of the sanction, as calculated by the methodology of calculation of sanctions granted to the first undertaking that cooperates. An undertaking is eligible for such reduction if:

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

Going in second

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

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

The CPC leniency programme provides incentives for applicants to come forward with information about other cartels they are involved in. If, during an investigation, any cartel participant provides information regarding involvement in another cartel, such undertaking may benefit from an additional reduction of up to 10 per cent of the fine for the first cartel ('leniency plus'). If the undertaking provides information disclosing the existence of more cartels, the CPC may reduce the fine imposed for participation in the first cartel by up to 10 per cent for any subsequent cartel, but by no more than 30 per cent overall.

Approaching the authorities

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

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

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

The leniency programme under the LPC sets out rules for markers applicable to both full and partial leniency applicants. Applicants should

terminate their participation in the cartel immediately after applying for leniency at the latest, except in specific cases where the CPC may consider their participation essential for the purpose of the cartel investigation.

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

Cooperation

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

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

Confidentiality

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

There are still very few cases where the leniency programme has actually been applied (the first leniency application was made in mid-2019). Therefore many aspects of the implementation of the Leniency Programme have not been developed in detail.

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

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

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

Settlements

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

In addition to leniency, which is settled at an earlier stage of a cartel investigation and when the CPC is yet to determine the existence of a cartel, another option for relief or reduction of a penalty is for the cartel participant to offer commitments to the CPC once the cartel is discovered. The LPC does not allow the commitments procedure to be applied to harsh infringements of competition law (which cartels are usually considered as). However, in practice, it has been applied to several cartel cases – most recently, to a cartel case in the retail fuel market in 2020.

After being served with the CPC's statement of objections, the LPC gives the option for the infringing party, within a term of not less than 30 days, to offer the CPC commitments that it will immediately cease the infringing (cartel) activity and execute adequate changes in the behaviour that has led to it. Both behavioural and structural commitments are offered (although the CPC usually shows preference to structural ones).

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

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

In the latter scenario, if there are any subsequent changes in the circumstances of a cartel, the cartel participant does not fulfil their agreed commitments, or if any information that the CPC's decision was based on is found to be incorrect or misleading, the CPC may re-open the case and sanction infringing entities.

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

Undertakings wishing to take advantage of the leniency programme should contact the CPC and apply for leniency. The application must be signed by a person who represents the applicant and should be submitted in the format adopted by the CPC. The application should contain information on the cartel's participants and detailed information about the cartel's activity, including:

- affected products or services;
- affected territories;
- the nature of the infringement (eg, price fixing, client and market allocation);
- the duration of the cartel;
- a description of the way it functions (including telephone calls and emails);
- any past or future leniency applications that the entity has initiated or is planning to initiate in the future; and
- a description of any evidence presented in favour of the application.

The application should be supplemented with relevant evidence.

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

Leniency applications submitted to other competition authorities or the EC are not recognised by the CPC and will not give the protection admitted to leniency applications submitted to the CPC. If the EC is the best-placed authority to investigate particular cartel activity, an undertaking applying to the EC for immunity may submit a leniency application to the CPC in short form. The procedure for submitting a short-form leniency application as well as the content requirements thereof have recently been introduced in the amended rules for application of the leniency programme.

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

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

DEFENDING A CASE

Disclosure

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

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

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

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

Representing employees

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

The Law on Protection of Competition (LPC) does not regulate this issue. Under the Bulgarian Bar Act, members of the Bar may not represent the interests of two or more parties if their interests conflict. Therefore, counsel may represent both a corporation and its employees if their interests do not conflict. However, if a conflict of interest arises, counsel should withdraw as counsel for one of the parties.

Multiple corporate defendants

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

As long as there are no conflicts of interest, attorneys-at-law (members of the Bar) can represent multiple defendants.

Payment of penalties and legal costs

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

The LPC does not regulate this issue. Based on the general rules of the Bulgarian Obligations and Contracts Act, the corporation could pay fines imposed on its employees and legal costs.

Taxes

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

Pursuant to Bulgarian law, fines are non-tax-deductible. According to the non-binding opinions of the Bulgarian tax authorities, private damages awards are deductible from the corporate tax base.

International double jeopardy

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

The CPC does not take penalties imposed in other jurisdictions into account.

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

Getting the fine down

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

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

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

Outside of the leniency programme, participants in a cartel may obtain a 10 per cent reduction in a fine from mitigating circumstances.

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

- terminating an infringement immediately after the start of an investigation (introduced in 2021);
- passive behaviour by the undertaking in the cartel activity;
- a limited role in the infringement or adopting the strategy of 'follow the leader';
- short-term participation in the cartel and terminating participation upon the company's management becoming aware of it (for which compliance programmes may help);
- fully cooperating with a competition authority during an investigation;
- undertaking measures to remedy unfavourable consequences of the infringement, such as voluntarily providing adequate compensation to the ill-affected parties for any damages the breach has caused; and
- other circumstances, depending on the specific case.

As cartels are considered a material infringement of the law, the CPC cannot adopt commitment decisions in cartel cases, even if certain commitments are proposed by parties.

UPDATE AND TRENDS

Recent cases

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

Similar to the trend last year, in 2021, the focus of the Commission for Protection of Competition (CPC) was not on the traditional sectors prone to cartels where it has detected coordinated behaviour (eg, retail chains, fast-moving consumer goods and its production sector, industry trade associations).

The period 2019–2020 also showed an increased number of bid-rigging cases. These cases, which only involved a minor part of the CPC's work, are now an urgent matter for the CPC due to an increasing number of publicly funded projects. Because of covid-19, even more state and EU-financed programmes have become available to local market players, so bid-rigging cases are likely to remain one of the CPC's top enforcement priorities. There is no trend to particular industries or industry-specific investigations that the CPC commenced.

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

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

Regime reviews and modifications

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

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

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Canada has one statute governing all aspects of competition law: the federal Competition Act (the Act). This statute is applicable throughout the country; there is no provincial or territorial competition legislation in Canada.

Relevant institutions

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

The Act is administered and enforced by the Commissioner of Competition (the commissioner) who serves as the head of the Competition Bureau (the Bureau) and who reports to the minister of innovation, science and industry. The commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau, consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners, and approximately 40 officers, investigates all matters relating to cartels, conspiracies and bid rigging.

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

In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes are initially handled by the Bureau but ultimately concluded by the PPSC, with the Bureau's input.

Changes

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

In March 2010, the former 'partial rule of reason' approach to criminal conspiracies in section 45 was replaced with a per se criminal offence to address hard-core cartel conduct. A civil 'reviewable practice' was added in section 90.1 to address other anticompetitive agreements between competitors. The amendments also raised the maximum penalties to a fine of C$25 million per count charged or up to 14 years in prison for the new conspiracy offence. The bid-rigging provision under section 47, which was also amended to include agreements to withdraw a previously submitted bid, carries the same imprisonment penalty or a fine in the discretion of the court.

In December 2009, the Bureau issued Competitor Collaboration Guidelines setting out its policy on competitor agreements, including how it will determine whether to pursue enforcement action under the criminal cartel or civil competitor agreement provisions. Following a public consultation that began in July 2020, the Bureau released the revised Competitor Collaboration Guidelines in May 2021, which reflect the Bureau's enforcement experience since 2009 and several recent related court rulings.

In November 2020, the Bureau released a statement clarifying that enforcement actions related to 'no-poaching', wage-fixing and other buy-side agreements will be based on the civil provisions since the criminal conspiracy offence does not apply to such conduct.

The Bureau conducted public consultations in October 2017 and May 2018 on proposed revisions to its immunity and leniency programmes. The revised immunity and leniency programmes were jointly released by the Bureau and the PPSC in September 2018.

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

Substantive law

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

Section 45 of the Act forms the core of Canadian cartel law. It provides that any person who, with a competitor (or potential competitor) in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offence:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

As a result, price-fixing, market allocation and output restriction conspiracies are illegal per se in Canada. Previously, the Act prohibited only conspiracies with 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Notably, there is no statute of limitations for the conspiracy or bid-rigging offences. Thus the former provisions remain applicable to conduct that occurred prior to March 2010.

As with most criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the actus reus and the mens rea of the offence. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement or arrangement with a competitor to fix prices, allocate markets or customers, or lessen the supply of a product in the manner described

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

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

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

Joint ventures and strategic alliances

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

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

Charges are often laid against both a corporation and individuals such as its senior managers, officers or directors. Senior officials have noted in speeches that the Competition Bureau (the Bureau) will look for appropriate cases in which to prosecute individuals and recommend that the Public Prosecution Service of Canada (PPSC) seek jail terms. The Bureau and PPSC have charged numerous individuals in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against the companies, although the proceedings were subsequently stayed against all parties for procedural reasons. In the past 10 years, more than 100 individuals have been prosecuted.

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

Personal jurisdiction

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

Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof' within the territory of Canada. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation.

If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of local implementation of the conspiracy. This offence may be prosecuted, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

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

Export cartels

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

Subsection 45(5) provides a defence for conduct that only affects customers or other parties outside of Canada:

> *No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product; (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or (c) is in respect only of the supply of services that facilitate the export of products from Canada.*

Industry-specific provisions

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

Federal financial institutions

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

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

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

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

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

Underwriting

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

Amateur and professional sport

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

In respect of professional sport, any person who conspires, agrees or arranges with another person to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or to limit unreasonably the opportunity for any other person to negotiate with and, if an agreement is reached, to play for the team or club of his or her choice in a professional league is guilty of an indictable offence. The Federal Court of Canada concluded in *Mohr v National Hockey League et al* that this provision applies to intra-league, but not inter-league, agreements. The maximum penalty is a fine in the discretion of the court or up to 14 years in prison.

Airlines

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

Collective bargaining

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

No-poaching, wage-fixing and other buy-side agreements

Buy-side agreements for the purchase of products and services – including employee no-poaching and wage-fixing agreements – are not subject to the criminal prohibition of section 45 of the Act. However, the Bureau may investigate such agreements under section 90.1 of the Act as reviewable anticompetitive agreements.

Government-approved conduct

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

A 'regulated conduct defence' was developed as a principle of statutory interpretation to avoid criminalising a regulatory body exercising its authority under a validly enacted provincial legislation or the regulated person proceeding in accordance with such provincial regulation. Canadian courts have occasionally applied the regulated conduct defence in the context of federal legislation. When the conspiracy provisions in section 45 were amended to create a per se offence, the regulated conduct defence, as it existed in common law at the time, was retained by statutory language and was expressly extended to apply to conduct authorised by federal and provincial law.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

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

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

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

If a matter is referred to the DPP, the DPP will make an independent decision whether to lay charges and pursue a prosecution. In May 2010, the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process. These roles were further clarified in the September 2018 revisions to the immunity and leniency policies.

Investigative powers of the authorities

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

During an inquiry, the commissioner has extensive (judicially supervised) powers to obtain information by means of search warrants, orders for the production of data and records, and even wiretaps. These statutory powers supplement information supplied voluntarily by marketplace participants, cooperating parties or enforcement agencies in other jurisdictions. The Bureau sometimes issues voluntary requests for information or 'target letters' to companies that it believes may have relevant information, before resorting to the formal investigative powers described below.

Search warrants

Warrants to search the premises of a business or the home of an individual can be obtained by means of an ex parte application under section 15 of the Act. The commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to and the search and seizure of computer records, including applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems in a cross-border context.

Documents that are subject to solicitor-client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the commissioner to report to the court to retain seized documents. Because the affected company or individual can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit (known as an 'information to obtain') supporting the commissioner's ex parte application, or where the inquiry giving rise to the order has ended without the laying of criminal charges.

Wiretaps

The commissioner has the power to intercept private communications without consent through electronic means (ie, use a wiretap). This power is restricted to conspiracy, bid-rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive telemarketing provisions of the Act, an area that

has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded 'thousands' of telephone conversations using its wiretap powers.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records or compel a corporation to prepare written returns of information under oath, within a certain period of time. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his or her possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this 'long-arm' authority has not been judicially determined, but it continues to be invoked in document production orders sought by the Bureau. The section 11(2) power was the subject of a constitutional challenge by Toshiba in the *Cathode Ray Tubes* investigation and by Royal Bank of Scotland in the *Libor* investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court.

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

In international cartel cases, the Competition Bureau (the Bureau) will often cooperate closely with other competition agencies, either through formal procedures or informally.

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

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

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

Interplay between jurisdictions

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

In light of the MLAT and other inter-agency cooperation, a company defending a cartel investigation that has multi-jurisdictional implications, particularly one involving the United States or the EU, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is increasingly critical, and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution and the lack of any limitation period for cartel conduct in Canada are factors of particular concern in developing a comprehensive strategy.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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

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

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

Under the federal Competition Act (the Act), a corporation has no right to a jury trial. However, individuals may elect trial by jury.

Burden of proof

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

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove each element of the offence beyond a reasonable

doubt. The ordinary rules of evidence in criminal proceedings generally apply, although the Act expressly provides for the admissibility of statistical evidence that might not be admissible in other types of criminal cases.

Circumstantial evidence

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

Pursuant to subsection 45(3) of the Act, a court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties. However, the conspiracy, agreement or arrangement must be proved beyond reasonable doubt.

Appeal process

18 | What is the appeal process?

There is an automatic right of appeal, by the accused person or the DPP, on any matter that involves a question of law alone, to the provincial appellate court or the Federal Court of Appeal, as the case may be. An accused person may also, with leave of the court, appeal against a conviction on any ground that involves a question of fact or a question of mixed fact and law. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so. Sentencing decisions may also be appealed by the accused person or the DPP with leave of the court.

On the hearing of an appeal against conviction, the court of appeal may allow the appeal where it is of the opinion that the verdict should be set aside on any of the following grounds:

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

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

SANCTIONS

Criminal sanctions

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

Given their status as the most serious indictable offences under the federal Competition Act (the Act), cartel prosecutions attract significant penalties – up to C$25 million per count charged for companies and for individuals up to a C$25 million fine or 14 years' imprisonment. There is no maximum fine for foreign-directed conspiracies or bid rigging. Courts have emphasised, in both the competition law and general criminal law contexts, that fines must be large enough to deter powerful companies and must not become simply a cost of doing business.

To date, C$10 million is the highest fine for a single count conspiracy under section 45. This amount (the previous statutory maximum) was imposed for the first time in January 2006 in the *Carbonless Paper* case, and again in 2012 (in respect of conduct occurring under the old offence) in the *Polyurethane Foam* case. The section 46 offence relating to implementing a foreign conspiracy in Canada carries no fine ceiling, and in 1999–2000 SGL Carbon AG and UCAR Inc agreed to pay fines of C$13.5 million and C$12 million respectively under that provision in the *Graphite Electrodes* case.

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

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

Civil and administrative sanctions

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

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment. It is also common for the director of public prosecutions (DPP) to seek a prohibition order to prevent the future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, the reviewable practice provisions in section 90.1 permit the Competition Bureau (the Bureau) to pursue a prohibition order against the conduct in question. (Fines are not available.) Alternatively, it might be possible for the commissioner to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act. Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of dominance provision of the Act of up to C$10 million for the first order and of up to C$15 million for subsequent orders.

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

Guidelines for sanction levels

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

While the Criminal Code enumerates a range of binding sentencing principles, they provide considerable latitude and the determination of sentence is ultimately a matter for the discretion of the court. In addition to sentencing principles, the Criminal Code provides the following list of aggravating and mitigating factors to be considered when sentencing organisations (including, corporations):

- any advantage realised by the organisation as a result of the offence;
- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- whether the organisation has attempted to conceal or convert its assets to show that it is not able to pay a fine or make restitution;

- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

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

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

These criteria and the Bureau recommendations are not binding on the DPP when negotiating a guilty plea, nor are they binding on the DPP when making submissions on the appropriate sentence after obtaining a conviction at trial. However, they are given significant consideration in the negotiation of guilty plea arrangements particularly since the Public Prosecution Service of Canada is a co-author of the 2018 revised immunity and leniency policies.

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

Compliance programmes

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

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

Director disqualification

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

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

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

A revised Integrity Regime was put in place by the Canadian government in July 2015. The regime applies to procurement and real property transactions undertaken by federal government departments and agencies. A supplier is ineligible to do business with the government of Canada if it, or a member of its board of directors, has been convicted of bid rigging or any other anticompetitive activity under the Competition Act or a similar foreign offence. 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.

Where an affiliate of a supplier has been convicted of such an offence, an assessment will be made to determine if there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction. If so, the supplier will be rendered ineligible.

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 ineligibility policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier that has been convicted. Possible circumstances necessary to the public interest could include:

- no other supplier is capable of performing the contract;
- an emergency;
- national security;
- health and safety; and
- economic harm to the financial interests of the government of Canada and not of a particular supplier.

In March 2018, the federal government announced that the Integrity Regime will be enhanced to introduce greater flexibility in debarment decisions and increase the number of triggers that can lead to debarment (including the addition of more federal offences, certain provincial offences, 'foreign civil judgments for misconduct' and debarment decisions of provinces, foreign jurisdictions and international organisations). The government announced that the enhanced Integrity Regime will be reflected in a revised Ineligibility and Suspension Policy. A proposed draft of the revised policy was released for public consultation in the fall of 2018. To date, the revised Ineligibility and Suspension Policy has not been finalised.

Many provincial (and also municipal) governments have also established rules governing debarment from their procurement processes. For example, the Quebec Integrity in Public Contracts Act prohibits a corporation convicted of price-fixing or bid rigging under the Competition Act in the previous five years from entering into contracts with public bodies or municipalities.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Once proceedings have been initiated under the criminal provisions in Part VI of the Act (including sections 45, 46 and 47of the Act), proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts (and vice versa). The choice of which enforcement track to pursue is a matter of discretion for the commissioner and the DPP.

The Bureau's Competitor Collaboration Guidelines, which were updated in 2020, indicate that hard-core cartel conduct normally will be prosecuted criminally and that other types of competitor collaboration normally will be dealt with under the section 90.1 civil provisions. However, at the initial stage of an investigation, the Bureau may proceed with both the criminal and civil tracks of the investigation in parallel, until such time that it has adequate information to decide which track is more appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Section 36 of the federal Competition Act (the Act) grants private parties the right to recover in ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The 'passing-on defence' is not permitted. The Supreme Court of Canada held in 2013 that the possibility of double recovery is an issue to be dealt with when assessing damages at trial, and should not be a bar to indirect purchaser claims.

In the 2019 decision in *Pioneer Corp v Godfrey*, 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 Competition Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track.

Class actions

27 | Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are available and are now a virtual certainty in multiple provinces in Canada after (and often before) a conviction under the cartel provisions in the Act. A vigorous and effective plaintiffs' bar has evolved in Canada, often acting in conjunction with US plaintiffs' counsel in cross-border cases. Claims are normally brought in provincial courts – most typically in British Columbia, Ontario and Quebec. Cases may be brought on the basis of classes defined by reference to the province in question, but some provinces also allow nationwide class actions to be brought in their courts. Class actions may also be initiated on a national basis in the Federal Court.

These regimes all 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, opt-outs are relatively rare in competition class actions in Canada.

There is no formal procedure for consolidating or coordinating parallel actions brought in multiple courts. However, to facilitate the management of multijurisdictional class actions by making use of existing class action legislations and rules of civil procedure, the Canadian Bar Association developed the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions in 2011, which was revised in 2018. This protocol has been adopted by courts in a number of provinces.

To date, most cases have been resolved through settlements, which are subject to the approval of the court to ensure that 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. In the international auto parts conspiracies, the plaintiffs have so far entered into settlements with 37 defendants, totalling approximately C$138 million. The largest settlement to date involved a long-running class action against Microsoft for C$517 million.

COOPERATING PARTIES

Immunity

28 | Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Bureau (the Bureau) has an immunity programme whereby a company or individual implicated in cartel activity may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the director of public prosecutions (DPP) on recommendation by the Bureau. As of September 2018, the first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral of the case to the DPP for possible prosecution, is eligible for a grant of interim immunity. The applicant must have terminated its participation in illegal activities and must not have coerced others to participate in illegal activities. The grant of interim immunity is a conditional immunity agreement that sets out the applicant's ongoing cooperation and full disclosure obligations that must be fulfilled 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 federal Competition Act (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 and the DPP on a case-by-case basis.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Bureau has created a leniency programme that complements its immunity programme for candidates that are not eligible for a grant of immunity. The Bureau will recommend to the DPP that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation. A prompt agreement to plead guilty along with valuable cooperation can earn a leniency applicant a reduction of up to 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP. At the request of the first leniency applicant (ie, the first cooperating party after the immunity applicant) that is a corporate applicant, the Bureau will also recommend to the DPP not to charge the directors, officers or employees of the applicant who admit knowledge of or participation in the unlawful conduct and are prepared to cooperate.

Providing all leniency applicants with the possibility to receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended is a new development in the September 2018 leniency programme. Previously, only the first-in leniency applicant was eligible for this 50 per cent reduction, which was automatic, with subsequent applicants only eligible for a fine reduction of up to 30 per cent. In the new programme, the percentage of the fine reduction is to be determined having regard to the extent that the leniency applicant's cooperation adds to the Bureau's ability to advance its investigation and pursue other culpable parties. The Bureau will take into account a number of factors, including the timing of the leniency application (relative to other parties in the cartel as well as relative to the stage of the Bureau's investigation), the timeliness of disclosure, the availability, credibility and reliability of witnesses, the relevance and materiality of the applicant's records, and any other factor relevant to the development of the Bureau's investigation into the matter. An additional fine reduction credit of 5 to 10 per cent is available to a party eligible for 'immunity plus' situations as described below.

All leniency applicants must meet the cooperation and other requirements of the programme, which are similar to those of the immunity programme. Most importantly, they must provide full, frank, timely and truthful cooperation until the Bureau investigation and any DPP prosecution of other cartel participants has been completed.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by an earlier applicant for immunity in respect of the same alleged cartel conduct. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, be able to request immunity at that time.

Under the Bureau's September 2018 leniency programme, the timing of the leniency application is an important consideration in the determination of the percentage fine reduction that will be available to the applicant. In the previous version of the leniency programme, there was more certainty as the second party benefited from a penalty reduction of 50 per cent of the fine that would otherwise be recommended; however, the new programme has made it clear that the extent of the applicant's cooperation will be one of the factors to be considered in this determination. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, so long as they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation in an ongoing manner. Other conspirators who seek to resolve their exposure later in the investigation will be progressively less able to negotiate favourable fine reductions, unless they are able to demonstrate a higher value associated with their cooperation. In addition, second and subsequent leniency applicants will have less ability to negotiate favourable terms in connection with the exposure of individuals to potential prosecution.

The concept of 'immunity plus' is also addressed in the leniency programme. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for additional favourable treatment if they are the first to disclose information relating to another offence for which they may receive immunity. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognised by the Bureau and the DPP in their sentencing recommendations with respect to the first offence, resulting in an additional 5 per cent to 10 per cent discount off the corporate fine for the first offence and potentially an additional favourable treatment for individuals.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for approaching the Bureau. However, the available benefits decline for subsequent cooperating parties. To increase its likelihood of obtaining immunity or a substantial leniency discount, a party should approach the authorities as soon as legal counsel has information indicating that an offence may have been committed.

A 'marker' can be obtained that will allow counsel time to complete a full investigation. Once a marker is granted, the applicant has 30 calendar days to provide the Bureau with a detailed proffer describing the illegal activity, its effects in Canada and the supporting evidence. If an applicant fails to provide its proffer within 30 days, or within any extended period of time agreed by the Bureau, the marker will automatically lapse. The marker can also be cancelled if the proffer is incomplete or insufficient. In situations involving multiple jurisdictions, a party whose business activities have a connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

A participant in the Bureau's immunity or leniency programmes must provide a:

> *full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anticompetitive conduct for which immunity is sought.*

Participants must also take all lawful measures to secure the cooperation of current and former directors, officers and employees for the duration of the Bureau's investigation and any ensuing prosecutions, including appearing for interviews and potentially providing testimony in judicial proceedings. All such cooperation efforts are at the cooperating party's own expense.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Bureau treats as confidential any information obtained from a party requesting immunity or leniency. The only exceptions to this policy are when disclosure:

- is required by law;
- is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- is agreed to by the cooperating party;
- has already been made public by the party;
- is necessary for the administration or enforcement of the Act; or
- is necessary to prevent the commission of a serious criminal offence.

In addition, unless required by law or on consent, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity or leniency applicant. However, as part of an immunity or leniency applicant's ongoing cooperation, absent compelling reasons, the Bureau will expect the applicant to provide its consent in the form of a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. Such waivers are expected to be provided promptly and cover both substantive information and procedural matters.

With respect to private actions, the Bureau's policy is to provide confidential information from immunity or leniency applicants only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of such information, including by seeking a protective order from the court.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

The DPP and defence counsel may make recommendations but cannot fetter the sentencing discretion of the court. In practice, plea bargains with joint recommendations on sentencing have almost always been accepted. Case law strongly favours acceptance of joint recommendations, which can only be refused where the court's acceptance of the recommended sentence would 'bring the administration of justice into disrepute' or otherwise be contrary to the public interest.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a company qualifies for immunity, all present directors, officers and employees who admit their knowledge of or participation in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for immunity. Agents of a company and past directors, officers and employees who admit their knowledge of or participation in the illegal activity and who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity (eg, if it coerced others to participate) past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they approach the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming no other contrary factors exist (eg, subsequently working for another party to the cartel). Subsequent cooperating parties may be able to obtain protection for some of their directors, officers and employees, but these determinations will be made on a case-by-case basis.

While immunity or leniency may be revoked where a party fails to comply with the immunity or leniency programme requirements, the revocation generally will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer retains its immunity or leniency (provided it has discharged its obligation to take all lawful measures to attempt to secure the individual's cooperation).

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity and leniency processes typically involve the following steps.

Initial contact and marker

Anyone may initiate a request for immunity or leniency in a cartel case by communicating with the deputy commissioner of competition – cartel directorate or their designate. Very basic information about the industry or product will need to be provided, usually through a hypothetical oral disclosure, to determine whether the Bureau is already investigating the matter. The party may be granted a marker to secure its place in the programme, and will normally be asked to confirm its participation in the immunity or leniency programme within four business days of receiving a marker.

Following confirmation of a marker, the Bureau will expect the applicant to perfect its marker by proceeding promptly to provide a proffer. The usual deadline is 30 days, although extensions to provide additional information emerging from an ongoing internal investigation may be given in appropriate circumstances (eg, complex ongoing cross-border investigations).

Proffer

If the party decides to proceed with the immunity or leniency application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information for the Bureau to determine whether it might qualify for immunity or leniency. This is normally done by way of a privileged proffer by legal counsel that describes the conduct and the potential evidence that the cooperating party can provide. At this stage, the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP provide a grant of interim immunity or leniency. The Bureau also seeks information during the proffer stage about the volume of commerce affected by the cartel in Canada.

If the Bureau determines that the party demonstrates its capacity to provide full cooperation and that it meets the requirements of the applicable programme, it will present all relevant proffered information and a recommendation regarding the party's eligibility to the DPP. The DPP will then exercise its independent discretion to determine whether to provide the party with a grant of interim immunity or leniency, as the case may be.

Grant of interim immunity or leniency agreement

If the DPP accepts the Bureau's recommendation, the DPP will issue a grant of interim immunity or enter into a plea agreement with the party that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party receives a grant of interim immunity or enters into a plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution of other parties.

Immunity agreement (for the immunity programme only)

Once a party has satisfied all of its obligations under the grant of interim immunity, the Bureau will recommend to the DPP to finalise the grant of immunity to the applicant. The final grant of immunity will not ordinarily be finalised until either the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution or the commissioner and the DPP have no reason to believe that further assistance from the applicant could be necessary.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The director of public prosecutions (DPP) is required to produce to an accused all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP does have discretion to withhold information as to the timing of the disclosure where necessary for the protection of witnesses or a continuing investigation but will have to disclose this information before the trial. This disclosure obligation begins at the outset of the prosecution at the first appearance and continues until the end of the proceedings. The right to receive disclosure of all relevant information from the DPP is protected by the Canadian Constitution and a violation of this right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

As individual employees and the corporation can both be charged with an offence under the federal Competition Act, there is a potential conflict of interest if counsel acts for both the corporation 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 corporation's participation in the immunity or leniency programme.

Counsel for a corporation must caution employees that he or she acts for the corporation alone and, if they believe that their interests may conflict with the corporation's interests, they should obtain independent legal advice. Counsel for the corporation will be free to act for both the corporation and the employee if they both consent to a waiver of potential conflicts of interest and confidentiality arrangements between them. However, the Competition Bureau (the Bureau) investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Affiliated companies normally do not require separate representation.

There is a potential for conflicts of interest among multiple corporate defendants (which are not affiliates) during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between co-defendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflict management arrangements have been established.

As a matter of current practice, the DPP will be unlikely to participate in joint resolution discussions involving multiple parties.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation can indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, there has been at least one instance in which a convicting court ordered a corporation not to pay the fine imposed on an individual employee.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties can be categorised as follows:

- judicial – these are imposed by a court of law for a breach of any public law; and
- statutory – these are imposed as a result of the application of statutes (eg, the Competition Act).

Damages include a payment in settlement of a damages claim to avoid or terminate litigation, even where there was no admission of any wrongdoing.

Paragraph 18(1)(a) of the Income Tax Act provides that, in calculating a taxpayer's income from a business or property, no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property. Fines, penalties, and private damages payments may be deducted from a taxpayer's income if they are incurred for the purpose of gaining or producing income.

As stated by the Supreme Court of Canada in *65302 British Columbia Ltd v Canada*, 'if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted'.

For purposes of establishing whether a fine or penalty has been incurred for the purpose of gaining or producing income the taxpayer:

- need not have attempted to prevent the act or omission that resulted in the fine or penalty; and
- need only establish that there was an income-earning purpose for the act or omission, regardless of whether that purpose was actually achieved.

The Supreme Court of Canada also stated that: 'it is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income'. The court did not, however, give any further guidance in this respect, other than to indicate that 'such a situation would likely be rare'.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is possible that the Bureau may investigate and seek to prosecute individuals who also have exposure in other jurisdictions, assuming it can obtain personal jurisdiction over them. For example, in the *Vitamins* case, the Canadian authorities negotiated guilty pleas with fines (but no custodial penalties) with three executives of F Hoffmann–La Roche that were also prosecuted in the United States.

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Similarly, the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has also expressed the view that it can take into account indirect sales into Canada made by a cartel participant when asserting jurisdiction or imposing penalties. This gives rise to the possibility of 'double jeopardy' in international cartel cases. In its leniency programme FAQs, the Bureau indicates that:

> *[W]here cartel members are penalized in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada from the indirect sales.*

Section 718.21 of the Criminal Code requires a sentencing court to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. It has not been conclusively determined whether this provision should be interpreted as applying only to other sanctions imposed in Canada, or whether fines paid in other jurisdictions can also be considered. However, an obiter comment in a 2012 Federal Court sentencing decision (*R v Maxzone Canada Corporation*) suggested that the mere fact that a company or individual had been penalised in another jurisdiction should not be considered relevant when determining a sentence in Canada.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

In Canada, plea negotiations in criminal matters are a well-recognised and accepted practice. The single most effective consideration in negotiating a favourable plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward and provides cooperation to the Bureau. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the

investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a significant fine reduction and possibly also leniency for exposed individuals may be negotiated. Other substantive factors may also be important elements in a negotiated settlement of the company's exposure to prosecution, including the quality of the cooperation, the capacity to pay a fine, the existence or lack of an effective corporate compliance programme, the degree of management awareness of the actions of individual participants, and passive or reluctant participation as opposed to involvement in the instigation of the offence.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

In *Mohr v National Hockey League et al*, the Federal Court of Canada concluded that section 45 of the federal Competition Act (the Act) does not apply to agreements between buyers of a product or service. This is consistent with the Competition Bureau's (the Bureau) statement in November 2020 clarifying that no-poach, wage-fixing and other buy-side agreements are not subject to the criminal offence in section 45 of the Act.

The Bureau released the updated Competitor Collaboration Guidelines in May 2021, which primarily reflected the Bureau's enforcement experience and developments in case law since 2009. The revisions include a clear warning against agreements between competitors that are specifically designed or structured to avoid scrutiny under the criminal provision of section 45, such as in the form of a merger or non-compete agreement, and indicated that Bureau will investigate an agreement under the most appropriate provision of the Act, 'regardless of formality or enforceability'.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

None.

China

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Anti-Monopoly Law of China (AML) of 2008 is the main legislation in China governing cartels. In addition, the State Administration for Market Regulation (SAMR), the consolidated anti-monopoly enforcement agency, issued the Interim Provisions on the Prohibition of Monopoly Agreements in 2019, which provides more detailed rules to regulate cartel arrangements.

In January 2019, the Anti-monopoly Committee of the State Council (AMC) issued the Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements (the Leniency Guidelines) and Guidelines on the Undertakings' Commitments in Antitrust Cases (the Commitments Guidelines), which provide more detailed provisions to regulate cartels and leniency. In addition, the Administrative Penalty Law and the Provisions on Administrative Penalty Procedures for Market Regulation amended in 2021 also provide guidance on the administrative penalties for cartels.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

SAMR and the Provincial Market Regulatory Department (PMRD) – the market regulatory departments of the governments of provinces, autonomous regions and municipalities directly under the Central Government – are the competition authorities in China and investigate cartel arrangements.

SAMR is responsible for investigation of the cartel arrangements that extend beyond a province, are relatively complex, or have significant nationwide impact. SAMR may assign certain cartel cases to PMRD if the target companies are located in one province. Where SAMR deems it necessary to investigate the cartel directly, it may investigate on its own. For these assigned cartel cases, SAMR may accompany PMRD to carry out on-site dawn raids and PMRD will report to SAMR from time to time regarding the development of the investigation. If PMRD finds no cartel behaviour, SAMR may accept this conclusion. However, if SAMR does not agree with the approach of the PMRD, it may rule on the matter as if it has not assigned the case to the PMRD. PMRD has the authority to initiate investigations and punish cartels within the province, autonomous region or municipality.

According to the AML, the AMC was established to organise, coordinate and supervise anti-monopoly activities. The AMC serves as a policy-making body and is not involved in specific antitrust cases.

Cartel agreements are not criminal violations in China. Therefore, except for bid rigging or obstructing law enforcement by means of violence or threats, the role of the criminal prosecution authorities is very limited in a cartel investigation in China.

Under the AML, SAMR and PMRD conduct antitrust investigations against cartel arrangements and render decisions independently, without relying on the People's Court.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The legislative changes related to cartels in 2021 are the revision of the AML and the promulgation of the Anti-Monopoly Guidelines of AMC on the Platform Economy.

Amendment of Cartel Rules in the AML

Definition of monopoly agreement

Monopoly agreements refer to agreements, decisions or concerted actions that have the purpose or effect of eliminating or restricting competition. Compared with the pre-amendment AML, this definition clarifies that as long as it has the purpose of eliminating or restricting competition, it constitutes a monopoly agreement and does not need to actually have the effect of eliminating or restricting competition. Specifically, if competitors engage in price-fixing, restriction of production or sales volume, market or customer allocation, restriction of R&D or new technology or products, and group boycotts (whether the conduct has anticompetitive effects or not) it constitutes a monopoly agreement. The significance of this definition is to further clarify the per se illegal nature of the cartels.

It should be noted that this amendment lists the definition of monopoly agreement as a separate article, indicating that this definition is applicable to both horizontal monopoly agreements and vertical monopoly agreements. Therefore, the existence of resale price maintenance is per se illegal and constitutes a monopoly agreement, and there is no need to examine its actual anticompetitive effects.

Hub and spoke agreement

The AML introduced a new article to deal with hub-and-spoke cartels, which provides, 'undertakings are prohibited from organising other undertakings to reach monopoly agreements or to provide substantive assistance to other undertakings in reaching monopoly agreements'. In a hub-and-spoke agreement, the hub and spokes are located at different levels of the industrial chain. The hub facilitates the coordination of competition between the spokes and there is no direct contact between the spokes. In this way, a cartel can be achieved based on indirect communication between the competing spokes.

Before the amendment, the AML was unable to deal with such an arrangement, as it only applied to competing undertakings and lacked

relevant provisions to deal with an undertaking that is not a competitor to a cartel's parties but plays an important role in it. The new AML extends the scope of investigations and penalties for monopoly agreements to include undertakings that organise or facilitate other undertakings to reach cartel agreements.

(3) Safe harbour

The AML stipulates that 'If an undertaking who has reached a monopoly agreement has evidence that its market share in the relevant market is below a specific standard, Article 16 (horizontal monopoly agreement), Article 17 (vertical monopoly agreement) and Article 18 (hub and spoke agreement) shall not apply, except where there is evidence that the agreement eliminates or restricts competition. The specific standards for market share shall be formulated by the Anti-monopoly Law Enforcement Agency of the State Council'. This clause provides safe harbour for undertakings in a highly competitive market and undertakings with a small market share. At the same time, it enables law enforcement agencies to focus on conduct with huge market influence and concentrate the limited law enforcement power on the market and enterprises that have a great influence on market competition.

Monopoly agreements in the field of digital economy

The new AML adds several articles addressing cartels in the digital economy. Undertakings in the digital economy shall not use technological means, platform rules, data and algorithms, etc to engage in monopolistic behaviours prohibited in this chapter (horizontal monopoly agreement, vertical monopoly agreement and hub and spoke agreement).

Cartel rules in the Anti-monopoly Guidelines of the AMC on Platform Economy (Platform Economy Anti-Monopoly Guidelines)

Hub and spoke agreement centred on the platform

The Platform Economy Anti-Monopoly Guidelines pointed out that competing undertakings in a platform may use the vertical relationship with the platform, or be organised and coordinated by the platform to reach a hub-and-spoke agreement with the effect of a horizontal monopoly agreement. To analyse whether such agreement falls within the scope of monopoly agreements under the AML, whether the competing undertakings are using technical means, platform rules, data, algorithms, etc. to eliminate or restrict competition may be taken into account.

Algorithm collusion

The Platform Economy Anti-Monopoly Guidelines provides, 'the term "other concerted conduct" refers to the conduct whereby undertakings do not explicitly enter into an agreement or decision, but are actually coordinated through data, algorithms, platform rules or other means, except for price following and other parallel conduct conducted by the relevant undertakings based on their independent expression of intent'. If a platform provides a unified pricing algorithm, and the competing undertakings on the platform unified the price by using the algorithm, this behaviour may be regarded as algorithmic collusion.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The AML and the Interim Provisions on the Prohibition of Monopoly Agreements prohibit:

- price-fixing;
- restricting production or sales volume, market or customer allocation, research and development, new technologies or products; and
- group boycotts.

Price-fixing

Price-fixing is an agreement, either written, verbal or inferred from conduct, among competitors that increases, lowers or stabilises prices or competitive terms.

Price-fixing can be achieved directly by setting the price level, range, or discount. It can also be achieved indirectly by setting the profit, fees and expenses or a standard formula for calculating prices. The nature of the price-fixing is to limit the discretion of the parties on pricing, rather than allowing the price to be determined naturally through free-market forces.

Market or customer allocation

Market or customer allocation is an agreement among competitors to divide sales territories or assign customers. In practice, the market allocation can be further divided as geographic market allocation, product-market allocation and market share allocation.

- geographic market allocation – undertakings assign exclusive territories for each cartel member (online and offline markets could also be so allocated);
- product market allocation – undertakings allocate the exclusive rights on certain categories, volume and timing of sales of products to each cartel member;
- market share allocation – undertakings' similar products compete in the same territory, however, when one cartel member reaches an agreed market share, sales target, sales revenue or sales profit, it restricts its sales activities and ceases to compete; and
- customer allocation – customers are allocated among the undertakings, so an undertaking will not sell their products or services to customers allocated to another cartel member.

Group boycott

Group boycott is an agreement among competing undertakings not to do business with a targeted undertaking. This arrangement could target the customers in the downstream market by jointly refusing to supply or sell products or target the suppliers in the upstream market by jointly refusing to purchase products. According to the Interim Provisions on the Prohibition of Monopoly Agreements, jointly restricting a specific undertaking from trading with undertakings which are in competition with them can also be determined as a group boycott.

Output agreement

An output agreement is an agreement among competing undertakings to prevent, restrict or limit the volume or type of particular products or services available in the market. The goal of such a cartel agreement can be achieved at either the production stage or the distribution stage. At the production stage, the competing undertakings will restrict or fix the production volume of particular products. At the distribution stage, the competing undertakings will restrict or fix the sales volume of specific types or models of products.

Bid rigging

'Bid rigging' is an agreement among competing undertakings as to who will submit the winning bid when an original equipment manufacturer solicits proposals to purchase products or services. Though the AML does not expressly include bid rigging, it may be seen as a type of cartel conduct. The competition authority in China investigates and fines bid rigging-related conduct by applying article 13 AML in several high-profile cases, including the *Auto Parts and Bearings* case (2014) and the *Auto Maritime Transportation* case (2015).

Restricting R&D or new technology or products

This is an agreement among undertakings to restrict innovation or restrict the purchasing or use of new technology and products in order

to maintain the ability to restrain competition and stifle new challenges to their hegemony.

Innovation, whether in the form of improved product quality and variety, or of production efficiency that allows lower prices, is a powerful engine to promote competition and enhance consumers' welfare. New technology and products are the result of innovation. This cartel rule under the AML is vitally important to preserve competition in innovation and ensure the best outcome for consumers.

Information exchanges

Information exchange among undertakings is not presumptively illegal in China, unless the cartel agreements, decisions or concerted practices can be found. Although information exchange may facilitate collusion, in most cases, an undertaking can gain insights on how to compete more effectively through information exchange and can introduce more and better products and services based on the information obtained.

Concerted practices

According to the AML, monopoly agreements are agreements, decisions or other concerted practices that eliminate or restrict competition.

Finding concerted practices does not require the existence of any written or oral agreements among the competitors, rather only:

- uniformity of behaviour among competitors;
- opportunity for communication or exchange of information among competitors;
- that the uniformity cannot be reasonably explained other than as the result of improper communication among competitors; and
- the market structure, competition status, market changes and other situations of the relevant markets may facilitate collusion.

Per se illegal v rule of reason

Because cartel arrangements are subject to exemption rules under the AML, in general, cartel arrangements are not per se illegal. However, according to the Supreme Court's Provisions on Several Issues concerning the Application of Law in the Civil Disputes Arising from Monopoly Conduct of 2012 (the Antitrust Judicial Interpretation), the anticompetitive effects of price-fixing, restricting production or sales volume, market or customer allocation, restricting R&D or new technology or products, and group boycotts are presumed. An undertaking under investigation shall bear the burden of proof to fulfil the exemption requirements.

In addition, according to the Commitments Guidelines, price-fixing, restricting production or sales volume, and market or customer allocation cannot be settled by commitments from an undertaking. Therefore it will be harder for an undertaking under investigation to apply for leniency for cartel arrangements.

Level of knowledge or intention required for a finding of liability

The Administrative Penalty Law provides, 'where a party concerned has sufficient evidence to prove that he has no subjective fault, no administrative penalty shall be imposed on him. Where laws or administrative regulations provide otherwise, such provisions shall prevail'.

In judicial practice, the People's Courts have different opinions on whether the subjective element constitutes one of the elements in the making of an administrative penalty decision.

In the appeal of *Wang Xiaojun v Hejing County Public Security Bureau*, the People's Court only considered conduct. It held that the plaintiff carried a forged driving license in his vehicle and that the Road Traffic Safety Law does not require administrative agencies to identify the subjective knowledge of the perpetrator when making administrative penalties (in this case, whether he knew, should have known but did not, or did not know the driving license was forged).

However, in the appeal of *China Rail Finance Leasing Co, Ltd v Tianjin Branch of the State Administration of Foreign Exchange*, Beijing No. 1 Intermediate People's Court held that the determination of a party's illegal conduct should satisfy both objective and subjective requirements: there should be conduct that violates the administrative law, and there should be subjective fault. That is, if the illegal conduct can be proved, and there is no contrary evidence that can rule out the subjective fault of the party, it should be presumed that the party is at subjective fault.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint Ventures

A joint venture can be established by either non-competitors or competitors. A joint venture can also compete with its participating companies or operate in a separate market. If the participating companies and the joint venture are actual or potential competitors, there is a risk of a carte being formed.

Establishment of a joint venture by competitors

Although the AML looks sceptically upon agreements between competitors, SAMR considers a joint venture as a new undertaking joining the market and increasing competition, and that, in general, joint ventures are pro-competitive behaviour, so it affords lenient treatment to the establishment of legitimate joint ventures.

Joint ventures can take a number of different forms, such as:

- the fully integrated joint venture – an integrated full line of businesses, including manufacturing, distribution, marketing and sales;
- the purchasing joint venture – enables the participating companies to procure parts, raw materials and services etc from a common source in order at economic scale to increase their purchasing power to balance with market power;
- the research joint venture – enables participating companies to increases innovation, reduce R&D costs, and so possibly create better quality products;
- the production joint venture – intergrates or creates a shared production facility among the participating companies; and
- the distribution joint venture – intergrates or creates a shared distribution channel among the participating companies.

Special attention must be paid to distribution joint ventures if the participating companies maintain their own brands and continue to compete in the market, and the only purpose of the joint venture is to coordinate distribution between the participants. Because of the structure of a distribution joint venture, it is inevitable that competing participating companies will share sensitive information and there is a strong risk that they may fix prices of their goods or divide the distribution market between them.

In general, the other forms of joint ventures established by competing companies are less likely to raise competition concern. For instance, a purchasing joint venture will lower costs and improve the quality of parts, which may lead to the final product having a lower price but a higher quality, which will benefit the consumers, while a production joint venture may achieve economic scale, which lowers the cost of production and improves efficiency, which also good for consumers of the participants' product.

No competition between a joint venture and its participating companies

In order to protect the commercial value and the effective operation of a joint venture after its formation, competing participating companies

often stipulate in the transaction agreement that they will not compete with the joint venture for specified products in a geographical area for a certain period of time. Such transaction terms are collectively referred to as a 'non-compete clause'.

A non-compete clause should be restricted within a proper scope to protect the joint venture's commercial value and its effective operation. Possible forms of restriction follow.

Duration

The term of the non-compete clause should not be too long. There are no guidelines for the duration of a non-compete clause, but more than three years could attract attention.

Geographic scope

The geographical scope covered by the non-compete clause should be limited to the joint venture's business scope. In the future, if it becomes necessary to cover further areas than what the venture originally planned to enter, it is necessary to check whether a preliminary investment has been made.

Product scope

The non-compete clause is limited to the products and services that constitute the operating activities of the joint venture but may include products in the advanced development stage or that are fully developed but not yet marketed. However, non-compete clauses should not be set for products or services that are not operated by the joint venture.

Restricted undertakings

A non-compete clause may restrict the participating companies from competing with the joint venture, however, the parent companies cannot divide the market outside the joint venture's products or services and geographic scope. In addition, the non-compete clause can only restrict a participating company, its subsidiaries and commercial agents, but it cannot directly restrict distributors. The joint venture's participating companies can only achieve this goal through vertical agreements with its distributors.

Competitors participating in a joint venture cannot use it as a platform for collusion

Information sharing between a participant and the joint venture itself is acceptable under the AML, as participants have to evaluate the joint venture's performance and may need to provide support to it.

However, there is a risk that competitors may use a joint venture they are party to as a platform to achieve collusion. The cartel rules under the AML clearly prohibit the fixing of prices or dividing markets between competitors, either directly or indirectly through third parties such as joint ventures.

Joint ventures cannot use participating companies as a platform for collusion

In addition, if a participant has two or more competing joint ventures, a firewall and a clean team should be established to prevent sensitive information flowing between the competing joint ventures and a parent company.

Strategic Alliances

Competing companies may coordinate through a strategic alliance without establishing an entity (ie, forming a joint venture). The reasons for choosing a strategic alliance are that they are commercial contracts, which are easier to unwind if they do not work out, and the relationship between the parties of a strategic alliance is simple and flexible and does not require the level of work regarding tax, accounting, governance and other matters associated with the formation of a joint venture.

However, the antitrust risk of a strategic alliance agreement should be considered. Anticompetition clauses are usually embedded in these agreements, but cartel issues may resurface when parties to a strategic alliance agreements agree on implementation agreements.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

The Anti-Monopoly Law of China (AML) defines an 'undertaking' as a natural person, a legal person or an unincorporated 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 within the domestic market of China. There have been a number of cartel cases, including the *LCD Panel* case (2013), *Auto Parts and Bearings* case (2014), and *Auto Maritime Transportation* case (2015), where conduct outside China was found to be in violation of the AML.

To establish that conduct outside China has an anticompetitive effect in China the product under investigation must be imported into China, and there is a reasonable causal nexus between the alleged conduct and the 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?

The AML permits exemptions to be granted for monopoly agreements that are entered into for the purpose of protecting the legitimate interest of international trade and foreign economic cooperation. This provision has been included to permit export cartels.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Agriculture

The AML provides that the AML shall not apply to cooperative or collaborative acts between agricultural producers and rural economic organisations in business activities such as the manufacturing, processing, sale, transportation and storage etc of agricultural products. This article is only applicable to agricultural producers and rural economic organisations; industrialised undertakings in the agricultural sector cannot enjoy this exemption. In addition, this article is only applicable to cartel activities, abusive conduct and resale price maintenance (RPM) can still be caught under the AML. For instance, the above agriculture exemptiong rule makes the price-fixing conduct of farmers in several villages agreeing to raise the prices of crops, meat, milk or eggs at the same time exempt from the AML.

'Agricultural producers' refers to undertakings and individuals operating in agricultural crop cultivation, forestry, animal husbandry or fisheries in agricultural land and separate facilities.

A 'rural economic organisation' are special economic organisations that are the main form of rural collective asset management. At this stage, local government authorities above the county level are responsible for issuing organisation registration certificates to these organisations, which enables them to follow the relevant procedures for opening bank accounts with the relevant government departments in order to carry out business operations and management.

Active pharmaceutical ingredients

The Guide to the Pricing Behavior of Undertakings Dealing in Drugs in Short Supply and Active Pharmaceutical Ingredients (the API Pricing Guidelines) issued in November 2017 and the Antitrust Guideline in the field of Active Pharmaceutical Ingredients (draft for comments) (the Draft API Guidelines) issued in October 2020 regulate the cartel activities related to active pharmaceutical ingredients (APIs).

According to the API Pricing Guidelines, the AML prohibits any of the following horizontal monopolistic price agreements by competing API undertakings:

- fixing the price level or the range of price;
- fixing the tender price;
- fixing agency fees, distribution fees, market discounts and other expenses influencing the price;
- fixing the benchmark price, profit rate, gross profit rate, etc for transactions with any third party;
- agreeing upon a standard formula to calculate the price of an API;
- fixing the price by limiting the output or sales volume;
- fixing the price by dividing the market;
- fixing the price by restricting the purchasing of new technologies or equipment, or restricting the development of new technologies or products;
- fixing the price by boycotting transactions; and
- fixing the price in any other disguised form.

The Draft API Guidelines cover broader antitrust issues, such as abusive of dominance, merger control and abuse of administrative power related to the API. According to the Draft API Guidelines, in a cartel investigation, SAMR or PMRD has the discretion to not define the relevant market; however, if an undertaking under cartel investigation wants to apply for an exemption under the AML, a market definition is required in order to prove that the market competition is not seriously restricted.

The Draft API Guidelines also states that the API, in general, constitute an independent market and may be further divided. This means that the API related antitrust investigations are more likely to involve abusive conduct, as it is very likely that API manufacturers and distributors will be assumed, whether independently or jointly, to dominate the API manufacturing or distribution markets.

The significant cartel rules under the Draft API Guidelines are:

- Competing API manufacturers shall avoid reaching joint production agreements, joint purchase agreements, joint distribution agreements and joint bidding agreements with competitors. This provision is a strong signal that SAMR and PMRD take a harsher position on API-related cases, as joint production and joint purchase agreements in the automotive industry are considered exempt under the AML.
- Competing API manufacturers shall avoid sharing sensitive information through third parties (such as API distributors or pharmaceutical manufacturers). This is the first time that a sharing information rule is specifically addressed in antitrust guidelines.

The Draft API Guidelines is subject to further revision. No matter how this document will be revised, as stated in article 20 of the Draft API Guidelines, SMAR and PMRD will strictly and severely investigate antitrust acts related to API.

Automobiles

According to article 5(1) of the Antitrust Guidelines for the Automotive Industry (the Auto Guidelines) issued by the Anti-monopoly Committee of the State Council (AMC) in 2019 (published in June 2020):

> *[Certain] types of horizontal agreements, for instance, research & development agreements, agreements on specialisation, technology standardisation agreements, joint production agreements and joint purchase agreements, would generally improve the efficiency and promote competition and are conducive to increasing the benefits of the consumers. For instance, the horizontal agreements during the R&D and production processes of a new energy automobile may enable the undertakings to share the investment risks, improve the efficiency and promote social public interests. Hence, undertakings in the automotive industry that reach the aforesaid horizontal agreements that can improve efficiency and promote competition may prove that the provisions of article 13 of the AML do not apply to their agreements pursuant to article 15 of the AML.*

The Auto Guidelines reshape the rules on vertical monopoly agreements in China, and its impact extends beyond the automotive industry.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

State actions and government-approved activity are not justifications for the cartel under the AML

According to the AML and the Interim Provisions on Prohibiting Acts of Abuse of Administrative Authority to Eliminate or Restrict Competition (Abuse of Administrative Authority Provision), administrative authorities shall not abuse their administrative authority to compel or compel in a disguised form undertakings to engage in the monopolistic practices in violation of the AML. In addition, the Opinions on Establishing a Fair Competition Review System During the Development of Market-oriented Systems (FCR Opinions) was issued in 2016. The purpose of the Fair Competition Review System is to prevent policy-making bodies from issuing measures that eliminate or restrict competition and to gradually abolish regulations and practices that hinder the creation of a unified market and fair competition. According to the FCR Opinions, the administrative authority cannot force the undertakings to engage in the monopolistic practices in violation of the AML, and cannot set government pricing exceeding the pricing authorities. Therefore, according to the above provisions and opinions, the cartels endorsed under the state actions or approved by the government are not exempted from the AML.

Government-guided prices or government-set prices are permitted in China with narrow application

In general, the administrative authorities shall not misuse their authority by drafting regulations containing provisions that eliminate or restrict competition.

However, government-guided prices and government-set prices are permitted under the Price Law and the Rules for the Pricing Activities of the Government (issued in August 2017). About 3 per cent of the prices in China are government-guided prices or government-set prices. The price related to important public utilities, public welfare services, and goods and services operated under the natural monopoly will be based

on the pricing catalogue drafted by the central or a local government. Undertakings follow the government-guided prices or government-set prices are not caught under the AML.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

A cartel investigation usually is started by a whistle-blower or a cartel member applying for leniency. The State Administration for Market Regulation (SAMR) or a local Provincial Market Regulatory Department (PMRD) may also initiate an investigation if it has reason to believe there has been a cartel infringement.

Pre-investigation
At this stage, SAMR or PMRD will conduct an external investigation to understand the background and verify the evidence obtained to determine whether to formally initiate an antitrust investigation. The PMRD may communicate with SAMR before initiating the investigation.

Initiation of an investigation
SAMR or PMRDs may initiate an antitrust investigation at their own discretion if one believes there is a good case to pursue. A PMRD shall, within seven working days after the initiation of an 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 a PMRD. SAMR or the PMRD shall decide whether to give a mitigated penalty or exempt the undertaking from a penalty by considering factors including the time sequence of the voluntary reporting by the undertaking, the degree of importance of the evidence provided, and the relevant information on the conclusion or implementation of the monopoly agreement concerned. The first-in may receive immunity or at least 80 per cent mitigation of the fine. The second may receive 30–50 per cent mitigation. The third may receive 20–30 per cent mitigation. In exceptional cases where leniency is provided to more applicants, they may receive no more than 20 per cent mitigation.

Fact-finding and dawn raids
SAMR and PMRDs have broad investigative powers and, during the fact-finding stage, SAMR or PMRD may carry out a dawn raid on the undertaking under investigation by conducting an on-site inspection to collect and fix evidence, conducting interrogations and request the undertaking to provide documents.

Undertakings that are under investigation and interested parties have the right to voice their views. SAMR or PMRD shall verify the facts, reasons and evidence presented by undertakings under investigation or interested parties.

SAMR or PMRD will ask undertakings under investigation to submit documents or provide explanations for certain conduct. The fact-finding process may last for several months, even years, and the scope of the investigation may be upstream, downstream or involve competitors of the undertaking under investigation.

Decisions on cancellation, suspension, resumption or termination of an investigation
The investigation can be cancelled if no violation can be found. The investigation can be suspended if the undertaking which submits an application agrees to undertake certain specific measures that will lead to the elimination of the effect of suspicious practices within a time limit designated by SAMR. If such measures are properly implemented in the agreed period of time, SAMR may terminate the investigation. The investigation could be resumed if the measures are not implemented as promised.

Expert argumentation meeting
There is an Expert Committee under the Anti-monopoly Commission of the State Council. Seventeen experts in the Expert Committee can be called on by SAMR to attend an expert argumentation meeting to give an expert opinion on the findings and preliminary decisions of SAMR.

Oral notice for the finding of the case
After the expert argumentation meeting, SAMR will release its findings and its preliminary decision to the undertaking under investigation orally. The oral notice may include the proposed fine base and the proposed rate of fine. The undertaking can provide SAMR with a statement or argument to challenge the facts and the law's application.

Prior notice for administrative penalties
After communication between SAMR and the undertaking under investigation, SAMR will issue the Prior Notice for the Administrative Penalty. This is a notice in written form stating the facts, the violation found, the fine base and the rate of fine. It will state the right for the undertaking to make a statement, an argument or apply for a hearing. The undertaking under investigation may challenge the decision, the fine base and the rate of fine to reduce the penalty.

Final decision on administrative penalties
After the undertaking under investigation provides the statement, argument or attends the hearing, SAMR will issue the final decision on the administrative penalty. The wording of the decision could be negotiated if it contains trade secrets.

Publication
A decision on the administrative penalty or a decision on suspending terminating an investigation will be released to the public through SAMR's website.

Administrative review or administrative lawsuit
If the undertaking does not accept a decision made by SAMR, it may apply for administrative review or file an administrative lawsuit.

There is no statutory timeline for a cartel investigation. In practice, the time spent on an investigation varies depending on the complexity of the case, SAMR's internal priorities, the cooperation of the undertakings under investigation, etc.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Anti-Monopoly Law of China (AML) grants SAMR and PMRDs broad investigative powers, including the ability to:

- conduct on-premise inspections of the place of business of the investigated undertaking or other relevant places;
- question the investigated undertaking, interested parties, and other relevant entities and individuals, requiring them to provide relevant information;
- examine or copy relevant documents and information including related documentation, contracts, accounting books, business mails, and electronic data, etc, of the investigated undertaking, interested parties, and other relevant entities or individuals;
- seal up and detain relevant evidence; and
- enquire about the bank accounts of the undertakings.

SAMR and PMRDs do not need to obtain court orders for searches, seizures, and other investigative actions. In practice, before any measures authorised by the AML may be taken, a written report shall be submitted to the leadership of SAMR or the PMRD for approval.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The State Administration for Market Regulation (SAMR) has pursued bilateral cooperation with their counterparts in other jurisdictions. Since the enactment of the Anti-Monopoly Law of China (AML) in 2008, it has entered into at least 55 cooperation agreements or memoranda of understanding (MoUs) with competition authorities in 28 countries and regions, including the United States, the European Union, Japan, Korea and Australia.

In July 2011, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) signed an antitrust MoU with the US Federal Trade Commission and Department of Justice to foster cooperation in the enforcement of their competition laws and policies.

In September 2012, the NDRC, the SAIC and the Directorate-General Competition of the EU signed an MoU, which created a dedicated framework to strengthen cooperation and coordination between DG Competition and China authority concerning legislation, enforcement and technical cooperation regarding cartels, other restrictive agreements and abuse of dominant market positions.

In May 2019, SAMR concluded an MoU with the Japan Fair Trade Commission, which provides that the authorities will provide information to each other on individual cases that both investigate or review.

In May 2012, NDRC and the Korea Fair Trade Commission signed an MoU to cooperate in work related to international cartels, abuses of dominance, abuses of intellectual property and cross-border violations of South Korea's Monopoly Regulation and Fair Trade Act.

In November 2015, NDRC and the Australian Competition and Consumer Commission signed an MoU to allow the agencies to take coordinated action in response to 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 the OECD. However, consolidation of China's three anti-trust agencies will smooth communication and coordination between SAMR and ICN and the OECD. As a member state of the United Nations, China is involved in some of the work of the competition group of the UN Conference on Trade and Development.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Despite the bilateral cooperation and communication between SAMR and antitrust enforcement agencies in other jurisdictions, inter-jurisdictional cooperation remains high level, and so far there is no clear indication of working-level coordination between jurisdictions in specific investigations.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

After State Administration for Market Regulation (SAMR) or a Provincial Market Regulatory Department (PMRD) establishes a finding of a monopoly agreement, it will issue a formal penalty decision and a public announcement. Usually, SAMR or PMRD is obliged to issue a 'prior notice for administrative penalties' to the investigated parties before issuing the formal penalty decision. The investigated undertaking may request a formal hearing or otherwise submit a written representation or defence, but often has only a few days to do so. There is no mandatory time limit between the issuance of the prior notice for administrative penalties and the formal decision, and SAMR or PMRD has the discretion to set this period.

The hearing and written submission provide investigated parties with an opportunity to challenge the to-be-issued formal penalty decision before resorting to the appeal process. If the defence is accepted by SAMR or the PMRD, no penalty will be imposed.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

In public enforcement, SAMR or the PMRD bears the burden to prove the existence of a cartel. Once SAMR or PMRD has proved the existence of a cartel, it is hard for the parties to rebut the presumption of anticompetitive effects.

As to cartel-related private actions, the general rule is a litigant must provide evidence to prove the facts on which its claims are based or the facts on which its rebuttal of the counterparty's claims are based, except otherwise stipulated by the law. Prior to the making of a judgment, where a litigant is unable to provide evidence or adequate evidence to prove its assertions, the litigant who has the burden of proof bears the adverse consequences.

In antitrust litigation, if the alleged monopolistic conduct is an entry into a horizontal agreement of price-fixing, division of the market, a restriction on output, a restriction on research and development or a joint boycott, the defendant has the burden to prove that those agreements do not have the effects of eliminating or restricting the competition. If the alleged monopolistic conduct is entering into a vertical agreement of resale price maintenance, the plaintiff has the burden to prove the resale price maintenance and the effects of eliminating or restricting the competition.

At present, a high degree of probability is the standard of proof that is applicable. Beyond reasonable doubt and a comparatively high degree of probability are supplementary standards of proof.

High degree of probability

Article 108 of the Judicial Interpretation of the Civil Procedural Law provides the foundation of the general standard of proof of 'high degree of probability':

> *. . . for evidence provided by a litigant who has the burden of proof, where the People's Court, upon examination and taking into account the relevant facts, confirms that it is highly probable that the facts sought to be proved exist, the People's Court shall deem that the facts exist.*

Beyond a reasonable doubt

For evidence provided by litigation to prove the facts of fraud, duress or malicious collusion, or to prove the facts of a verbal will or gift, where

the People's Court concludes that the possibility of the existence of the facts sought to be proved is beyond a reasonable doubt, the People's Court will deem that the facts exist. (See article 86 of the Several Provisions of the Supreme People's Court on Evidence for Civil Actions.)

Comparatively high degree of probability

For the facts relating to procedural matters, such as litigation preservation or abstention, where the People's Court takes into account the litigant's statement and the relevant evidence to conclude that the relevant facts are comparatively highly probable, the People's Court may deem that the facts are existent. (See article 86 of the Several Provisions of the Supreme People's Court on Evidence for Civil Actions.)

Circumstantial evidence

17 | 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

18 | What is the appeal process?

There are two routes available to an undertaking to challenge an administrative penalty decision of SAMR or a PMRD after the formal penalty decision has been made: an administrative review and administrative litigation.

After a formal penalty decision is made, the undertaking has 15 days to pay any penalties. Applying for an administrative review or filing an administrative suit with a court does not suspend the payment of penalties.

Administrative review

The competent authorities

Administrative review is a procedure that generally applies to penalties imposed by administrative agencies. For the penalty decision made by SAMR, the application for administrative review shall be submitted to SAMR. Decisions made by PMRD can be challenged either at the provincial government level or with SAMR, subject to the applicant's discretion.

Who may file an application for an administrative review

The undertaking under investigation that is subject to a penalty imposed by SAMR or a PMRD (the administrative counterpart), or undertakings which have an interest in a specific administrative decision of SAMR or a PMRD may file an application for administrative review to the competent authority.

Foreign nationals, stateless persons and foreign organisations may also file such an application.

The standard of review

The review is, in principle, limited to on-paper review, with the possibility of a hearing or consultation upon request by the applicant or the discretion of the reviewing agency. After the administrative review, the administrative decisions can be nullified, changed or confirmed to be illegal, if:

- the main facts are unclear and the material evidence is inadequate;
- the application of the law is incorrect;
- the statutory procedures have been violated;
- the power of authority has been exceeded or abused; or
- the administrative decision is obviously inappropriate.

Process and timing

The undertaking must apply for administrative review within 60 days of receipt of the formal decision. The agency has 60 days from accepting an application to make a decision, which can be extended by up to 30 days upon approval.

The applicant may file for administrative litigation if it is unsatisfied with the decision of the administrative review.

Administrative litigation

The c administrative lawsuit

An undertaking can challenge a SAMR or PMRD penalty decision via an administrative lawsuit in a court. For the decision issued by a PMRD, the undertaking can bring an administrative lawsuit directly to the Basic or Intermediate People's Courts where the PMRD is located. For decisions issued by SAMR, the undertaking can bring an administrative lawsuit directly to the First Intermediate People's Court of Beijing.

Who has the right to file an administrative lawsuit?

An administrative counterpart or any citizen, legal person or other organisation who or which has interests in a specific administrative decision of SAMR or PMRD has the right to initiate an administrative lawsuit. The 'interests' could be:

- the decision of SAMR or PMRD involves its right to fair competition;
- the revocation or change of the decision of SAMR or PMRD involves its lawful rights and interests; or
- the undertaking has made a complaint to SAMR or PMRD, and it has not handled the case.

The standard of review

In an administrative lawsuit, the People's Court will look at the facts and the application of the law. The People's Court may make a ruling to nullify or partially nullify the administrative decision, or rule that the defendant make a new administrative decision, in the following cases:

- inadequacy of material evidence;
- erroneous application of the law or regulations;
- violation of legal procedure;
- exceeding authority;
- abuse of powers; and
- obvious unfairness.

The process and timing

The undertaking must file the administrative suit within six months of receipt of the formal penalty decision. Administrative lawsuits are usually accepted at the time of filing if formalities are complete; if not, the court will provide a time limit for the plaintiff to supplement the formalities. The court must make its first instance decision within six months of acceptance of the case. This period can be extended upon approval.

From 2019, the Intellectual Property Tribunal of the Supreme People's Court can bypass the Higher People's Courts and directly hear appeals against the rulings and judgments of first-instance civil and administrative monopoly cases made by the Intellectual Property Courts and the Intermediate People's Courts. This is called a 'leapfrog' appeal.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Except for bid rigging or obstructing law enforcement by means of violence or threat, cartel behaviour is generally not a criminal violation in China.

Bid rigging

According to the Criminal Law, bidders who act in collusion with each other in offering bidding prices, jeopardising the interests of bid inviters and other bidders, shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and may also be fined.

A crime of 'bid rigging' is not a concept that originated in the AML. In 1993, the Anti-Unfair Competition Law first touched on this issue, providing that bidders shall not collude in bidding to raise or lower the bid price. In 1999, the Bidding Law provided that bidders shall not collude with each other in bid quotations, and shall not crowd out other bidders to damage the lawful rights and interests of the tenderer or other bidders. The criminal offence of bid rigging was introduced in the Criminal Law in 1997. All the above legislations are earlier than the AML in 2008, and the Bid rigging crime is not a part of the AML.

According to statistics, about 75 per cent of bid rigging is found in the construction industry. The longest sentence for bid rigging is two years and six months where the offender paid a 'reasonable benefit' to other bidders and asked them not to compete genuinely and let the offender win the bid.

Obstructing law enforcement by means of violence or threat

According to the Criminal Law, whoever obstructs a functionary of a state organ from carrying out its functions according to law by means of violence or threat shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or be fined. (Criminal detention shall be not less than one month but not more than six months and is carried out by the public security organ in the vicinity the obstruction occurred in. During the period of detention, the criminal may return for one to two days each month.)

The longest sentence for obstructing law enforcement by means of violence or threat is one year and six months.

Civil and administrative sanctions

20 What civil or administrative sanctions are there for cartel activity?

SAMR or a PMRD may impose the following penalties against cartel arrangement according to the AML:

- order the illegal act to cease;
- confiscate illegal income; and
- order the undertaking to pay a fine of 1 per cent to 10 per cent of its sales volume for the preceding year.

In practice, 'preceding year' refers to the fiscal year before an investigation is launched. A fiscal year spans from 1 January to 31 December based on the Gregorian calendar. Where an undertaking adopts a different fiscal year system, adjustments shall be made accordingly.

Where a monopoly agreement has been entered into but has not been implemented, a fine of not more than 3,000,000 yuan may be imposed.

Where an industry association has violated the provisions of the AML in organising the undertakings in the industry to enter into a monopoly agreement, SAMR or a PMRD may impose a fine of not more than 5,000,000 yuan; where the case is serious, the registration and administrative authorities for social organisations may de-register the industry association pursuant to the law.

In recent years, enforcement against cartels has increased, with increasingly higher penalties imposed on the cartel members and any industry association organising the cartel activities.

The highest fines against cartel conduct to date were made in the 2014 penalty decision against 12 Japanese auto parts and bearing companies. Eight auto parts manufacturers were imposed fines totalling 831.96 million yuan (Hitachi was exempted from this penalty) and four bearing manufacturers were imposed fines totalling 403.44 million yuan (Nachi-Fujikoshi was exempted from this penalty). The combined amount of the fines reaches 1.24 billion yuan, representing 4 per cent to 8 per cent of the penalised companies' annual turnovers.

In a 2017 penalty decision against 23 electricity companies and the electricity industrial association in Shanxi Province, the industrial association organising the price-fixing agreement was fined 500,000 yuan, the maximum fine available for industrial association under the AML.

In terms of civil sanctions, a plaintiff can file a civil lawsuit seeking compensation for damages caused by the alleged cartel activities. In addition, the party losing the litigation generally bears the litigation fees charged by the court; upon the plaintiff's request, the court may also incorporate the plaintiff's reasonable costs for investigation and prevention of the cartel activity into the amount of damages.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Step 1: To determine the fine base

As a general rule, the fine will be imposed on the basis of the preceding year's sales revenue of the undertaking. To determine the fine base, SAMR or PMRD shall determine which entity's sales revenue should be used as the fine base, which year is the 'preceding year', and what could be deducted from the sales revenue.

The sales revenue of the undertaking under investigation is the foundation of the fine base. If an investigation targets one subsidiary of an undertaking, in general, the fine will not extend to the sales revenue of the parent company and other affiliates. However, in certain cases, the scope of the investigation could be extended from one subsidiary to several subsidiaries, and the fine base will be enlarged accordingly. In practice, the 'preceding year' shall be the year prior to the initiation of the antitrust investigation by SAMR or PMRD.

Generally, the figures from the audited accounts of the undertaking under investigation in the preceding year are the starting point to calculate the fine base. The following factors could be considered to make an adjustment. First, only the sales revenue from China will be taken into consideration. For example, in the Qualcomm antitrust investigation, Qualcomm's sales revenue in 2013 was US$24.87 billion, and the sales revenue from China was US$12.3 billion. The final fine against Qualcomm imposed by the authority in 2014 was US$12.3 billion × 8 per cent = US$984 million = 6.088 billion yuan. Second, the sales revenues generated internally among affiliates of an undertaking could be deducted from the total sales revenue. Third, the sales revenue shall cover all products and the whole geographic market of China. It cannot be narrowed by the relevant product market and geographic market affected by the monopolistic conduct. In the view of SAMR, this approach could increase deterrence and unify the standard of antitrust enforcement in China.

Step 2: To determine the ratio of the fine

SAMR or PMRD shall consider the factors of the nature, extent and duration of the monopolistic behaviour to determine the ratio of the fine.

- The nature of the monopolistic behaviour. Under normal circumstances, the anticompetitive damage of vertical monopoly agreements is relatively light: the initial ratio of fines is 4 per cent, the initial ratio of fines for abuse of dominance is 4 per cent, and the initial ratio of fines for anticompetitive damage of horizontal monopoly agreements is 5 per cent. For other cartel behaviours under the catch-all provisions, the initial ratio of fines is 3 per cent.

- The duration of monopolistic behaviour. For every additional year of monopolistic behaviour, the fine ratio increases by 1 per cent. If the additional duration of monopolistic behaviour is less than half a year, the fine ratio increases by 0.5 per cent.
- The extent of monopolistic behaviour. Under normal circumstances, for those who play a major role in monopolistic behaviour or coerce or induce other undertakings to implement monopolistic behaviour, or prevent other undertakings from stopping such monopolistic behaviour, the fine ratio will be increased by 1 per cent; where multiple monopolistic behaviours are implemented in the same case, or monopolistic acts are carried out multiple times in different cases, the fine ratio will be increased by 1 per cent; if the harmful consequences of illegal activities are actively eliminated, the fine ratio may be reduced by 0.5 per cent or 1 per cent; if the undertaking under investigation voluntarily confesses an illegal act that is not yet known to SAMR or PMRD or has performed meritorious service in cooperating with SAMR or PMRD, the penalty may be reduced by 1 per cent.
- Evaluation of the damage caused by the monopolistic behaviour: the market share, impairment to the interest of consumers, market entry, competition restraint, etc.

After determining the basic fine ratio based on the nature, extent and duration of the monopolistic behaviour, SAMR or PMRD could adjust the fine ratio based on the specific circumstances of the case.

Circumstances where the fine ratio may be increased:

- SAMR or PMRD has ordered the undertaking to cease implementation of the monopolistic behaviour, but the undertaking refuse to do so; and
- the undertaking refused to cooperate with SAMR or PMRD during the antitrust investigation process.

Circumstances where the fine ratio may be reduced:

- being coerced or induced by others to implement monopolistic behaviour;
- actively confessing monopolistic behaviour that SAMR or PMRD has not yet identified; and
- cooperating with SAMR or PMRD by performing meritorious deeds in investigating and punishing monopolistic behaviour.

In addition, according to article 33 of the Law on Administrative Penalties of 2021:

- if the violation is minor and corrected in a timely manner, and it does not cause harmful consequence, no administrative penalty shall be imposed;
- for anyone who violates the law for the first time with minor consequences and makes timely corrections, no administrative penalty may be imposed; and
- if the party has sufficient evidence to prove that there is no subjective fault, no administrative penalty shall be imposed.

Illegal earnings

According to article 28 of the Law on Administrative Penalties, 'illegal earnings' refers to the money obtained from the implementation of illegal acts.

The 'illegal earnings' are limited to the money obtained from the product or service involved. The money obtained from products or services not involved in the monopoly behaviour cannot be confiscated as illegal earnings. The time span for calculating the illegal earnings must be determined based on the duration of the monopoly behaviour. In general, the illegal earnings comprise all the income obtained by the party's illegal acts minus appropriate and reasonable expenditures directly used for business activities. The reasonable expenditures include: the purchase price of raw materials or goods and the taxes and fees paid prior to administrative penalties. The earnings that should be refunded can be deducted from the illegal earnings and will not be confiscated.

In certain cartel cases, the SAMR or PMRD can use the price difference between the cartel price and the market price multiplied by the actual sales volume for each transaction to calculate the illegal earnings.

According to article 28 of the Law on Administrative Penalties, the illegal earnings shall be confiscated. In some cases, the illegal earnings are difficult to calculate and are not confiscated. However, SAMR or PMRD will consider this special factor when determining the final ratio of fines.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The AML and the Antitrust Compliance Guidelines for Undertakings issued by the Anti-monopoly Commission in September 2020 are silent on whether the existence of a compliance programme affects the level of the fine. Based on the past practice of SAMR and PMRDs, the mere existence of a compliance programme is not recognised as a factor affecting the level of a fine. In the view of SAMR and PMRDs, if the compliance programme is effective, there should be no suspicious cartel activities at all.

Establishing or strengthening antitrust compliance programme going forward, even after SAMR or PMRD initiate an investigation, is more helpful as this shows that the parties are willing to cooperate and take the authority's concerns seriously.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There are no relevant laws or regulations prohibiting individuals from serving as director, supervisor or senior officer of a company due to conducting a cartel.

The Antitrust Compliance Guidelines for Undertakings encourages undertakings to:

- establish and improve anti-monopoly compliance assessments and reward and punishment mechanisms for employees;
- make results of anti-monopoly compliance assessments important bases for employee and department performance assessments; and
- punish violations and improve incentives for employee compliance with relevant provisions of the AML.

However, the Antitrust Compliance Guidelines for Undertakings is not a law and is not mandatory.

Debarment

24 | 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 for debarment for bid rigging. Specifically, for severe bid rigging violations, the bidder shall be disqualified for one to two years from taking part in bidding for projects for which a bid invitation is required by law.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The administrative penalty imposed by SAMR or a PMRD does not preclude private civil litigation against the same conduct. Both 'stand-alone' actions and 'follow-on' actions after the decision of SAMR or PMRD are permitted.

Tian Junwei v Carrefour and Abbott (2016) was a follow-on private litigation of an NDRC penalty decision against baby formula manufacturers for resale price maintenance. The suit was dismissed since court considered that the penalty decision submitted by plaintiff Tian Junwei could not prove that there is a monopoly agreement between Carrefour Shuangjing Store and Abbott. More specifically, the decision of an administrative penalty issued by NDRC only proved that Abbott and its downstream undertakings had a fixed vertical monopoly agreement on the price of milk powder when reselling milk powder to a third party, but it was not clear who was the other party of the vertical monopoly agreement, therefore, it was unreasonable to directly conclude that Carrefour Shuangjing Store and Abbott had a vertical monopoly agreement.

This case demonstrates the possibility of parallel proceedings and a *de novo* review by the court.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private damage claims are available for indirect purchasers. Neither the Anti-Monopoly Law of China (AML) nor the Anti-Monopoly Judicial Interpretation distinguishes between direct purchasers and indirect purchasers. Indirect purchasers are allowed to file antitrust civil actions with courts as no laws or precedents have prohibited this.

Pursuant to the Civil Procedure Law, the plaintiff should have a direct interest in the case to have standing to file a lawsuit. An indirect purchaser who suffers losses from cartel arrangement may file a lawsuit under the AML.

In *Tian Junwei v Carrefour and Abbott* (2016), Tian Junwei, a consumer or indirect purchaser, who purchased a tin of Abbott's infant formula at a Carrefour supermarket in Shuangjing Beijing filed a lawsuit against Carrefour Shuangjing Store and Abbott Shanghai for the resale price maintenance imposed by Abbott upon Carrefour Shuangjing Store (the direct purchaser). The plaintiff was challenged that he did not have the standing to file the lawsuit. The court held that Junwei Tian, as an indirect purchaser, had the right to bring antitrust litigation in court. In the appeal, the Beijing Higher People's Court rejected the jurisdictional challenge filed by Abbott and Carrefour.

According to the general rules relating to the burden of proof, if the plaintiff is an indirect purchaser challenging price-fixing, it has the burden to prove that a horizontal agreement has been reached by the defendant and its competitors and that the direct purchaser has passed on the damages caused by higher pricing to the indirect purchaser. The defendant (direct purchaser) then has the burden to prove that the passing on has not occurred, and it bears the cost.

If the plaintiff is a direct purchaser challenging price-fixing, it has the burden to prove a horizontal price-fixing agreement. The defendant (supplier) then has the burden to prove that passing on has occurred, and the direct purchaser does not suffer any losses.

In practice, it is unlikely undertakings that purchased an affected product from non-cartel members would bring claims against cartel members based on alleged parallel increases in the prices they paid, as it would be much easier to purchase a product from cartel members to have the standing to sue.

In theory, umbrella purchaser claims are possible in an oligopolistic market, if the plaintiff can prove:

- the existence of a cartel;
- the product purchased from non-cartel members is a competing product (in order to do so the market definition is inevitable); and
- the product purchased from non-cartel members is affected by the cartel arrangement, such as being subject to a price increase at the same level as cartel members.

In a competitive market, such an umbrella purchaser claim has almost no chance to win.

Double or treble damages, or other kinds of punitive damages, are not available under the AML. According to the Anti-Monopoly Judicial Interpretation, upon a request from the plaintiff, the court may consider the plaintiff's reasonable costs for investigation and prevention of the monopoly conduct when deciding the amount of damages.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

China does not have class actions but it does have representative claims. Pursuant to the Civil Procedure Law, a joint lawsuit (in which there are numerous plaintiffs) may be brought by representatives selected by and from the group of plaintiffs.

In the case of a joint action where there more than 10 persons comprising one party to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative will be binding upon the litigants that he or she represents. For changes of representative, waivers of the claims of the action or confirmation of the claims of the counterparty litigants or settlement, consent by the litigants he or she represents is required.

If multiple litigants cannot be confirmed at the time of the filing of the lawsuit, the relevant People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period.

The new AML stipulates that the People's Procuratorate can file public interest anti-monopoly civil lawsuits in the People's Courts, requiring undertakings who implement monopolistic acts to bear civil liability for compensation. Since monopolistic behaviour impairs the interests of unspecified majority, it is worth observing how to determine the compensation and how to compensate the victims.

The advantage of this provision is that the People's Procuratorate has advanced investigative technology and strong evidence collection capabilities. If it can use this ability to make it fight against the undertaking that implements monopolistic behaviour in litigation, it can increase the probability of the plaintiff's victory and help protect the weak group.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

An immunity programme that provides full leniency or amnesty is available under the Anti-Monopoly Law of China (AML). State Administration for Market Regulation (SAMR) and Provincial Market Regulatory Departments (PMRDs) have the discretion to grant immunity or mitigate the penalty for undertakings participating in a cartel if undertaking voluntarily reports the relevant facts and provides material evidence.

According to the Leniency Guidelines published in June 2020, the immunity and mitigated rate shall be determined according to the following rules:

- for the first applicant, SAMR or PMRD may grant immunity to such undertaking or mitigate the fine amount by not less than 80 per cent;
- for the second applicant, the fine amount may be mitigated by 30 per cent to 50 per cent;
- for the third applicant, the fine amount may be mitigated by 20 per cent to 30 per cent; and
- for subsequent applicants, the fine amount can be mitigated by not more than 20 per cent.

When determining the confiscation of illegal earnings, SAMR or PMRD may apply the same immunity and mitigated rate to deal with the illegal earnings.

To obtain immunity or a mitigated sanction, the undertaking must cease the suspected cartel arrangements immediately after making the application for leniency; unless SAMR or a PMRD requires it to continue carrying out the cartel acts in order to ensure the smooth progression of the investigation. If the undertaking has applied for leniency from an overseas law enforcement agency that requires it to continue to perform the cartel acts, it shall report this to SAMR or a PMRD.

The undertaking must also cooperate promptly, continuously, comprehensively and sincerely with the investigation, properly preserving and providing evidence and information, and must not conceal, destroy or transfer evidence or provide false materials or information or engage in any other conduct that may affect the antitrust investigation.

The application for leniency must not be disclosed without the consent of SAMR or the PMRD.

Basic elements of the immunity programme

According to the Leniency Guidelines published in June 2020, the leniency application shall be accompanied by a report and material evidence.

The report must include:

- basic information of the participants of the cartel agreement (including but not limited to name, address, contact information and participating representatives, etc);
- the background of the cartel agreement (including but not limited to the time, place, content, and specific participants of the agreement);
- the main content of the cartel agreement (including but not limited to the products or services involved, price, quantity, etc);
- the undertakings' conclusion and implementation of the cartel agreement;
- the geographic area and market scale affected by the cartel agreement;
- the duration of the implementation of the cartel agreement;
- explanation of the material evidence;
- whether the undertaking has applied for leniency from other overseas law enforcement agencies; and
- other relevant documents and materials.

'Material evidence' refers to evidence which plays a critical role in the launch of an antitrust investigation or the determination of a monopoly agreement by SAMR or PMRD, including:

- for the first-in:
  - providing sufficient evidence for an antitrust investigation to be launched, if SAMR or the PMRD had no clues or evidence;
  - providing evidence the SAMR or PMRD can use to determine a monopoly agreement exists under the AML.
- for the second and following applicants, providing:
  - evidence that has greater proving power or supplementary proving value in terms of the conclusion and implementation of the cartel agreement;
  - evidence that has supplementary proving value to prove:
  - the content of the cartel agreement;
  - the time of the conclusion and implementation of the cartel agreement;
  - the scope of the products or services involved; and
  - the participating members; and
  - other evidence that can prove the cartel agreement, or fix the probative power of the evidence that proves the cartel agreement.

A leniency application can be made orally. In practice, SAMR or PMRD permits an undertaking to orally submit the leniency application if there are disclosure risks in the context of civil litigation. The oral submission will be conducted at the office of SAMR or a PMRD. SAMR or PMRD officials will make written records of the oral submission, which shall be verified and signed by the representatives of the undertaking.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

An undertaking applying for leniency by submitting the report on the cartel agreement and material evidence after the first-in may apply to SAMR or PMRD for mitigation. SAMR or PMRD issues a written receipt to the undertaking specifying the list of materials and the time it was received.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The mitigated rates for fines for the second and following applicants are:

- 30 per cent to 50 per cent for the second applicant;
- 20 per cent to 30 per cent for the third applicant; and
- no more than 20 per cent for each subsequent applicant.

There is no 'immunity plus' or 'amnesty plus' treatment under the AML. If an undertaking in one antitrust investigation reports information about another antitrust violation occurring in a separate industry, it may not get additional benefits from SAMR or the PMRD because the authority may not have enough enforcement resources to investigate the reported conduct in the other industry and cannot prove the truthfulness of such reports. However, if another antitrust investigation

is initiated based on such a report, the reporter will benefit from the leniency application in the separate antitrust investigation and may be eligible for benefits in the current antitrust investigation.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The deadlines for initiating or completing an application for immunity (ie, full leniency or amnesty) or partial leniency is the issuance of the prior notification of the administrative penalty.

Undertakings participating in a cartel agreement can apply for leniency before SAMR or PMRD initiates an antitrust investigation. They can also apply for leniency after the initiation of an antitrust investigation but before the prior notification of the administrative penalty.

The marker system for the first-in

The marker system is detailed in the Leniency Guidelines. For the first applicant that applies for leniency by submitting the report on the cartel agreement and material evidence, SAMR or the PMRD shall issue a written receipt to the applicant specifying the time of receipt and a list of materials. This written receipt is an official document to prove the chronological order of the leniency application. The written receipt will not be issued to the first applicant if the report submitted does not meet the requirements of the Leniency Guidelines.

If the first applicant submits a report that meets the requirements of the Leniency Guidelines, but temporarily cannot provide complete material evidence when it applies for leniency, SAMR or the PMRD may register the date of the report and will issue a written receipt if the undertaking submits all necessary supplemental materials within the period specified by the authority. This registration is the marker and the written receipt issued by SAMR or PMRD will show the date on which it received the report.

If the undertaking fails to supplement the material evidence within the specified period (generally no longer than 30 days, and this can be extended to 60 days under special circumstances), SAMR or PMRD will cancel its registration qualifications, and the first-in will have lost its marker.

After the first-in is disqualified from registration, it can still supplement the material evidence and apply for immunity if there are no follow-up leniency applicants. If other undertakings have already applied for leniency, the first-in whose registration qualification has been disqualified may apply for mitigation.

Normally, the marker is made in written. In certain cases, the leniency application can be made orally through a dictation in SAMR to reduce the risk of disclosure.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

To obtain full immunity, the undertaking as a party to a cartel agreement shall be first-in and voluntarily report the circumstances of its cartel activities and provide 'material evidence' that can help SAMR or PMRD to start the investigation or to make the final decision.

In addition, pursuant to the Leniency Guidelines, the applicants should also fulfil the following obligations:

- the suspected cartel arrangements must be stopped immediately after the application for leniency;
- the undertaking must cooperate promptly, continuously, comprehensively and sincerely with the investigation of SAMR or PMRD;
- the undertaking must properly preserve and provide evidence and information, and must not conceal, destroy or transfer evidence or provide false materials and information;
- the application for leniency from SAMR or PMRD must not be disclosed without the consent of SAMR or PMRD; and
- not engage in any other conduct that may affect the antitrust investigation.

The subsequent applicants are expected to do the same to obtain partial leniency.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the Leniency Guidelines, the report, documents and other materials submitted by the undertaking in applying for leniency shall not be disclosed to the public without the consent of the undertaking, and no entity or individual has the right to access such information.

In practice, in order to attract more leniency applications, SAMR and PMRDs will not disclose the documents or materials provided by the leniency applicants to any third party. No other agencies, organisations or individuals can obtain access to such information.

The level of confidentiality protection applicable to subsequent cooperating parties is the same as to the first-in.

In practice, SAMR or PMRDs keep the identity of the leniency applicants confidential during investigations. However, the applicants' identities will be revealed in SAMR or the PMRD's final decision. Usually, SAMR or the PMRD will publish the final penalty decisions and the decisions of exemption from penalties at the end of an investigation, which will disclose the leniency applicants' identities. For example, in the *Zhejiang Insurance Companies Cartel* case (2013), NDRC published its penalty decisions and the decision of exemption from penalties on its website and disclosed the identities of leniency applicants.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Guidelines on the Undertakings' Commitments in Antitrust Cases (the Commitments Guidelines) were issued by the Anti-monopoly Commission in 2019 and published in June 2020. According to the Commitments Guidelines, SAMR or PMRD may accept commitments from undertakings in which the undertakings undertake or commit to eliminating anticompetitive effects of the infringing conduct within a period approved by the authority.

The commitment is, in general, a unilateral conduct made by the undertaking under investigation. However, since the content of the commitments should be evaluated and discussed with SAMR or the PMRD before the decision of the suspension of the investigation, a settlement negotiation could be conducted. The process of settlement negotiation is:

- timely filing of the application to suspend the investigation, together with the initial commitments to establish the foundation

of the settlement negotiation between the undertaking and SAMR or the PMRD;
- the undertaking may negotiate with SAMR or PMRD regarding the content of the commitments and address all concerns of the authority; and
- if SAMR or PMRD, after considering the subjective attitude of the undertaking towards the cartel, the nature of the cartel, its duration, its consequences, its social impact, the measures committed by the undertaking and their expected effects, holds that the facts are clear, and the committed measures are sufficient to eliminate the effects caused by the cartel arrangements, SAMR or the PMRD may decide to suspend the investigation based on the commitments.

Price-fixing, restricting production or sales volume, and dividing the market cannot be settled by commitments.

In addition, if SAMR or PMRD has identified and verified the cartel agreement after the investigation, it will no longer accept applications for the suspension of the investigation proposed by the undertaking.

If the cartel arrangements have affected the legitimate rights and interests of another unspecified majority of undertakings, consumers, or the public interest, SAMR or PMRD may solicit public opinions on the commitment measures proposed by the undertaking under investigation. The time for soliciting opinions is generally no less than 30 days.

The investigation can be terminated if the undertaking performs its commitments within a time limit designated by SAMR or the PMRD. However, it can be resumed, if:
- the undertaking fails to perform its commitments;
- a major change has occurred that is relevant to the grounds for the settlement; or
- the settlement was based on incomplete or inaccurate information provided by the undertaking.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The AML adds a provision on the punishment of the legal representative, the main person in charge and the person directly responsible for the business undertakings who have reached a monopoly agreement. When immunity or partial leniency is granted to a corporate defendant, it is unclear whether its current and former employees can be exempted from penalty based on the immunity or partial leniency granted.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Before applying for leniency, the undertaking may communicate with SAMR or a PMRD anonymously or using its real name, either orally or in writing.

During the whole process of the antitrust investigation, an immunity applicant or subsequent cooperating party must cooperate with the investigation promptly, continuously, comprehensively and sincerely.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

Usually, the undertaking under investigation has very limited access to the case information during the investigation. State Administration for Market Regulation (SAMR) or the Provincial Market Regulatory Department (PMRD) may disclose information or evidence to the undertaking under investigation at its discretion. In addition, SAMR and PMRDs are required to issue a prior notice for administrative penalties to the undertaking under investigation before formally making a decision. The prior notice for administrative penalties includes the basic facts found by SAMR or the PMRD.

In *Calcium Gluconate API* (2020), Shandong Kanghui Medicine (Kanghui), Weifang Puyunhui Pharmaceutical (Puyunhui) and Weifang Taiyangshen Pharmaceutical (Taiyangshen) were pharmaceutical distributors in China. They purchased and distributed calcium gluconate API (active pharmaceutical ingredient) for injection from August 2015 to December 2017. SAMR found that they held a dominant position in China's sales market for calcium gluconate API for injection and had abused their dominance by selling products at unfairly high prices and imposing unreasonable trading conditions on clients. SAMR issued a penalty decision against them in April 2020. The total fines plus the confiscation of illegal earnings amounted to 325.5 million yuan – the largest penalty imposed on API producers and the overall pharmaceutical industry in China to date.

Before issuing the penalty decision, SAMR sent a prior notice to the companies outlining the details of its planned decision as well as their legitimate rights to make statements, arguments or to apply for hearings. Kanghui applied for a hearing, which was conducted on 8 January 2020. During the hearing, not all of the evidence collected from the manufacturers or from dozens of calcium gluconate injection manufacturers was provided to the companies for cross-examination by SAMR due to reasons of confidentiality.

This case indicates that when challenging SAMR or PMRD's penalty decision in administrative litigation, administrative review or hearing before the decision, the undertaking under investigation may not gain access to SAMR's or PMRD's complete case files.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

There are no administrative or criminal penalties imposed on employees under the Anti-Monopoly Law of China (AML) unless they obstruct an investigation. But the law does not prohibit counsel from representing employees as well as their corporation, provided there is no conflict of interest.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Affiliated companies normally do not require separate representation. For instance, in a cartel investigation, both the parent company and its subsidiaries are involved. The counsel can represent them all to defend the case.

For multiple corporate defendants which are not affiliates, there could be a conflict of interest for counsel to represent all of them in

a cartel investigation. For instance, when all the parties want to apply immunity, there is no way to compromise. Therefore, it is not advisable for a counsel to represent multiple corporate defendants in a cartel investigation.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

The Anti-Monopoly Law (AML) adds a provision on the punishment of the legal representative, the main person in charge, and the person directly responsible for the business undertakings who have reached a monopoly agreement. The company could pay the legal costs or financial penalties imposed on that employee, whether former or current, as no rules or regulations prevent the company from doing so.

In practice, the company will not pay the fines to the authority directly on behalf of its employees. The employees shall pay the fines from their personal accounts and the company may indemnify such losses by paying the employees the same amount.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

According to the Corporate Income Tax Law (2018), penalties, fines and losses on the confiscated property may not be deducted when computing the taxable amount of income.

According to the same law costs, expenses, taxes, losses and other reasonable expenditure (the necessary and normal expenditure which complies with the norms of production and business activities and which should be included in the profit and loss in the current period or in the relevant asset costs) incurred in direct relation to income received by an enterprise may be deducted when computing the taxable amount of income. Private damages payments are not necessary and normal expenditure which complies with the norms of production and business activities, therefore cannot be deducted when computing the taxable amount of income.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

SAMR and PMRDs do not recognise a principle of international double jeopardy. Another jurisdiction may penalise the undertaking under investigation by imposing fines. However, this will not prevent SAMR or PMRD from investigating the cartel activities and imposing fines in China.

The purpose of the damages in private antitrust litigation is to compensate for the losses caused by the monopolistic conduct. If the plaintiff already received damages or amounts paid in settlements from the defendant in civil cases in other jurisdictions, such amount should be deducted from the damages in the civil case in China to avoid double recovery by the plaintiff. In short, in private damage claims, the overlapping liability for damages in other jurisdictions may be taken into account.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Under article 15 of the AML, the cartel prohibition rules under the AML are not applicable if undertakings can prove the following.

- At least one of the following public interests or efficiencies can be realised through the cartel arrangement:
  - advancing technology or researching and developing new products;
  - improving product quality, lowering cost, increasing efficiency, unifying specifications and standards, or implementing a division of labour based on specialisation;
  - improving the operation efficiency and competitiveness of small- and medium-sized undertakings;
  - realising public interests such as energy conservation, environmental protection, and rescue and relief efforts;
  - alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;
  - protecting legitimate interests during foreign trade or foreign economic cooperation; or
  - other circumstances specified by laws or the State Council.
  - The specific form and effect of the cartel arrangement realises the public interests or efficiencies; and
  - the causation between the cartel arrangement and the public interests or efficiencies can be shown; and
  - the cartel arrangement is necessary in order to realise the public interests or efficiencies.
- The cartel arrangements do not seriously restrict competition in the relevant market.
- The cartel arrangements enable consumers to share the benefits therefrom, such as lowering prices, improving quality or introducing new types of products into the market.

In addition to the leniency programme and commitment negotiation, another effective way to reduce the fine is for the undertaking to negotiate with the relevant authority and proof that:

- it was coerced by other undertakings to implement the cartel;
- it was forced or coerced by administrative authorities to implement the cartel;
- it cooperated with SAMR or a PMRD and made a meritorious performance;
- it took the initiative to eliminate or mitigate the harm and consequences of the cartel;
- it voluntarily provided relevant evidence of other undertakings' violation of the AML;
- it neither played a leading role in cartel nor coerced other undertakings to implement the cartel;
- it neither committed multiple examples of monopolistic conduct nor violated the AML in the past;
- the duration of the cartel's existence was very short; and
- it has stopped taking part in cartel activities.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

The glacial acetic acid API cartel investigation

Glacial acetic acid is used in the production of hemodialysis concentrate for the treatment of advanced kidney failure and uremia. Chengdu Huayi, Sichuan Jinshan and Taishan Xinning are three undertakings that supply glacial acetic acid active pharmaceutical ingredients (API) in China. The three undertakings agreed to raise the price for glacial acetic acid API, which resulted in a hike in the price from 9.3 yuan per kilo to 28 yuan per kilo or 33 yuan per kilo. In December 2018, the SAMR fined the three undertakings 4 per cent of their turnover for the preceding

year (the year before the investigation is launched), and confiscated the illegal earnings.

The Tianjin port yard cartel and leniency application

Twenty-seven undertakings operating container yard services at Tianjin port discussed increasing and adjusting the comprehensive surcharge and unloading fees from 2010. Ten of these undertakings no longer exist or are in operation. Sixteen of them were fined by the Tianjin Municipal Development and Reform Commission (the Tianjin DRC) at 2 per cent to 5 per cent of their turnovers in the preceding year because of the cartel arrangements.

Tianjin Penvavico Logistics was exempted from the fines because it was the first to file a leniency application, actively cooperated with Tianjin DRC and took the initiative in stopping the illegal activities.

Tianjin Keyun International Logistics was the second to file a leniency application, and as a result its fine was halved from 5 per cent to 2.5 per cent of its turnover in the preceding year.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The detailed rules to implement the new AML will be issued soon.

The new AML adds many new rules, which need to be further clarified. They include, but are not limited to, the following:

- safe harbour standard for cartels; and
- how to impose penalties against the legal representative, the main person in charge and the person directly responsible for the business undertakings who have reached a monopoly agreement.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is:
- Article 46 of the Costa Rican Political Constitution;
- Law No. 7472 For the Promotion of Competition and Effective Consumer Protection;
- Law No. 8642 General Law of Telecommunications; and
- Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica.

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 authorities are:
- the Competition Promotion Commission (COPROCOM); and
- the Superintendency of Telecommunications (SUTEL).

COPROCOM investigates and prosecutes cartel behaviour in most cases. The exception is competition in the telecommunications sector, which SUTEL overlooks.

These two enforcement agencies adjudicate and determine cartel matters according to the specific fields of their jurisdiction.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The last amendment to competition law was enacted on 5 September 2019: Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica. This law was approved based on the commitments that Costa Rica undertook to join the OECD.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Competition law defines absolute monopolistic practices as restrictive agreements, arrangements and contracts between current or potential competitors that have the following purposes:
- to fix, set, raise or manipulate purchase or sale prices, or exchange information with that purpose or effect;
- to establish restrictions or limitations on the quantities, volume or frequency of the goods or services that are produced, processed, distributed or commercialised;
- To divide, distribute or assign parts or segments of the market in terms of clients, suppliers, time or geographic locations;
- to establish, arrange or coordinate bids or abstention from bids, tenders or auctions;
- to refuse to sell or purchase goods or services; and
- to exchange information with any of the objects or effects referred to in the preceding items.

Absolute monopolistic practices are prohibited per se. They are legally void (ie, not legally enforceable) and cannot be defeated by claims that they are efficient, as the law presumes their inefficiency conclusively.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Any agreement between existing or potential competitors, including joint ventures and strategic alliances, can potentially be subject to cartel laws if it has any of the following purposes:
- to fix, set, raise or manipulate purchase or sale prices, or exchange information with that purpose or effect;
- to establish restrictions or limitations on the quantities, volume or frequency of the goods or services that are produced, processed, distributed or commercialised;
- to divide, distribute or assign parts or segments of the market in terms of clients, suppliers, time or geographic locations;
- to establish, arrange or coordinate bids or abstention from bids, tenders or auctions;
- to refuse to sell or purchase goods or services; and
- to exchange information with any of the objects or effects referred to in the preceding items.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Competition law applies to economic agents, individuals and corporations (including de facto corporations), private or public, participating 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?

Competition law applies to all economic agents whose actions generate effects in the territory of Costa Rica, independently of whether such activities are developed outside Costa Rica.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Not applicable.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

In the case of entities that are part of the financial sector, the Competition Promotion Commission must notify the National Council of Supervision of Financial Entities of the beginning of proceedings to determine cartel behaviour.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no defence or exemption for state actions, government-approved activity or regulated conduct except for public constitutionally protected monopolies and specific rules for regulated activity that is inspected by the Regulating Authority of Public Services (eg, energy, water, transportation, fuel and alcohol).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The procedure has three stages: preliminary investigation, appraisal of investigation and decision. The process often begins with competition authorities carrying out the preliminary investigation, which has the objective of determining if there are enough elements to move to the second stage. The proceedings can start ex officio or through a third-party complaint.

In case of a complaint, the Technical Body of the Competition Promotion Commission (COPROCOM) will decide in 10 working days if the preliminary investigation will begin or not.

Preliminary investigations are confidential. COPROCOM is not required to notify the possible parties about such preliminary investigation or grant them access to the file, which is entirely confidential at this stage.

The preliminary investigation phase could take up to 12 months, which the Technical Body can extend for six additional months. This extension can only take place once.

The appraisal of the investigation phase can also be initiated without a preliminary investigation (eg, if a complaint provides enough information). At the beginning of the appraisal phase, the Appraising Body of COPROCOM will notify the economic agents involved about the investigation's existence.

At this point, all of the evidence and documentation gathered by the competition agencies must be made available to the interested parties for review and to submit their arguments of defence and corresponding evidence. The minimum period given to the parties to consult this evidence is 10 working days, even though the Appraising Body of COPROCOM may grant a more extended period if appropriate.

The appraisal phase may take up to 10 months, which the authority can extend for six additional months. This extension can only take place once.

An oral hearing, in which the parties and the Appraising Body of COPROCOM examine the claims, counterclaims and evidence, takes place at this stage.

The private oral hearing has two purposes: granting the parties involved in the investigation access to COPROCOM's docket; and allowing the parties to submit de jure and de facto pleas, as well as evidence. Although COPROCOM's commissioners have access to the file, they do not attend this hearing.

Upon conclusion of the hearing, and unless the Appraising Body deems it necessary to introduce new facts or additional evidence – in which case a further hearing may be held – the Appraising Body submits the docket and its recommendation to the Commissioners for their review and decision. The parties are not entitled to a hearing before the Commissioners.

Third parties can participate in the administrative procedures under generally applicable administrative rules to demonstrate a legitimate interest. If COPROCOM rejects their request to participate in the process, they can challenge that decision before the administrative courts.

The administrative procedure ends with the adoption of a final decision by COPROCOM, which may impose sanctions if a competition law infringement has been established.

COPROCOM's decisions may be appealed within three working days. Although COPROCOM can change its decision following this appeal, this has seldom occurred in practice.

Special Telecommunications Regime

The procedure for investigating competition infringements in the telecommunications sector is almost identical to that outlined above. Like COPROCOM, the Superintendency of Telecommunications (SUTEL) can also start investigations ex officio or following a complaint.

SUTEL must investigate all complaints unless they do not fulfil some formal requirements or do not refer to a competition matter. Once a complaint is deemed complete, the relevant technical staff and the Director of the Directorate-General of Markets (DGM) send a report to the SUTEL Council, which may order a preliminary investigation or, if applicable, consult with COPROCOM about the need to open a procedure.

If the Council orders a preliminary investigation, the DGM Director will submit a report to the SUTEL Council once this is finalised. The Council will then decide whether to open an appraisal of the investigation procedure or dismiss the complaint.

As SUTEL (contrary to COMPROCOM) does not have the power to conduct dawn raids, its investigations rely on information collected in other ways. SUTEL has general powers to request information from investigated parties, third parties and public authorities. However, only telecommunications operators are under a duty to provide information subject to an information request.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

COPROCOM has the power to issue subpoenas, to issue questionnaires that any economic agent must answer and to compel testimony. This authority can execute dawn raids and orders to produce with prior court approval. Wiretapping is not possible as this is reserved for criminal cases only.

SUTEL has the same powers as COPROCOM, except for requesting dawn raids and orders to produce.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Article 25 of Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica grants competition authorities broad faculties to enter into any international agreement that would allow them to meet their legal purpose and objectives. However, to this day, only a handful of agreements have been executed, and most of them refer to technical assistance.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Not applicable.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

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Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

Every party must prove a disputed assertion in the procedures before the competition authorities. The standard of proof in Costa Rica is one of 'reasoned judgment', which is similar to the common law concept of 'preponderance of the evidence'.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Circumstantial evidence might raise enough concern to start an investigation; however, the authorities should show more robust evidence in the different stages of the process to determine the actual existence of an infringement.

Appeal process

18 | What is the appeal process?

Only judicial courts may invalidate competition authorities' resolutions. There are two levels of appeal. In the first instance, the revocation against the final infringement decision and appeals against decisions related to interim injunctions, dismissing a claim or integrating all respondents that should be part of a procedure. There are no appeals against matters of mere procedure.

At higher instance, an extraordinary recourse of cassation – before the Supreme Court, against sentences or resolutions that have the force of res judicata and violate procedural and substantive rules of the legal system – and review may arise.

If the parties to a proceeding before COPROCOM consider their constitutional rights to have been violated, they can file a claim (amparo) appeal to the Constitutional Chamber of the Supreme Court of Justice.

Many administrative acts can be subject to judicial review, including final administrative acts, the outcome of administrative appeals and acts suspending, interrupting or terminating a procedure.

Judicial review will consider both procedural issues and the merits of the decisions taken by the competition authorities.

The average duration of judicial review cases on competition matters is approximately five years.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity in Costa Rica.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Competition Promotion Commission can impose fines against individuals that participated directly in the sanctioned acts on behalf of the responsible companies.

Infractions for companies are minor, serious and very serious.

Minor infractions will result in a fine equivalent to an amount between 0.1 per cent and up to 3 per cent of the total turnover of the economic agent in the fiscal year immediately preceding the imposition of the sanction.

Serious violations will result in a fine equivalent to 0.1 per cent and up to 5 per cent.

Very serious violations will result in a fine equivalent to 0.1 per cent and up to 10 per cent. Cartel behaviour is considered a very serious violation.

In the case of telecommunications, very serious violations will result in a fine equivalent to 0.5 per cent and up to 1 per cent of the total turnover of the economic agent in the fiscal year immediately preceding the imposition of the sanction.

The fines for individuals or public officials who violate the law range from US$750 up to US$515,000.

Finally, besides the fines, in the case of bid rigging in government contracts a ban of two to 10 years from any government deal may be imposed.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 120 of Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica, the decisions made by the competition authorities should be duly motivated. These resolutions will be applied gradually and proportionally, taking into account the following aspects: severity of the infraction, the threat or damage caused, the intent, the size of the market, the market share of the incumbent, the duration of the conduct, the recidivism and the economic capacity of the infractor.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Sanctions might be reduced if the organisation has a compliance programme according to the guidelines issued by the competition authorities. The competition authority has discretion to decide the magnitude of the reduction.

Article 26 of Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica, gives the competition authority the power to issue the guidelines and by-laws applicable for compliance programmes. To this date, such policies have not been issued by the authorities.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Not applicable.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

In the case of bid rigging in government contracts, the competition authority, at its discretion, can impose a ban of two to 10 years from any government deal.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

In the case of criminal activity that may also result in cartel behaviour, sanctions (including imprisonment) for an illegal activity could be pursued parallel to the cartel investigation before the competition authorities.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private damage claims are available to any economic agent, including direct or indirect purchasers who could demonstrate the harm caused by the cartel behaviour before a court of law.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not regulated in Costa Rican legislation, and recent jurisprudence has stated that class actions are not permitted. However, it is possible to file joint lawsuits among different companies or individuals, in which case each party must appear before the court. Any individual or company, even those not affected by the cartel behaviour, could file a complaint. Therefore, group actions are feasible following the regular proceedings established by the competition law.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

There is a leniency programme in place. Any economic agent or individual who has incurred, aided, encouraged, induced, participated in or is participating in the commission of absolute monopolistic practices could benefit from this programme. For that purpose, the economic agent or individual may acknowledge their behaviour before the corresponding competition authority and avail themselves of the benefit of amnesty from applying the respective fine.

The authority will exempt them from the payment of the fine that could have been imposed if it is the first among the economic agents or natural persons involved in the conduct to provide truthful evidence that is unknown to the corresponding competition authority.

The exemption from the fine also benefits the legal representatives part of the illegal agreement or decision. They must collaborate with the corresponding authority until the issuance of the final resolution of the particular proceeding.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

There are specific provisions related to partial leniency for parties that cooperate after an immunity application has been made. In general, the following parties will not receive a total fine exemption but a progressive (depending on timing) decreased fine.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Economic agents who go to the corresponding authority after the first one and comply with the requirements may reduce the related fine.

They shall receive a 50 per cent reduction of the fine related to the monopolistic practice for which they are being investigated. They will obtain a total dismissal of any additional fine associated with any extra monopolistic practice it reports.

If the economic agent wishing to avail itself of the benefit of pardon or reduction of fines does not comply with the requirements of the law, the corresponding authority shall reject the request for clemency or removal of the fine. In this case, it may not use the evidence provided by the economic agent. It must keep it confidential unless it has already had access to such evidence by other means.

For the authority to grant leniency, the economic agent or, as the case may be, the individual who has filed the corresponding application shall comply with the following requirements:

- cooperation with the competition authority during the investigation;
- terminating its participation in the absolute monopolistic practice; and
- not having adopted measures to force other economic agents to participate in the infringement.

Once all the requirements mentioned have been met, the authority will issue a resolution exonerating it from the payment of the fine.

Economic agents may not avail themselves of the benefits provided if they have previously participated in absolute monopolistic practices affecting the same market.

The authority shall reduce the fine of an economic agent or individual, provided that it gives elements of evidence unknown to the corresponding competition authority.

The reduction will be 50 per cent for the second economic agent; 30 per cent for the third economic agent and 20 per cent for the fourth economic agent, provided that they provide additional evidence to that already in possession of the corresponding competition authority. Subsequent economic agents after the fourth economic agent shall not benefit from the reduction of the fine.

The reduction of the fine will be in the same proportion for the company's legal representatives, as long as they have cooperated with the competition authority.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The specific guidelines of the leniency programme for absolute monopolistic practice are yet to be issued by the competition authority through the applicable regulations.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The specific guidelines of the leniency programme for absolute monopolistic practice are yet to be issued by the competition authority through the applicable regulations.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The authority shall maintain the confidentiality of the identity of each economic agent and individual who intend to avail themselves of the benefit of the leniency programme. In a separate file, the authority shall process the resolution on the pardon of the fine for each economic agent.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica expressly introduces three mechanisms that allow undertakings to request the early termination of an investigation: termination due to manifest inadmissibility (archiving), early termination with acknowledgement of the commission of the infraction (settlement) and early termination with an offer of commitments

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The reduction of the fine will be in the same proportion for the company's legal representatives and employees, as long as they have cooperated with the competition authority.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The specific guidelines of the leniency programme for absolute monopolistic practice are yet to be issued by the competition authority through the applicable regulations.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

All information in possession of the competition authority (that is not marked as confidential for substantive reasons) will be disclosed to the defendants when the appraisal of the investigation phase begins.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

While the same counsel may represent employees and the corporation, it is recommendable that both parties retain their separate counsel.

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Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

While the same counsel may represent multiple corporate defendants, it is recommendable that all parties retain their separate counsel.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

While corporations may pay their employees' legal costs, the fines before the competition authority should be paid in full and exclusively by the employee.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Neither is deductible.

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Sanctions imposed on corporations or individuals will not take into account any penalties imposed in other jurisdictions. Also, in private damage claims, overlapping liability for damages in other jurisdictions will not be considered.

Getting the fine down

43 What is the optimal way in which to get the fine down?

Getting the fine down depends on the severity of the conduct. A pre-existing compliance programme might be a good idea once the competition authorities release the guidelines for this type of programme to be considered as an element that might help to decrease a possible fine. Following this programme, and depending on the severity of the behaviour, a settlement (paying a reduced penalty, with or without conditions) will be the next best alternative. Finally,

if the conduct could lead to one of the higher sanctions, the leniency programme might be the best option.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

Not applicable.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Executive power should soon issue the by-laws to Law No. 9736 For the Strengthening of the Competition Authorities in Costa Rica, which will allow the competition authorities to release specific guidelines, including those for the leniency programme and for building a robust compliance programme.

Denmark

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Danish rules on cartel regulation are laid down in the Danish Competition Act (the Act), which entered into force in 1998. An English version of the Act, the relevant executive orders issued under the Act and guidelines on the application of the rules, dawn raids, leniency and compliance are accessible on the website of the Danish Competition and Consumer Authority (DCCA). The Competition Damages Act lays out the regulation on damages claims related to infringements of competition law.

Danish competition law is, to a large extent, similar to EU competition law. Section 6 of the Act contains a general prohibition against anticompetitive agreements similar to article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). Correspondingly, section 8 of the Act contains an efficiency defence for agreements, decisions or concerted practices that are caught by section 6, similar to article 101 (3) of the TFEU. Moreover, the Danish rules are interpreted in accordance with case law from the European Commission as well as the European Court of Justice.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The DCCA constitutes, together with the Danish Competition Council (the Council), an independent competition authority. The DCCA is the authority responsible for enforcing the Act. Thus, the DCCA investigates cartels and other competition law infringements and ensures compliance with the competition rules in general.

Cartel cases are generally initiated, investigated and prepared by the DCCA. On the basis of the DCCA's recommendation, the cases are subsequently decided by the Council in the first instance. Decisions by the Council may be appealed to the Danish Competition Appeal Tribunal (DCAT) and subsequently to the Danish courts. Appeals proceedings before the Danish courts are civil, and potential damages are awarded in civil proceedings before the courts.

Where the Council finds that an *undertaking* has committed an intentional or negligent breach of competition law, the competition authorities may request the courts to impose civil fines in accordance with civil proceedings before the courts. The civil fine regime was introduced in Danish competition law in March 2021 with the implementation of Directive 2019/1EU of 11 December 2018 (ECN+ Directive).

Where the Council finds that an *individual* has participated in, or contributed to, an intentional or negligent breach of competition law, the competition authorities must forward the case to the State Prosecutor for Serious Economic and International Crime (the State Prosecutor) for criminal investigation and, potentially, prosecution. If the State Prosecutor decides to initiate prosecution, the case will be led by the State Prosecutor and brought before the courts in accordance with criminal procedure.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The implementation of the ECN+ Directive in Danish competition law has resulted in significant changes to the regime. Most notable is the introduction of the civil fine regime. Until now, the imposition of fines for violations of the competition rules has been a matter solely under criminal law and in accordance with the rules of Danish criminal procedure. Consequently, the new civil fine regime in relation to undertakings' infringements of competition law is a significant deviation from Danish legal tradition.

Further, the Danish Parliament's implementation of the ECN+ Directive has entailed a strengthening of the DCCA's investigation and decision-making powers. Some of the amendments include, inter alia, the powers to conduct investigations in private homes, and the powers to request information and carry out inspections on behalf of other national competition authorities in the European Union.

The amendments implementing the ECN+ Directive came into force on 4 March 2021.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Danish competition law is generally consistent with EU competition law. Accordingly, the substantive provisions of the Act largely correspond to the similar provisions of the TFEU. Section 6 of the Act lays down a general prohibition against certain anticompetitive agreements and provides that such agreements are void unless covered by the exceptions in section 7 (de minimis rule for non-hard-core infringements) or the exemptions in section 8 of the Act (efficiency defence).

The principle of per se illegality is not applied under Danish law. As under EU law, certain anticompetitive agreements are considered hard-core infringements under Danish law (ie, price-fixing agreements, restrictions on production or sales, market and customer sharing and bid rigging). However, there are no specific provisions dealing with these types of agreements. Thus, all anticompetitive agreements are dealt with under the general prohibition set out in section 6(1) of the Act and are subject to a competitive effects test (section 8 of the Act).

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are subject to cartel laws. Section 6(2) of the Act explicitly lists coordination through the creation of a joint venture as an example of an anticompetitive agreement that is covered by the prohibition in section 6(1).

Coordination through a full-function joint venture is assessed by the DCCA as part of the merger control process if the thresholds for notification are met. The creation of a non-full-function joint venture is not notifiable (in line with EU competition law, cf. C-248/16 *Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*) and should therefore undergo self-assessment by the undertakings concerned to ensure that the joint venture does not lead to anticompetitive coordination.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The substantive provisions of the Danish Competition Act (the Act) apply to agreements between undertakings, decisions made by associations of undertakings and concerted practices between undertakings. The Act applies to economic activity, whether carried out under private or public management. There are no requirements in terms of corporate form. The decisive criterion is whether or not the undertaking concerned carries out economic activity in a market. However, the Act does not apply to agreements, decisions or concerted practices within the same undertaking or group of undertakings.

The Act applies to individuals who carry out economic activity or have a controlling interest in one or more undertakings. Furthermore, the Act applies to individuals practising a liberal profession, such as lawyers, accountants, doctors and dentists. Finally, members of the board, the management and employees of the relevant undertakings must adhere to the competition rules and may be held liable for competition law infringements, as criminal sanctions may be imposed on both undertakings and individuals.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Act contains no provisions on extraterritoriality (except for section 29, which provides that the Act does not extend to the Faroe Islands and Greenland).

However, in general, it is assumed that the Act extends to conduct that has anticompetitive effects in Denmark (the effects doctrine). Consequently, a cartel between two undertakings situated outside Denmark may infringe the Danish competition rules and be subject to scrutiny by the Danish competition authorities.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The Act only applies to conduct having an anticompetitive effect in Denmark (the effects doctrine).

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Act contains no provisions on industry-specific infringements or industry-specific defences or exemptions. However, the Act does not apply to pay and working conditions or to agreements, decisions or concerted practices within the same undertaking or group of undertakings (sections 3 and 5(1) of the Act).

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Under section 2(2) of the Act, the prohibition against anticompetitive agreements, including cartels, does not apply where an anticompetitive agreement is a direct or necessary consequence of public regulation. 'Public regulation' comprises, among others, legislation, ministerial orders, general budget rules, ratified conventions and EU regulations. Section 2(2) ensures that the competition authorities do not overrule politically decided public regulations and that companies are shielded from the consequences of anticompetitive agreements required by public regulation. In this respect, section 2(2) is similar to the state compulsion defence under EU competition law (see, for example, case C-280/08 P, *Deutsche Telekom*).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Cartel investigations are primarily carried out by the Danish Competition and Consumer Authority (DCCA). However, if there is reasonable cause to suspect that an individual is contributing to an infringement, the investigations must be carried out by the State Prosecutor for Serious Economic and International Crime (the State Prosecutor).

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 or a foreign national competition authority. In this regard, the DCCA has introduced a feature on its website making it possible for employees or others who may have knowledge of a cartel to inform the DCCA anonymously.

During an investigation, the DCCA will usually carry out a dawn raid on the premises of the relevant undertaking to secure evidence. The DCCA must obtain a court order stating the subject matter and purpose of the inspection ahead of a dawn raid.

Following the dawn raid, the DCCA will conduct a review of the secured material, which can be a lengthy procedure. Electronic material copied from the undertaking's IT system must be reviewed within 40 working days after the dawn raid has been carried out. The review of the electronic material must be concluded with a report listing the documents that the DCCA has tagged as potentially relevant for the investigation. Afterwards, the undertaking subject to the dawn raid will have 10 working days (according to the DCCA's guidelines on dawn raids) to go through the tagged material. The 10 working days constitute a stand-still period for the DCCA, where the DCCA does not work on the case. During the stand-still period, the undertaking can make protests regarding material included by the DCCA that the undertaking does not find relevant for the investigation, or which is covered by the principle of legal professional privilege.

When an agreement is reached as to what documents can be included in the investigation, the DCCA will commence the analysis

phase, which typically lasts two to three months. The investigation may result in a decision by the DCCA:

- to close the case;
- to refer the case to the State Prosecutor (if the DCCA finds that an individual has intentionally or negligently infringed competition law); or
- to continue the investigation and present the case to the Danish Competition Council (the Council) for the Council to render a decision and possibly request the courts to impose a fine on any undertaking that intentionally or negligently has infringed competition law.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under section 17 of the Danish Competition Act (the Act), the DCCA may demand all information deemed necessary to carry out its tasks under the Act or to decide whether the provisions of the Act apply to a certain situation. Pursuant to section 18 of the Act, the DCCA is entitled to carry out dawn raids on the premises of an undertaking. If the DCCA cannot gain access to information directly from the undertaking, the DCCA is entitled to be given access to data processors that store or process data on behalf of the undertaking.

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.

During a dawn raid, the DCCA is entitled to gain access to any information, no matter the media. Consequently, the DCCA must be given access to rooms, cabinets, drawers, computers, smartphones, USB memory sticks, iPads etc. The DCCA may view, read and make copies of any type of information, even if it is considered confidential by the undertaking. Information found at the premises of the undertaking is presumed to belong to the undertaking. Consequently, the DCCA must be given access to the mailboxes of the employees, including folders labelled 'private'. The burden of proof rests with the employee to document that correspondence on a medium is private. The DCCA can request oral statements (concerning factual circumstances) from employees and can request employees to present the contents of their pockets, bags and briefcases etc. The DCCA is also entitled to access company vehicles.

With the implementation of Directive 2019/1EU of 11 December 2018 (the ECN+ Directive), pursuant to Section 18a of the Act, the DCCA is now entitled to conduct dawn raids at other premises, such as private homes or private cars, if there is a reasonable suspicion that proof of the undertaking's suspected violation is kept in such premises. If there is reasonable suspicion that an individual has contributed to an undertaking's violation of the competition rules, and proof thereof is being kept in premises accessible to this individual (eg, private home or car), the State Prosecutor will conduct the inspection. The DCCA may be present during the inspection, but only the State Prosecutor is authorised to carry out investigations with the purpose of criminal prosecution of individuals. Inspections at other premises are only allowed when certain conditions are met and subject to a court order.

On 1 March 2013, the legal basis for the State Prosecutor to conduct wiretapping, monitoring and install 'sniffer programs' on computers was introduced in Danish legislation. However, with the amendments to the Act following the ECN+ Directive, whereafter competition law infringements committed by undertakings are subject to civil fines under the civil procedure, such investigatory powers appear to be available only in relation to cases against individuals (who are investigated by the State Prosecutor under the criminal procedure).

It should be noted that the DCCA does not have the right to review an undertaking's correspondence with its external legal counsel concerning the undertaking's compliance with competition law. This corresponds to the EU rules on legal professional privilege.

The legal basis for these measures entered into force on 1 March 2013 and is, thus, relatively new.

It should be noted that the DCCA does not have the right to review an undertaking's correspondence with its external legal counsel concerning the undertaking's compliance with competition law. This corresponds to the EU rules on legal professional privilege. However, the question of whether the State Prosecutor will have access to such correspondence has not yet been tried before the courts.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Denmark is part of the European Competition Network (ECN) and thereby participates in cross-border cooperation between the European Commission and the national competition authorities of the other EU member states.

The Danish Competition and Consumer Authority (DCCA) also participates in informal cooperation with the European competition authorities. Further, the DCCA may conduct dawn raids to grant assistance to the European Commission and other national competition authorities of the European Union or the EEA area in connection with these authorities' application of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or articles 53 or 54 of the EEA agreement in accordance with section 18(9) of the Danish Competition Act. Further, following the implementation of Directive 2019/1EU of 11 December 2018, the DCCA is authorised to request information, carry out inspections and interviews on behalf of, and for the account of, other national competition authorities within the European Union.

On a Nordic level, the Danish competition authorities cooperate with Norway, Sweden, Finland, Iceland, Greenland and the Faroe Islands. Denmark has entered into a formal agreement with the national competition authorities in Sweden, Norway, Finland and Iceland on the exchange of confidential information.

Finally, Denmark is also active within the OECD (which has set up the Global Competition Network), the International Competition Network and the WTO.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

In general, jurisdictions within the EU (and the ECN) cooperate with the Danish competition authorities.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Decisions on cartel infringements committed by undertakings can be made by the Danish Competition and Consumer Authority (DCCA) (in uncomplicated cases) or by the Danish Competition Council (the Council) based on investigations by the DCCA. The decisions of the DCCA and

the Council cannot be appealed to any other administrative body than the Danish Competition Appeal Tribunal (DCAT). Material decisions may be appealed to the DCAT or directly to the courts, while decisions on formality can first be appealed to the courts when the DCAT has decided on the case. Following a final decision of an undertaking's infringement of competition law, the competition authorities may request the courts to impose a fine in accordance with civil procedure.

Decisions on cartel infringements committed by individuals are made by the courts in accordance with criminal procedure and led by the State Prosecutor for Serious Economic and International Crime.

The DCCA may offer undertakings a fixed-penalty fine. Hence, if an undertaking admits having committed an infringement of competition law, and accepts the fixed-penalty fine, the case can be closed without court proceedings. Individuals cannot be offered a fixed-penalty fine.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The Danish Competition Act (the Act) does not contain any provisions on the burden of proof or on the level of proof required. Consequently, the general rules of Danish law apply as regards the burden of proof.

As a general rule, the burden of proof lies on the competition authorities to prove their case, including the existence of an anticompetitive agreement under Section 6 of the Act. However, if the authorities prove an anticompetitive agreement, the burden of proof shifts so that the undertaking has to prove that the agreement meets the conditions of section 8 (similar to article 101(3) of the Treaty on the Functioning of the European Union).

In civil proceedings (ie, in cases against undertakings), the competition authorities and the courts are free to assess the evidence. No hierarchy of different forms of evidence is set out in any statutory provisions. Accordingly, it is for the authorities and the courts to determine when the burden of proof has been lifted, with the result that the burden of counterproof shifts to the undertaking. For fines to be imposed, an infringement must be intentional or negligent.

In criminal proceedings (ie, in cases against individuals), it is required that there is no reasonable doubt about the guilt of the defendant (the in dubio pro reo principle). For fines to be imposed, an infringement of the competition rules must be intentional or grossly negligent, while the requirement for imprisonment for a cartel agreement is that the breach committed is intentional and of a grave nature.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The Act does not contain any specific provision on the type or threshold of evidence needed to establish an infringement. Section 6(3) of the Act provides that section 6(1) applies to cases of concerted practices. Consequently, it follows from section 6(1) of the Act that a restriction of competition can be demonstrated without proof of a specific agreement.

The DCCA must prove its case, but it and the courts are free to assess all the evidence.

Case law from the European Court of Justice (ECJ) serves as guidance in relation to the inclusion of circumstantial evidence by the DCCA and the courts. In this regard, the ECJ has held that the existence of an anticompetitive infringement can 'be inferred from a number of coincidences and indicia that, taken together, can, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules' (case T–113/07, *Toshiba*).

Appeal process

18 | What is the appeal process?

Decisions made by the DCCA or the Council may be appealed to the DCAT and may not be brought before any other administrative authority than the DCAT. Material decisions may be appealed to the DCAT or directly to the courts, while decisions on formality may not be brought before the courts until the DCAT has made its decision.

An appeal must be submitted to the DCAT within four weeks after a decision by the Council has been communicated to the party concerned. The DCAT 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 DCAT 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 DCAT becomes final.

The DCCA cannot challenge a decision by the DCAT before the courts. However, the DCCA may appeal a decision by a lower court to a higher court.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Criminal sanctions may be imposed on individuals where an intentional or grossly negligent infringement of competition law is established. Sanctions on undertakings are civil.

When meting out a penalty, consideration must be given to the gravity and duration of the infringement. Under the amended sanction regime of 2013, the gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level for fines imposed on individuals for cartel behaviour (very grave) is a minimum of 200,000 krone. It should be noted that the courts have considerable discretion when imposing fines.

As of 1 March 2013, imprisonment may be imposed on individuals in cartel cases if their participation in the cartel has been intentional and if the breach has been of a grave nature, especially owing to the extent of the infringement or its potentially damaging effects. The maximum term of imprisonment is usually one and a half years but may be increased up to six years in case of aggravating circumstances. The courts have yet to impose the first prison sentence for cartel participation, but prison sentences are, when relevant, expected to be imposed on members of the board or the management. The State Prosecutor for Serious Economic and International Crime (the State Prosecutor) has, unsuccessfully, asserted claims for unconditional imprisonment in cartel cases as seen in, inter alia, the Danish Eastern High Court judgment of 21 December 2018 and in two cases concerning bid rigging between demolition contractors (the District Court of Hilleroed judgment of 11 January 2019 and the District Court of Roskilde judgment of 4 April 2019).

Sections 81 and 82 of the Danish Criminal Code list a number of aggravating and mitigating circumstances to take into account when deciding on the level of a sanction.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Following the amendment of the Danish Competition Act (the Act) of 4 March 2021, due to the implementation of Directive 2019/1EU of 11 December 2018 (the ECN+ Directive), the sanctions on undertakings for cartel activity are civil. In cases where undertakings intentionally

or negligently infringe competition law, the competition authorities may request the courts to impose fines in accordance with civil procedure.

When meting out the level of a fine, the gravity of the infringement and its duration must be taken into account (cf section 23b(1) of the Act). Further, the undertaking's worldwide group turnover of the previous financial year must be considered. According to Section 23b(4) of the Act, fines should not exceed 10 per cent of the undertaking's worldwide group turnover. Section 23b further mentions a list of aggravating and mitigating circumstances to consider when deciding on the level of the fine.

Under the amended sanction regime of 2013, the gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level for fines imposed on undertakings for cartel behaviour (very grave) is more than 20 million krone. It should be noted that the courts have considerable discretion when imposing fines.

Of administrative sanctions, the Danish competition authorities may offer undertakings a fine in lieu of prosecution. Further, the Director General of the Danish Competition and Consumer Authority (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.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

When meting out a criminal penalty, consideration must be given to the gravity and duration of the infringement. The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level for fines imposed on legal persons for cartel behaviour is more than 20 million krone, while the indicative level for individuals for cartel behaviour (very grave) is a minimum of 200,000 krone. It should be noted that the courts have considerable discretion when imposing fines. Sections 81 and 82 of the Danish Criminal Code list a number of aggravating and mitigating circumstances to take into account when deciding on the level of a sanction.

In civil cases, when meting out the level of a fine, the gravity of the infringement and its duration must be taken into account (cf section 23b(1) of the Act). Further, the undertaking's worldwide group turnover of the previous financial year must be considered. According to Section 23b(4) of the Act, fines should not exceed 10 per cent of the undertaking's worldwide group turnover. Section 23b further mentions a list of aggravating and mitigating circumstances to consider when deciding on the level of the fine.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

According to Section 23b(3)(iii) of the Act, when assessing the level of a fine, it is a mitigating factor if the undertaking 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

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Act does not warrant disqualification of individuals involved in cartel activity.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Under section 137(1)(4) of the Danish Act on Public Procurement (based on Directive No. 24 of 26 February 2014 of the European Parliament and of the Council on Public Procurement), it is possible for a contracting authority to exclude a company from participation in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the company has entered into agreements aimed at distorting competition and if the contracting authority has stated in the contract notice that participation in such anticompetitive behaviour leads to exclusion.

The contracting authority has decision-making powers. The decision is usually a discretionary sanction but under certain circumstances debarment is mandatory. The usual duration of debarment is two years from the date when the relevant anticompetitive behaviour ended. The company has the right to take self-cleaning measures and demonstrate its reliability despite the existence of the said ground for exclusion. If the self-cleaning measures are considered sufficient, the company cannot be excluded from the procurement procedure.

Any questions in this regard can be brought before the Danish Complaints Board for Public Procurement.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Up until the implementation of the ECN+ Directive, civil and administrative fines did not exist under Danish competition law. As of 4 March 2021, sanctions for undertakings are civil fines imposed in accordance with civil procedure, while sanctions for individuals are criminal fines (or imprisonment) imposed in accordance with criminal procedure and led by 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 choice of sanction depends on whether the infringing party is an undertaking or an individual.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The rules on private damage claims are outlined in the Competition Damages Act (CDA), supplemented by the general principles and practice concerning liability in tort. The CDA ensures a right to full

compensation for competition law infringements. The CDA applies to infringements initiated after 27 December 2016.

Under Danish law, a claimant may be granted damages if the competition law infringement was committed with negligence or intent, if there is a causal and foreseeable loss and if there was absence of fault by the claimant.

Indirect purchaser claims are permitted, and thus indirect purchasers may make a damage claim for a competition law infringement. Also, purchasers that acquired the affected product from non-cartel members may bring claims against the cartel members if the before-mentioned requirements for bringing a damage claim are met.

The passing-on defence may be used in damages cases arising from a competition law infringement in accordance with the Competition Damages Act. Thus, a tortfeasor may argue that the claimant did not suffer any loss as any overcharge attributed to anticompetitive behaviour has been passed on to a subsequent purchaser. The burden of proof lies with the tortfeasor. However, the burden of proof may shift during the case if, for example, an indirect purchaser brings a damage claim. If a claimant has passed on its loss, the claimant cannot be granted damages for the loss that has been passed on.

As regards the level of damages, it is a fundamental principle that the claimant's financial position before the occurrence of the damage must be restored. The damages should include lost profit and interest, but the level of damages must not be such as to enrich the claimant. Furthermore, the claimant is under a duty to mitigate his or her loss.

Only a limited number of cases on private damages claims has been brought before the Danish courts. All of these cases have concerned infringements that have taken place before the implementation of the Damages Act on 27 December 2016, and consequently, recent case law gives no guidance on the new damages claim regime. However, in general, the Danish courts have a conservative approach to damage claims. In the *Electricity Cartel*case from 2006, where the municipality of Copenhagen claimed to have suffered a loss of 320,000 krone, 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 krone. In the *Skandinavisk Motor Company* case from 2008, the District Court dismissed the case on the basis of an absence of actual data or calculations of the plaintiff's loss. In the *Cheminova A/S* case from 2015, where Cheminova had claimed damages in the amount of 47.2 million krone, the Maritime and Commercial High Court awarded damages of 10.71 million krone without specifying the details of the calculation.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions for follow-on damage claims are possible under Danish law. Class actions are regulated in Chapter 23a of the Danish Administration of Justice Act, and, as a general rule, a class action is subject to the same procedure as other Danish court cases. Additionally, section 16 of the Competition Damages Act states that where several persons have raised claims for damages due to infringements of the Danish Competition Act or articles 101 or 102 of the Treaty on the Functioning of the European Union, 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 awaits the final judgment in the cases between Nets and the Danish Competition and Consumer Authority (DCCA), which is now pending before the Supreme Court after the High Court of Eastern Denmark ruled in favour of the DCCA on 17 February 2021.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Danish Competition Act (the Act) provides for a leniency programme, which is by and large comparable to the leniency programme set out under EU law.

Thus, according to section 23d of the Act, anyone who acts in breach of section 6 of the Act or article 101 of the Treaty on the Functioning of the European Union (TFEU) by entering into a cartel agreement can apply for leniency and can under certain conditions be granted immunity from a fine or from imprisonment for participating in a cartel. Withdrawal will be granted only if the applicant is the first to have approached the authorities and if the applicant has submitted information that the authorities were not in possession of at the time of the application.

It is further a condition that *either,* before the authorities have conducted any inspection or a search regarding the matter in question, the submitted information must be the information to give the authorities specific grounds to initiate an inspection, to conduct a search or to inform the police of the matter in question, *or*, after an inspection or search regarding the matter in question, the submitted information must be the information that enables the authorities to establish an infringement in the form of a cartel.

Section 23d(3) lays out further conditions, and withdrawal will be granted only if the applicant cooperates with the authorities throughout the entire case, brings the participation in the cartel to an end no later than by the time of the application, and has not coerced any other party into participating in the cartel.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

According to section 23e of the Act, a leniency application will be treated as an application for a reduction of the penalty if the leniency applicant is not the first one to apply for immunity (and therefore does not meet the requirements set out in section 23d to obtain immunity). Thus, anyone acting in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will be granted a reduction of the fine that would otherwise have been imposed for participation in the cartel, provided the applicant submits information about the cartel that constitutes significant added value compared to the information already in the authorities' possession, and provided the requirements in section 23e of the Act are satisfied.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Under section 23e of the Act, the applicant that goes in second (and is therefore unable to obtain full leniency) will receive a 50 per cent reduction of the fine. The penalty reduction for the third cooperating party is

30 per cent, and, finally, the penalty reduction for subsequent applicants will be up to 20 per cent of the fine that would otherwise have been imposed on the party concerned for participating in the cartel.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no formal deadlines for the initiation or completion of a leniency application. However, it should be stressed that a leniency application must be submitted at a point in time when the authorities have not yet conducted an inspection or a search regarding the matter in question or at a time when the submitted information constitutes significant added value to an ongoing investigation. Moreover, the applicant must bring the participation in the cartel to an end before submitting the application.

A marker system was recently introduced making it possible for a cartel participant to reserve its place in the queue while putting together a final leniency application (see section 23f of the Act). The applicant must hand in a preliminary application for leniency and must subsequently deliver further documentation to the Danish Competition and Consumer Authority (DCCA) within a fixed time frame.

There are no formal requirements as to the form of application to be submitted to the DCCA for leniency but using the application form provided on the DCCA's website is recommended.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

To date, there have been very few leniency cases in Denmark and no ministerial orders or the like have been issued. Nonetheless, the competition authorities expect full cooperation throughout the process, both by the first leniency applicant and by any subsequent cooperating parties. The applicant must provide all information and evidence on the cartel and, at any time, be available to provide a quick response to questions from the authorities (according to the guidelines on leniency).

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Danish Act on Public Access to Documents in Public Files does not apply to cases and investigations carried out pursuant to the Act.

The Danish Public Administration Act applies to competition cases and may provide a right of access to documents for the parties, which in cartel cases will be the addressee of the competition authorities' decision. Furthermore, under certain circumstances, the DCCA may choose to provide a more extensive right of access to documents by applying a principle of 'extended openness'.

Generally, the practice of the DCCA is to keep the identity of leniency applicants confidential. This practice was confirmed by the Appeal Tribunal in a case from 2018. Furthermore, the DCCA is reluctant to publish information that may lead to the identification of the leniency applicants.

Confidentiality is, however, not guaranteed, as the DCCA is required to publish judgments and penalty decisions, or a summary thereof, involving a fine or prison. Furthermore, the DCCA notifies the European Commission and national competition authorities in other EU member states when receiving applications for leniency.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Plea bargaining as such does not exist under Danish law. However, it is, to some extent, common for the DCCA to enter into negotiations or talks with the undertakings involved regarding the level of the fine to be imposed.

Undertakings may accept a fine in lieu of prosecution from the DCCA and in this way avoid proceedings in open court.

An undertaking that contacts the DCCA to settle a case will normally be granted a reduction in the fine.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Under section 23i 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 23d.

A leniency application from an undertaking or an association must be filed by a person who can sign for the undertaking or association (eg, a director). The authorised person must expressly state that it is the company applying for leniency and if an application is to cover companies in a group it must also be expressly stated in the application.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A leniency application can be submitted to the DCCA. 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. An application may be submitted in Danish or English, or, upon agreement with the DCCA, in another official language of the European Union.

In practice, the DCCA will generally invite the applicant to a meeting to discuss the application.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

Usually, the defendant will receive a notice of concern (NOC) from the Danish Competition and Consumer Authority (DCCA) at the beginning of the case. The NOC will contain the DCCA's immediate opinion with

regard to the claimed breach of the Danish Competition Act (the Act). The opinion is non-binding for the DCCA.

The Danish Public Administration Act applies to competition cases and provides a right of access to documents for the defendant. The right of access includes all registered documents regarding the defendant, excluding internal working papers and confidential material (eg, competitively sensitive information).

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

As a general rule, a counsel may represent both the undertaking under investigation and the employee unless the representation will create a conflict of interest. If there is a conflict of interest – or an immediate risk that a conflict of interest will arise – a present or past employee should be advised to seek independent legal advice.

It should always be considered carefully whether there is a conflict of interest.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

A counsel may represent multiple corporate defendants unless the representation implies a conflict of interest or an immediate risk of a conflict of interest.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation may pay the legal penalties imposed on its employees as well as their legal costs. Such payments will be taxed as income for the relevant employees.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Under Danish law, the general rule is that expenses incurred by an undertaking are tax-deductible if the expenses are considered a natural operating expense. As fines and other penalties are generally not considered a natural operating expense, fines or other penalties are thus not tax-deductible.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In general, companies and individuals sanctioned in a criminal proceeding outside Denmark cannot be sanctioned for the same action in a subsequent Danish criminal proceeding (the ne bis in idem principle). This should apply also in the case of a subsequent civil proceeding.

As regards private damage claims, it is a fundamental principle for the assessment of damages that the claimant's financial position must be restored to what it was before the damage occurred. Consequently, any compensation received by the claimant in another jurisdiction will be taken into account in a subsequent Danish case.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The optimal way in which to get the fine down is to apply for leniency, assuming the conditions for leniency are fulfilled.

Other means to seek a reduction in the fine include contacting the DCCA to settle the case or to have a compliance programme in place. Undertakings that contact the DCCA to settle a case by paying a fine in lieu of prosecution will generally be granted a reduction of the fine. Undertakings that had a compliance programme in place at the time of the offence, which continue to follow such a programme and which do in fact seek to ensure compliance with the competition rules may obtain a reduction of the fine.

Section 82 of the Danish Criminal Code provides for a number of mitigating circumstances that can be taken into consideration when meting out a sanction, the most relevant of which provides the basis for the leniency programme.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 12 March 2021, the High Court of Eastern Denmark found that HMN Naturgas had illegally coordinated prices on gas furnace maintenance subscriptions. HMN offered its end customers gas furnace maintenance subscriptions through independent plumbers, who themselves also offered gas furnace maintenance subscriptions to end users. In 2016, the Danish Competition Council (the Council) found that the parties were competitors in 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 decision from the Council was upheld by the Danish Competition Appeal Tribunal (DCAT), and when HMN appealed the case to the courts, the case was upheld first by the Danish Maritime and Commercial High Court in June 2019, and finally by the High Court of Eastern Denmark. The case is noteworthy, as the agreement in fact caused a reduction of the total price for HMN's customers.

In two cases from the sector of retail clothing of June 2020, the Council found that two competing dealers had illegally exchanged information. The Council found that Hugo Boss, a producer and supplier and retailer of articles of clothing in retail, had exchanged Information on prices from January 2014 to November 2017 with Kaufmann and from December 2014 to April 2018 with Ginsborg. Both Kaufmann and Ginsborg were retailers of articles of clothing from, among other brands, Hugo Boss. The Council found that the exchange of information on prices, rebates, etc. constituted horizontal concerted practices subject to the prohibition in section 6(1) of the Danish Competition Act (the Act), and article 101(1) of the Treaty on the Functioning of the European Union (TFEU) that could not benefit from either block exemptions or the exemptions in section 8(1) of the Act or article 101(3) of the TFEU. The DCAT upheld both decisions and subsequently the two cases were referred to the State Prosecutor for Serious Economic and International Crime for criminal prosecution (in accordance with the Act previous to the implementation of Directive 2019/1EU of 11 December 2018).

A number of recent cases have been closed with the undertaking accepting to pay a fixed penalty fine. On 26 August 2021, Kaufmann accepted a fine of 3.7 million krone for having exchanged information on prices and offered campaigns with a competitor in violation of section 6(1) of the Act.

On 9 July 2021, Ageras A/S accepted a fine of 1.275 million krone for having used a price-fixing mechanism and minimum price levels on

their digital platform for auditing and accounting services, ageras.dk. The Council had found that Ageras infringed competition law in a decision from June 2016.

In May 2020, the Council found that MediaCenter Danmark had agreed with a competitor, MPE Distribution, to share the market for distribution of bulk mail between them. As MPE Distribution applied for leniency and assisted with the investigation as required, MPE Distribution received total immunity from the imposition of any fines. MediaCenter Danmark, in contrast, accepted a fine of 2.25 million krone.

In August 2020, the competition authorities made investigations into the use of minimum resale prices on Happy Helper and Hilfr, two digital platforms enabling contact between providers and buyers of private cleaning services. The cases are notable as they are the first to deal with the question of whether self-employed individuals that sell services on digital platforms are subject to the Act. The Council found that the providers of cleaning services on the digital platforms most likely are to be considered self-employed individuals that are competitors on the platform. For this reason, Happy Helper and Hilfr made commitments to the Council to cease the use of fixed hourly prices for the cleaning services offered on the platforms, as they restricted the self-employed individuals' possibility to set their own prices. Furthermore, the cases are notable as they demonstrate, in practice, the DCCA's increased focus on cases involving digital platforms.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 1 May 2019, the Danish Competition and Consumer Authority (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. The DCCA has had an increased interest in the growing market for digital platforms. For example, the case of Happy Helper and Hilfr was brought to the Council's attention due to a general sector investigation of the market in 2019. Thus, an increase in cases involving digital platforms can be expected to continue due to the enhanced focus.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartels that have an effect on trade between member states of the European Union are prohibited under article 101 of the Treaty on the Functioning of the European Union (TFEU), which applies to all agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market. Although they are not intended to specifically address cartels, the European Commission's (EC) guidelines on the applicability of article 101 TFEU to horizontal cooperation agreements, issued in 2011 (2011/C 11/01, the Horizontal Guidelines) contain several references to cartels as well as a specific chapter on the competitive assessment of information exchange that, depending on the circumstances and type of information exchanged, may be fined as cartels.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Pursuant to Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003), the EC, which is primarily in charge of enforcing article 101 TFEU, has exclusive jurisdiction to both investigate – through its Directorate-General for Competition (DG Competition) – and sanction cartels at the European level. Its decisions can then be appealed to the General Court of the European Union (GCEU) and, ultimately, the European Court of Justice (ECJ).

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

On 6 May 2021, the EC released a staff working document (SWD) on the evaluation and revision of the Horizontal Guidelines and horizontal block exemption regulations for research and development (R&D BER) and specialisation agreements (Specialisation BER, together HBERs). According to the EC, both the Horizontal Guidelines and the HBERs should be revised to better address certain novel issues that are of growing concern, such as sustainability or digitalisation, and to adapt certain rules perceived as unnecessarily strict and unclear.

Key findings and suggestions of the EC notably include:

- revising the Horizontal Guidelines to ensure compatibility between the rules governing horizontal agreements and the sustainability goals set by the European Green Deal. The revised HBERs shall thus clarify the level of cooperation authorised between competitors to implement sustainable development models, in terms e.g. of data pooling and data sharing arrangements; and
- Revising the HBERs to include a section on the withdrawal of the benefit of the block exemption and to adapt the assessment criteria of certain agreements entered into by SMEs or that involve research institutes and academic bodies, which are unlikely to raise anticompetitive concerns and have beneficial effects on consumers.

Following a public consultation that ended on 5 October 2021, the EC now aims at publishing a draft of the revised rules beginning of 2022, on which undertakings and other stakeholders (competition authorities, legal practitioners, environmental organisations, etc) will be able to comment again. The final revised rules are expected to come into force after 31 December 2022, when the current rules are due to expire.

Finally, the temporary framework communication adopted by the EC on 8 April 2020 to address the challenges resulting from the coronavirus outbreak is still applicable and shall remain in force until the EC considers that the exceptional circumstances underlying this framework are no longer present and withdraws it.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU prohibits:

> *[All] agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.*

A non-exhaustive list of prohibited practices is set out in this provision and includes agreements, decisions and concerted practices which, directly or indirectly, aim to:

- fix prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply; and
- apply dissimilar conditions to equivalent transactions or making the conclusion of contracts subject to acceptance of supplementary obligations.

Depending on the conduct, a cartel may be considered as having either an anticompetitive object or, in the alternative, an anticompetitive effect. Object restrictions are those which, by their very nature, entail a sufficient degree of harm to competition so that there is no need to examine their effects (see ECJ, 2 April 2020, *Gazdasági Versenyhivatal*

c/ Budapest Bank Nyrt. e.a, C–228/18). To determine whether an agreement or concerted practice has an anticompetitive object, regard must be had to the content of the agreement, its objectives, and the economic and legal context of which it forms part. In practice, certain collusive behaviours, including information exchanges, are deemed by object restrictions, such as price-fixing or market sharing.

Under article 101(2) TFEU, agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the EC that they breach article 101(1) TFEU.

However, article 101(3) TFEU provides that agreements whose efficiencies outweigh the anticompetitive effects can be exempted, provided they meet certain criteria, and notably that they contribute to economic progress to the benefit of the end-consumer, without foreclosing competition. It is nonetheless extremely rare that cartels qualify for such exemption.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

If a joint venture is not deemed a 'concentration' within the meaning of the EU merger control regulation, it will be considered as a cooperation agreement, which must therefore be examined under article 101 TFEU. In practice, this will be the case of all non-full function joint ventures (ie, those where the joint venture does not have sufficient resources to operate autonomously from its parent companies), which are therefore deemed parties to a cooperation agreement.

While the Horizontal Guidelines recognise that cooperation agreements can have pro-competitive effects, those that directly or indirectly organise or facilitate price fixing, market sharing or limitation of output are prohibited under article 101(1) TFEU.

Similarly, while they can bring benefits to final consumers and are generally exempt under article 101(3) TFEU, strategic alliances – such as the ones in the air transport or food retail sectors – can also give rise to competition concerns and be sanctioned under article 101(1) TFEU. The EC has, for example, recently opened an investigation targeting two French supermarket chains for possible collusion on sales activities as part of a buying alliance they set up in 2014 (case AT.40466).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

Article 101 of the Treaty on the Functioning of the European Union (TFEU) only applies to undertakings. The notion of 'undertaking' has been defined broadly in European Union case law, as any entity engaged in an economic activity (ie, the sale of goods or provision of services), regardless of its legal status and the way in which it is financed (European Court of Justice (ECJ), 1991, *Höfner and Elser*, C–41/90). Accordingly, in addition to individual companies operating in a market, the following entities have been considered as undertakings within the meaning of competition law:

- professional orders;
- trade unions and professional associations;
- public agencies that do not exercise the prerogatives of a public authority;
- sports federations and associations; and
- entities working in the social sector.

Individuals can only be subject to competition law provisions if they themselves are an undertaking (ie, if they sell goods or services on their own behalf). However, article 101 TFEU does not apply to individuals acting as employees of an undertaking. Note that some national legislations in the EU provide for criminal sanctions or administrative fines for employees that participate in an infringement of competition law.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes. Article 101 TFEU has an extra-territorial reach insofar as any conduct that has effects in EU territory, irrespective of the nationality of the infringer and the country in which sales are booked, falls within the jurisdiction of the European Commission (the EC). The General Court of the European Union (GCEU) recently confirmed the EC's jurisdiction over anticompetitive practices that took place outside of the European Economic Area (EEA) but which had an effect on the internal market insofar as the cartel participants had exchanged information and coordinated their commercial policies, including with respect to customers having their headquarters in the EEA, thereby giving a global reach to their practices (GCEU, 29 September 2021, *Nichicon*, cases T-342/18 and T-363/18).

Moreover, while, according to the Guidelines on the method of setting fines imposed pursuant to article 23(2)a of Regulation No. 1/2003 (the Guidelines on the method of setting fines), the EC usually calculates fines on the basis of 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area' within the EEA (paragraph 13), by way of exception, the EC may take into account sales made by participants in the cartel outside the EEA (paragraph 18) to reflect their participation in the infringement when they had few or no sales within the EEA. This was notably the case in the *Power Cables* decision (EC, 2 April 2014, *Power Cables*, AT.39610). This approach was subsequently validated by EU courts (General Court of the European Union (GCEU), 2018, *Viscas*, T–422/14; ECJ, 2019, *Viscas*, C–582/18 P).

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such exemption or defence under EU law.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements. However, specific regulations or guidelines exist in some sectors that the EC wishes to encourage. This is the case, for instance, in the maritime transport sector, where Regulations No. 246/2009 of 26 February 2009 and No. 906/2009 of 28 September 2009 exempt joint-service agreements between liner shipping companies aimed at rationalising their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as 'consortia'). Exemptions also apply in the agricultural and food sector, where Regulation No. 2017/2393 provides for a derogation for some activities of producer organisations, such as joint sales, or in the air transport sector, where Regulation No. 487/2009 of 25 May 2009 provides for a derogation for concerted practices whose objective is joint planning and coordination of airline schedules.

Specific regulations used to apply in other sectors, such as insurance or telecommunications, but they expired or were repealed.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is not, as such, a defence or exemption for a cartel that has been approved or encouraged by a state. For instance, in a 2008 preliminary ruling about a scheme under which some beef processors undertook to leave the processing industry the ECJ considered that even if the scheme resulted from a study carried out at the request of the Irish government, it amounted to a restriction of competition by object (ECJ, 20 November 2008, *Beef Industry Development Society*, C–209/07). However, the Guidelines on the method of setting fines provide that the basic amount of the fine imposed on undertakings that infringed article 101 TFEU may be reduced to take into account mitigating circumstances, such as where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation.

In 2017, following the GCEU annulling its first decision on procedural grounds, the EC readopted a cartel decision against 11 air cargo carriers that were found to have infringed article 101 TFEU by operating a price-fixing cartel. They were all granted a 15 per cent reduction in fines on the ground that they had been encouraged to concert on prices with their competitors by the applicable regulatory regime (see EC, 9 November 2010 and 17 March 2017, *Airfreight*, AT.39258).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Initiation of the proceedings

The European Commission (the EC) may take up a matter on its own initiative or be contacted by any natural or legal person with a legitimate interest (eg, competitor, victim, or even co-perpetrator within the context of leniency). The EC may also launch a sector inquiry, which can subsequently give rise to individual investigations (eg, the case of the pay-for-delay investigations launched against Lundbeck and Servier that followed the EC's sector inquiry in the pharmaceutical sector). Please note that the EC enjoys full discretionary prosecution powers, and can choose not to investigate a complaint, for instance, if it lacks interest from a European perspective or if it is already being examined by a national competition authority (NCA).

Investigation

The proceedings are carried out by the investigation services of the EC. They can request oral or written information from the undertakings concerned, carry out on-site inspections at their premises (including sealing premises) and seize documents. The companies investigated are under a duty of cooperation, meaning that they are required to respond to the investigation services' questions, and to abide by the decisions authorising dawn raids, at the risk of sanctions. The EC can also hear other persons than the companies being investigated. Such interviews are not mandatory; however, after the subject has agreed to testify, he or she must cooperate and provide the EC with accurate information.

Adversarial phase of the procedure

The undertakings concerned receive a statement of objections in which the EC presents the objections raised against them, as well as the factual evidence and legal arguments behind its analysis. The undertakings are then able to examine all elements contained in the EC's investigation file, to file observations in response to the statement of objections and to request an oral hearing to present their comments on the case. Please note that, where applicable, discussions regarding a potential settlement procedure will be initiated by the EC before the undertaking receives the statement of objections. If the undertaking accepts to settle, it will have to send a settlement proposal to the EC, to which the latter will respond by sending a statement of objections setting out the content of the proposal.

Decision

If it concludes in the existence of an infringement of article 101 of the Treaty on the Functioning of the European Union (TFEU), the EC will adopt a grounded decision prohibiting the conduct and imposing a fine or specific remedies, or both. While in certain antitrust cases the EC may deem appropriate to close its investigation with a commitment decision, in which case there is no finding of infringement, commitment decisions are not appropriate for cartel cases.

There is no legal deadline for the EC to complete cartel inquiries. Though it is difficult to make general assumptions about the timing of cartel cases, such proceedings usually last for several years.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003) sets out the main investigative powers of the EC, which notably include:

- issuing requests for information (under article 18);
- taking voluntary statements from natural or legal persons (under article 19);
- carrying out on-site inspections at the premises of the undertakings concerned (under article 20); and
- where the circumstances require it, inspecting employees' homes and private cars; although this was exceptional, this may become more standard in the future with the accelerated development of remote working (under article 21).

The EC may collect any information it deems necessary for the proper conduct of its investigation. In addition, the EC may itself conduct the inspection on the territory of a member state, or request an NCA to carry out the inspection on its behalf.

Request for information

Requests for information are the most common means used to carry out an investigation and can be issued by the EC at any stage of the procedure. The EC may require the information either by simple request or by decision.

Simple requests must be imperatively motivated and state the legal basis and the purpose of the request, the information requested, which is necessary to establish a violation of article 101 TFEU, the time limit to provide the information (generally two to three weeks), and the sanctions in case false or misleading information is provided (which can reach up to 1 per cent of the total turnover of the undertakings concerned).

Decisions forcing the provision of information may be adopted only when, following a simple request, no information or incomplete information was supplied within the time limit fixed by the EC. It shall contain the same information and remind the addressee of its privilege against self-incrimination. If the undertaking fails to provide the requested information, the EC may impose periodic penalty payments not exceeding 5 per cent of the undertaking's average daily turnover in the preceding business year per day.

Power to receive statements

The EC can interview representatives of the undertakings concerned, as well as third parties. Interviews with third parties are conducted on a voluntary basis.

The EC has wide discretion in the conduct of interviews. It shall only, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview. In practice, the interview is always recorded. The presence of a lawyer is permitted. The officials of the relevant NCA can assist the EC.

Undertakings that are subject to an investigation do not normally have a right to question witnesses testifying against it. In this respect, the European Court of Justice (ECJ) ruled that:

> *[As] the procedure before the Commission is purely an administrative procedure, the Commission is not required to afford the undertaking concerned the opportunity to cross-examine a particular witness and to analyse his statements at the investigation stage. (ECJ, 7 January 2004, Aalborg, joined cases C–204/00, C–205/00, C–211/00, C–217/00 and C–219/00).*

On-site inspections

On-site inspections may be conducted on two grounds: pursuant to a written authorisation or pursuant to a formal EC decision (a dawn raid). The undertaking concerned is only obliged to accept the investigation when it is carried out pursuant to a formal decision. However, in practice, should the undertaking refuse an inspection, the EC will then generally order a dawn raid pursuant to a formal decision and may request the support of officials of the member state within which the inspection is to be conducted.

Whether on the basis of a written authorisation or of a decision, the EC must specify the subject matter and purpose of the inspection, as well as the relevant penalties provided for in Regulation No 1/2003. In case of a formal decision, the EC must also specify the date on which it is to begin as well state the right of the undertaking to have the decision reviewed by the ECJ. In this regard, the GCEU recalled in three judgments of 5 October 2020 that the powers of investigation of the EC were not unlimited. The EC thus has to justify a certain level of evidence to legitimately suspect an infringement of competition law requiring an on-site inspection, which in practice depends on the nature of the infringement at stake.

When carrying out an inspection, either on the basis of a written authorisation or a decision, the EC may:

- enter any premises, land and means of transport of undertakings and associations of undertakings;
- examine the books and other records related to the business, irrespective of the medium on which they are stored and not limited to documents already identified by the EC;
- take or obtain in any form copies of or extracts from such books or records;
- seal any business premises and books or records for the period and to the extent necessary for the inspection; and
- ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Companies facing an inspection are under a duty to cooperate and may be sanctioned if they fail to do so. In practice, the company is under the obligation to give access to all professional documents requested by the investigators stored in any medium or device (eg, PCs, laptops, smartphones, USB drives), including electronic messages (eg, WhatsApp). EC officials can take copies of the documents, including by transferring data on their computers. Usually, the EC selects the documents that are relevant to the subject matter of its investigation directly on the company's premises. However, when the circumstances do not allow the EC to complete its inspection on-site, it may make copies of documents to examine them later in Brussels (ECJ, 16 July 2020, *Nexans*, C–606/18).

The officials also have the power to ask oral questions and to request 'explanations on facts or documents relating to the subject matter and purpose of the inspection', as well as to record the answers.

The rights of defence of the undertakings concerned are limited during dawn raids, and mostly include:

- the right not to be subject to an unauthorised inspection, or to refuse inspections conducted pursuant to simple authorisations;
- the right to be assisted by a lawyer, although the inspection can start before a lawyer has arrived;
- the right not to be required to produce legally privileged documents (limited to correspondence with external lawyers admitted by the bar of a member state of the European Union); and
- the right not to be required to incriminate themselves.

Finally, breaching a seal is considered a violation of the undertakings' duty to cooperate and can result in a significant fine. In 2012, the ECJ upheld the €38 million fine imposed by the EC on a German company for a broken seal (see ECJ, 22 November 2012, *E.ON Energie AG*, C–89/11).

Please note that although the EU courts confirmed that the EC has extensive powers of investigation, these powers are not unlimited and due account must be given to the fundamental rights of the undertakings being investigated. In 2015, the ECJ clarified the scope of the EC's ability to use the information it found during a dawn raid. In particular, it cannot go on 'fishing expeditions', which means that the information obtained during the investigation must not be used for purposes other than those indicated in the inspection warrant or decision (see ECJ, 18 June 2005, *Deutsche Bahn*, C–583/13 P). More recently, the General Court of the European Union (GCEU) recalled that the EC needs sufficiently strong evidence to reasonably suspect an infringement of competition law to justify a dawn raid. In exercising its powers, the EC must therefore give due account to the rights of the undertakings being raided and cannot, without sufficient evidence, order an inspection that is, by its very nature, extremely intrusive (see GCEU, 5 October 2020, *ITM*, T–254/17 and *Casino*, T–249/17).

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Cooperation between the European Commission (EC) and other competition authorities takes place at two levels: bilateral and multilateral.

At the bilateral level, the European Union has signed cooperation covenants with a number of countries, based on dedicated competition agreements, be they simple memoranda of understanding whereby the authorities can discuss legislation, share non-confidential information and request assistance from one another (eg, with Brazil, China, India or Russia), or wider agreements for the enforcement of competition law including cooperation provisions, notification obligations with respect to enforcement activities that may affect each other's interests and exchanges of confidential information (eg, with Canada, Japan, Mexico, Switzerland, South Korea or the US); and general trade agreements including competition provisions, (eg, with the UK in the context of Brexit, Chile, Colombia, Egypt, Israel, Jordan, Morocco and Ukraine).

At the multilateral level, the EC participates in the work of international organisations where competition issues are discussed, such

as the International Competition Network, which aims at providing antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. The EC also contributes to the work of the European Economic Area (EEA), the OECD and the World Trade Organization.

The EC also cooperates extensively with national competition authorities (NCAs) within the European Competition Network (ECN), which aims at creating an effective mechanism to counter companies that engage in cross-border practices restricting competition. In accordance with Regulation No. 1/2003, it 'transmit[s] to the competition authorities of the member states copies of the most important documents it has collected' (article 11) and at the request of an NCA, it 'shall provide it with a copy of other existing documents necessary for the assessment of the case'. Conversely, governments and competition authorities 'shall provide the Commission with all necessary information to carry out the duties assigned to it by [Regulation No. 1/2003]' (article 18).

Furthermore, according to the 2004 EC Notice on Cooperation within the Network of Competition Authorities, ECN members in charge of a case may refer a case to another NCA best placed to handle it. Although in most instances the authority that receives a complaint or starts an ex officio procedure will remain in charge of the case, reallocation can indeed be envisaged at the outset of a procedure. Reallocation to the EC itself will also usually occur for cases involving more than three member states.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The most significant interactions of the EC in cross-border cases are with NCAs of member states. Cooperation between the EC and NCAs, with regard to the distribution of powers regarding investigations, prosecutions and fining, is specifically provided for in Regulation No 1/2003 (article 11) and relationships are organised by the 2004 EC Notice on Cooperation within the Network of Competition Authorities. It was used for instance in the *Prestressing Steel* case, where the EC cooperated with the German competition authority, which provided it with documents, including statements and audited reports that helped it prove the involvement of one specific undertaking in the cartel (EC, 30 June 2010, *Prestressing Steel*, COMP/38.344).

There is also significant interplay between the NCAs themselves, within the framework of the ECN network. For instance, the French competition authority (FCA) issued a decision sanctioning a cartel in the fruit-compotes sector, after dawn raids conducted in France and in the Netherlands in coordination with the Dutch competition authority, under article 22 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, which led to the finding of additional evidence to that already provided by the leniency applicant (FCA, 17 December 2019, *Fruit-compotes*, 19-D-24).

The EC also often cooperates with the US Federal Trade Commission and Department of Justice, through two agreements signed in 1991 and 1998, which provide that both competition agencies notify each other when proceedings initiated by one competition authority are likely to affect the other's important interests. These agreements also provide for exchanges of information, and mutual assistance when they have an interest in doing so and whenever their laws and resources enable them to do so.

Above all, the 1998 agreement introduces the principle of 'positive comity', under which one party may request the other party to remedy anticompetitive behaviour which originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. Please note that positive comity provisions are rarely used in practice, as complainants usually prefer to directly address the competition authority they consider to be best suited to deal with the alleged infringement.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The European Commission (the EC) both investigates and adjudicates on cartel matters. The final decision is taken by the EC's College of Commissioners.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

Pursuant to article 2 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, the burden of proof rests on the EC, which must establish the existence and duration of the alleged infringement to competition law with sufficient evidence. The principle of legal certainty requires that, absent evidence directly establishing the duration of the infringement, the EC must rely on evidence relating to facts sufficiently close in time so that it can reasonably be assumed that the infringement was continuous and uninterrupted between two specific dates.

It is then up to the undertaking being investigated to demonstrate that its conduct does not violate article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It may also decide to invoke a possible exemption that requires it to prove that it meets the conditions of article 101(3) TFEU.

There is no specification as to the level of proof required. In practice, while the EC is not bound by an obligation to adduce proof of an infringement beyond reasonable doubt (General Court of the European Union (GCEU), 8 July 2008, BPB, T-53/03), the GCEU indicated that:

> *[Any] doubt in the mind of the Courts of the European Union [...] must operate to the advantage of the undertaking to which the decision finding the infringement was addressed (GCEU, 24 March 2011, Viega, T-375/06).*

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

It is well-established in case law that direct evidence is rather scarce in cartel cases. The EC can therefore rely on a 'body of evidence', (ie, a set of concurring elements to support its thesis). If, for example, a document refers only to certain facts mentioned in other elements of evidence, it is not sufficient to compel the EC to set it aside. The GCEU held that:

> *[In] most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (GCEU, 12 July 2018, ABB, T-445/14).*

Appeal process

18 | What is the appeal process?

The decisions of the EC may be appealed to the GCEU, which has the power to annul the decision (as the case may be only partially), dismiss the appeal, or adjust the fines. The decisions of the GCEU are themselves subject to appeal before the ECJ, which rules on points of law only.

Undertakings that have lodged an appeal against the decision must either pay the fine provisionally or provide a bank guarantee equivalent to the amount of the fine plus interest, enforceable upon first call. The former vice-president of the EC, Joaquín Almunia, recalled in a 2010 information note that, though the management of fines guarantees and their safekeeping imposes an administrative burden on the EC that does not exist in the case of provisional payments, article 85a of the implementing rules for the Financial Regulation grants the undertakings the right to choose between these two options.

The duration of proceedings before the GCEU depends on the complexity of the case. They generally last between 32 and 36 months, with an additional 12 to 18 months in the case of an appeal to the ECJ. Please note that the EC may incur a financial liability in cases of excessively lengthy proceedings, where such a length was unjustified and caused damage to the undertakings concerned. In the *Gascogne* case, for instance, the applicants, which were convicted for their participation in a cartel in the industrial bags sector, brought an action for damages before the GCEU against the EU for the excessive duration of the proceedings, which lasted almost six years. The judges ruled in favour of the applicants at the lower court (see GCEU, 10 January 2017, *Gascogne Sack Deutschland*, T-577/14), but the decision was overturned by the ECJ, which found that there was no sufficiently direct causal link between the violation of the reasonable time limit for judgment and the loss allegedly suffered by the companies as a result of the payment of bank guarantee fees, during the period by which that time was exceeded (ECJ, 13 December 2018, *Gascogne Sack Deutschland*, C-138/17 and C-146/17).

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity at the EU level. However, criminal sanctions might be imposed at the national level in certain member states.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The EC derives its power to impose fines from article 23(2) of Regulation No. 1/2003, which grants it a wide latitude in setting the amount of the fine, the only limit being that it shall not exceed 10 per cent of the undertaking's total turnover in the preceding business year. In this respect, it should be noted that this maximum limit applies to the undertaking's group turnover and not only to the entity that participated in the infringement.

There has been a clear increase in the amount of fines in the recent years. The record-breaking total fine imposed in a single case is €3,807 billion in the *Trucks* decision (2016/2017), where Daimler also received the highest individual fine ever of €1 billion for a cartel infringement.

In addition, while the EC cannot itself impose civil sanctions, EU law encourages victims of cartels to seek indemnification before national courts. Directive No. 2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of member states and of the European Union (the Damages Directive), transposed by all member states since 2020, notably establishes a framework to facilitate damages actions by victims of competition law infringements.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The EC first adopted its Guidelines on the method of setting fines in 1998 and then updated them in 2006. They are self-binding on the EC, which must therefore follow them, but not on EU or national courts nor national competition authorities (NCAs).

In practice, in setting the amount of a fine the EC first determines the basic amount of the fine, taking into account the value of the undertaking's sales to which the infringement directly or indirectly relates in the relevant geographic area, to which it applies a percentage usually ranging from zero per cent to 30 per cent depending on the egregiousness of the infringement (in practice, this percentage has varied between 15 per cent and 18 per cent for cartels in the last five years), and a multiplying factor reflecting its duration. In cartel cases, the EC also applies an additional percentage ranging from 15 per cent to 25 per cent to this basic amount, to ensure the deterrent effect of the fine.

The EC then adjusts this basic amount downwards or upwards, to take into account aggravating and mitigating circumstances for each undertaking. Aggravating circumstances include the undertaking instigating or leading the cartel, or it being a repeat offender (the EC recently increased a fine by 50 per cent on the ground that the undertaking concerned had previously been sanctioned for another cartel – EC, 20 April 2021, *Freight Forwarding*, AT.39462). On the other hand, mitigating circumstances include the undertaking's cooperation with the investigation (the EC recently granted a 45 per cent reduction in fine rewarding such cooperation – EC, 20 May 2021, *EGB*, AT.40324) or the fact that the infringement was encouraged or authorised by public authorities or legislation.

Once adjusted, the EC verifies that the amount of the fine does not exceed the legal maximum, (ie, 10 per cent of the undertaking's worldwide turnover in the last business year – the EC recently reduced to zero the originally €4.8 million fine it had imposed on an undertaking on the ground that the latter did not generate any turnover during the last business year – EC, 20 May 2021, *EGB*, AT.40324).

Finally, where applicable, the amount of the fine is further decreased to take into account leniency proceedings (full immunity for the first undertaking that came forward to the EC, and reductions of up to 50 per cent for the subsequent ones) or settlement proceedings (a fine reduction of 10 per cent, as recently granted by the EC to all participants in the *Car emissions* cartel – EC, 8 July 2021, *Car emissions*, AT.40178).

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The EC does not have to take into account compliance programmes put in place by an undertaking concerned when it sets the fine. In 2014, the GCEU clearly excluded that a compliance programme be regarded as a mitigating circumstance. Indeed:

> *[The] mere adoption by an undertaking of a programme of compliance with the competition rules cannot constitute a valid and definite guarantee of future and continuing compliance by that*

undertaking with those rules, and consequently the mere existence of such a programme cannot compel the Commission to reduce the fine on the ground that the objective of prevention pursued by the fine has already been at least partly achieved. (GCEU, 14 May 2014, Donau Chemie, T–406/09).

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is currently no EU legislation prohibiting individuals involved in cartel activity from serving as corporate directors or officers. However, some national legislations provide for director disqualification regimes, either as standalone sanctions that can be imposed by NCAs (eg, in Sweden) or as penalties contingent on being found liable for a criminal law offence for breaching competition laws that can be imposed by the courts.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

While Regulation No. 1/2003 does not list debarment from government procurement procedures as a possible sanction, Directive No. 2014/24 on EU Public Procurement provides for a combination of mandatory and facultative debarment when public authorities have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition, which can be qualified as 'grave professional misconduct' (article 57). 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 where the period of exclusion has not been set by final judgment. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability. The debarment rule is seldom enforced throughout the EU.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Cartels are subject to both administrative penalties, which can exclusively be imposed by the EC, as well as potential civil damages, which can be decided by any national court. In this respect, public enforcement and private enforcement are considered as being complementary tools to effectively tackle cartel infringements and deter anticompetitive conducts.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The right to compensation is enshrined in EU case law (ECJ, 20 September 2001, *Courage* and *Crehan*, C–453/99). Thus, any third party – being a direct purchaser or indirect purchaser – who has suffered loss as a result of a cartel can sue one or several of its participants for damages before the national courts of member states. Victims are entitled to full compensation for their damage, which includes actual loss as well as loss of profits, plus the payment of interest. However, there is no such thing as punitive or multiple damages under EU law.

The ECJ clarified that in the absence of EU rules governing the matter, it was for the domestic legal systems of each member state to prescribe the detailed rules governing the exercise of that right, provided that the principles of equivalence and effectiveness are observed (ECJ, 13 July 2006, *Manfredi*, joined cases C–295/04 to C–298/04). The ECJ has nonetheless provided guidance to national courts on several occasions as to how the general principles of EU law should be interpreted, each time showing its willingness to facilitate compensation for victims of competition law infringements. The ECJ recently ruled that the victim is entitled to claim damages from a subsidiary of the infringing undertaking that did not participate in the cartel and was not an addressee of the EC's decision, provided that it proves that the subsidiary and the parent company formed an economic entity at the time of the infringement (ECJ, 6 October 2021, *Sumal*, C-882/19).

Furthermore, to ensure an effective system of private enforcement throughout the European Union, the European Parliament and the Council adopted Directive No. 2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (the Damages Directive), which aims at facilitating private enforcement actions by victims of competition law infringements.

In particular, the Damages Directive sets forth several presumptions to facilitate the compensation of victims of cartel infringements, such as a presumption that prohibition decisions constitute irrevocable evidence of a wrongdoing or that cartels cause harm. In addition, while recognising the passing-on defence, the Damages Directive reverses the burden of proof that now lies on the infringer: with respect to direct purchasers, the Damages Directive establishes a presumption that cartel overcharges have not been passed on to the indirect purchasers; conversely, with respect to indirect purchasers, it establishes a presumption that overcharges have been passed on to them.

Although the Damages Directive may have seemed to take particular account of 'follow-on' actions, its provisions are also applicable to 'standalone' actions, brought in the absence of any prior decision by the EC or an NCA.

Class actions

27 | Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The Damages Directive does not provide for class actions. While the EC had issued a draft directive on 11 April 2018 as part of its 'New Deal for Consumers' initiative, which aimed at introducing a European class action mechanism for damages claims related to anticompetitive behaviours, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (the Representative Actions Directive, RAD) effectively adopted by the European Parliament and of the Council on 25 November 2020 does not cover competition law infringements.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The EC 2006 Notice on Immunity from fines and reduction of fines in cartel cases (the Leniency Notice) provides for a leniency mechanism under EU law.

To benefit from full immunity from fines (and softening of liability in damages claims), an undertaking must be the first to denounce the cartel and must provide evidence allowing the EC to 'carry out a targeted inspection in connection with the alleged cartel; or find an infringement of article 81 EC [now 101 TFEU] in connection with the alleged cartel' (paragraph 8). The undertaking must also cooperate with the EC throughout the procedure, and in particular should supply it with accurate information. In addition, the company must terminate its participation in the alleged cartel without delay. It must not have destroyed, falsified or concealed evidence of the cartel, nor have disclosed its intention to apply for leniency or the contents of its application (except to an NCA). Finally, a company may be deprived of immunity if it has forced one or more others to join or remain in the cartel.

In addition, the EC has introduced whistle-blowing mechanisms. In 2017, it put in place an online anonymous whistleblowing form allowing any individual to sound the alert about the existence of a cartel. Furthermore, Directive No. 2019/1937 on the protection of whistle-blowers, adopted in 2019, provides for the creation of reporting channels within companies and administrations, a hierarchy of internal and external communication channels, the protection of a large number of profiles (eg, employees, including civil servants, shareholders, volunteers, trainees) and measures to protect whistle-blowers from reprisals. Member states have until 17 December 2021 to transpose this Directive.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings that do not qualify for full immunity may still be granted a reduction to their fine. They must provide evidence that has an 'added value with respect to the evidence already in the Commission's possession' (ie, that strengthens by its nature or degree of precision the EC's ability to establish the existence of the alleged cartel). In terms of cooperation, subsequent applicants must satisfy the same level of cooperation as the first-in. The reduction ranges from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others. There is currently no 'immunity plus' nor 'amnesty plus' option.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Second cooperating parties must satisfy the same level of cooperation as the first-in. They may benefit from reductions in the fine ranging from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others, provided that they bring additional compelling evidence with significant added value. There are no 'immunity plus' nor 'amnesty plus' treatments available under EU law.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The leniency applicant should contact the Directorate-General of Competition (DG Competition) before the statement of objections has been issued. However, in practice, most leniency applications seeking immunity from a fine (which is only available to the first leniency applicant) are made either before the EC starts an investigation (in which case they form the basis for initiating an investigation) or upon the initiation of an investigation.

The undertaking must submit a formal application for immunity including relevant statements and evidence. According to the Leniency Notice, it can also present this information in hypothetical form, 'in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date' (paragraph 16).

Please note that the EC has set up a marker system 'protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis to allow for the gathering of the necessary information and evidence' (paragraph 15). The marker system is typically used during dawn raids or at the very beginning of an investigation, insofar as it allows the undertaking to file for leniency without having to immediately provide supporting evidence. If the undertaking provides all the documents within the deadline set by the EC, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

All immunity applicants, regardless of their rank, must provide compelling evidence to the EC and fully cooperate with the EC's investigators throughout the procedure. The EC will grant immunity from fines to the first leniency applicant, provided that it submits evidence and information which, in the EC's view, will enable it to carry out a targeted inspection in connection with the alleged cartel or to find an infringement of article 101 TFEU. Any subsequent applicant must bring additional evidence with significant added value.

Applicants must also terminate their participation in the alleged cartel without delay, and refrain from disclosing their intention to apply for leniency or their application to anyone, except to an NCA.

Applicants that have destroyed, falsified or concealed evidence of the cartel, or forced one or more others to join or remain in the cartel, will not be eligible for leniency.

The ECJ recently confirmed that secondary leniency applicants are not entitled to any change of ranking should the antecedent applicant fail to comply with leniency requirements. It thus ruled that 'neither the wording [...] nor the logic of the 2006 Leniency Notice gives the second undertaking in the ranking [...] the right to replace the first undertaking in that ranking [...] on the ground that the first undertaking failed to observe the conditions laid down in point 12 of that notice' (ECJ, 3 June 2021, *Recyclex*, C-563/19, paragraph 57).

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Information and documents communicated to the EC under the Leniency Notice are confidential. In practice, the following will be deemed confidential:

- documents containing business secrets;
- documents that would significantly harm a person or an undertaking if they were to be disclosed; and
- internal documents of the EC or of NCAs, such as minutes of meetings with leniency applicants.

Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to files (ie, after deletion or replacement of business secrets and other confidential information, as provided for by the Notice on the rules for access to the Commission file of 22 December 2005).

The Leniency Notice further provides that any written statement made to the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used by the EC for any other purpose than the enforcement of article 101 TFEU. Therefore, they may not serve as evidence in matters of private enforcement.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Under the settlement procedure (governed by Regulation No. 622/2008 of 30 June 2008 on the conduct of settlement procedures in cartel cases and the EC's settlement notice issued the same year), parties that admit having participated in a cartel infringement can obtain a 10 per cent reduction in the fine. The settlement procedure can be combined with a leniency application. Although it was originally scarcely used, with time the EC has adopted more and more decisions under this procedure, including hybrid cases where only some undertakings chose to settle while others opted for a full-blown defence.

In practice, while undertakings may express their interest for a settlement, the initiative rests with the EC, which has a discretionary power to decide whether a case is suitable or not for settlement. When it considers having recourse to the settlement procedure, the EC sends a letter to all parties informing them of its decision to consider a potential settlement and requesting them to express their interest in such a procedure.

Each party has a period of at least two weeks to decide whether or not to enter into the settlement procedure, without this implying any admission of having participated in an infringement or of being liable for it at this stage. If the party decides to enter into the settlement procedure, bilateral discussions open with the EC. Please note that a party that wishes to enter into such procedure and at the same time to apply for leniency must do both within the same deadline.

If the discussions are fruitful, the party will be granted at least 15 working days to submit a conditional settlement proposal to the EC, in which it acknowledges and explains in detail its responsibility in the implementation of the infringement. Upon the party's request, the EC may allow those settlement submissions to be provided orally. In such cases, settlement submissions will be recorded and transcribed at the EC's premises. In response, the EC sends a streamlined statement of objections endorsing the party's proposal, to which the latter will have at least two weeks to reply, confirming that it reflects its submission.

Finally, the College of Commissioners of the EC adopts the settlement decision, which is generally a lighter version of a decision adopted pursuant to the normal procedure, in that it contains far fewer elements than a full probe decision. The EC can terminate the settlement procedure at any time and retains the right to change its position until the final decision is made.

Lastly, if the settlement procedure is not subject to the agreement of all of the undertakings involved, the EC is faced with a hybrid procedure, whereby certain undertakings settle while others decide to defend themselves. This was notably the case in the Trucks cartel case, where one participant to the cartel was prosecuted under the standard procedure (EC, 27 September 2017, *Trucks*, AT.39824), while the others settled with the EC (EC, 19 July 2016, *Trucks*, AT.39824). In 2017, the GCEU held that in such cases the EC must take all necessary measures to guarantee the presumption of innocence of the undertaking which has decided not to enter into a settlement. To do so, it must take the necessary measures when:

> *[It] is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement [including] possible adoption on the same date of several decisions relating to all the undertakings concerned by the cartel. (GCEU, 10 November 2017, Icap, T–180/15).*

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The EC does not impose penalties on individuals; there is thus no such immunity.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity applicant and subsequent leniency applicants must contact the DG Competition before the statement of objections has been issued and submit a formal application for leniency including relevant statements and evidence. In practice, information may first be presented in a hypothetical form, together with a list of evidence that the undertaking intends to disclose, and must then be completed by an agreed date (paragraph 16 of the Leniency Notice).

Immunity and leniency applicants must, without delay, terminate their participation in the alleged cartel and cooperate fully with the EC's investigation team throughout the procedure. The ECJ recalled in 2014 that they must refrain from disclosing their application to the other cartel members, on pain of having their immunity removed (ECJ, 12 June 2014 *Deltafina*, C-578/11).

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The information disclosed to the defendant depends upon the type of procedure: standard or settlement procedure.

Under the normal procedure, the statement of objections must be issued in writing and contains all the factual and legal elements on which the EC's assessment is based. Thus, the nature, geographical area, gravity and duration of the infringements, as well as the scope of liability of each undertaking concerned, must be specified. However, the EC does not have to mention the range of potential fines. Each undertaking concerned must be able to understand clearly the infringement with which it is charged and may have access to the case team's file, but not to internal documents and documents containing confidential information or relating to business secrets.

Conversely, under the settlement procedure, the parties are informed in advance of the objections that the EC intends to raise against them, as well as of the maximum amount of the potential fine that may be imposed on them. They have access to all the elements on which the EC intends to rely during the procedure. The parties may be granted access to the file if the statement of objections does not correspond to the content of their submissions.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

The EC does not impose fines on individuals.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Conflicts of interests are dealt with at the national level, in accordance with each country's laws.

This principle was recalled by the ECJ in 2018, in a case where the GCEU allegedly erred in law by dismissing a breach of a 'principle of prohibition of double representation'. According to the applicant, the GCEU should have declared the evidence submitted by one party inadmissible, since its lawyers had a conflict of interest in respect of one of their other clients in the same case. The ECJ ruled that:

> *[The] question whether a lawyer has complied with his obligations under national law and rules governing conduct in agreeing to represent a client in a case liable to give rise to a conflict of interest in respect of another client does not fall within the scope of the competence conferred on the Commission for the purposes of applying articles 101 and 102 TFEU. (ECJ, 1 February 2018, Schenker, C-263/16)*

A counsel may therefore represent multiple corporate defendants if their interests are aligned and if there is no risk of conflict in the future. However, in practice, unless they form part of the same group, each investigated company is usually represented by its own counsel.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

The EC does not impose fines on individuals.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Tax consequences of fines and other penalties are dealt with at the national level, as are private damages payments. Please note however that the EC published amicus curiae observations in 2012, stating that allowing these fines to be tax-deductible would deprive them of their deterrent effect (EC, 8 March 2012, written observations in Case No. 5285, *Tessenderlo Chemie*).

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In principle, the EC does not take into account penalties imposed in non-member states' jurisdictions when determining sanctions for a cartel. The ECJ recalled in 2015 that neither the principle non bis in idem nor any other principle of law obliges the EC to take account of proceedings nor penalties to which an undertaking has been subject in non-member states (see ECJ, 9 July 2015, *InnoLux*, C–231/14).

Getting the fine down

43 What is the optimal way in which to get the fine down?

The leniency procedure is the best option available to the parties to obtain a reduction in the fine, which can go up to full immunity for the first applicant. The settlement procedure is the other option available to the parties, allowing them to benefit from a 10 per cent reduction of their fine in exchange for their cooperation and recognition of liability, which allows the EC to achieve procedural gains.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

Case-law

On 20 January 2021, the ECJ confirmed that when a fine must be reimbursed by the EC, the latter should also pay default interest at the European Central Bank refinancing rate + 3.5 percentage points, specifying that the starting point for the calculation of such compound interest shall be the date on which the appellant filed its appeal against the EC's decision with the GCEU, rather than the date of the judgment of the GCEU (ECJ, 20 January 2021, *Printeos*, C-301/19).

On 27 January 2021, the ECJ upheld the GCEU's judgment in the *Power cables* case, ruling that the parental liability presumption applied in situations where the parent company holds all the voting rights of its subsidiary, although it does not hold all or almost all of its share capital. It thus confirmed the expansion of the scope of this presumption, which shall be analysed taking into account the degree of control of the parent company over its subsidiary, regardless of the means of such control (ECJ, 27 January 2021, *Goldman Sachs*, C-595/18).

On 25 March 2021, the ECJ upheld the GCEU's finding that patent settlement agreements between an originator and generic companies constitute 'by object' restrictions (ECJ, 25 March 2021, *Lundbeck*, C-601/16).

On 3 June 2021, the ECJ ruled that, barring exceptional circumstances, full immunity is not available to leniency applicants already under investigation by the EC, although they may benefit from a substantial reduction in fine. It also confirmed that once the leniency ranking is set, any failure to comply with cooperation requirements by one leniency applicant does not qualify the subsequent applicant to take a higher position in the ranking (ECJ, 3 June 2021, *Recyclex*, C-563/19).

On 29 September 2021, the GCEU upheld a decision of the EC imposing fines on several undertakings that participated in a cartel on the market for aluminium and tantalum electrolytic capacitors. The GCEU notably considered that the EC was right in finding that one of the undertakings concerned was a repeat offender, notwithstanding the fact that the first infringement had been sanctioned while the infringement found in the contested decision was already ongoing (GCEU, 29 September 2021, *NEC*, T-341/18).

In the same case, the GCEU also ruled that the EC had jurisdiction although the anticompetitive practices were Asia-oriented and had not been implemented in the EEA, insofar as the cartel participants exchanged information concerning customers having their headquarters in the EEA and coordinated their commercial policies, thereby giving a global reach to their practices (GCEU, 29 September 2021, *Nichicon*, cases T-342/18 and T-363/18).

On 6 October 2021, the ECJ ruled that a victim of an infringement of EU competition law is entitled to claim damages from a subsidiary of the infringing company, provided that it proves that the subsidiary and the parent company formed an economic entity at the time of the infringement (ECJ, 6 October 2021, *Sumal*, C-882/19).

EC decisions

On 20 April 2021, the EC fined three railway companies active in the sector of cross-border rail cargo transport services on block trains on key rail corridors in the EU. The EC's investigation revealed that they colluded by exchanging strategic information on customer requests for competitive offers and provided each other with higher quotes to protect their respective businesses, thereby participating in a customer allocation scheme (EC, 20 April 2021, *Freight Forwarding*, AT.39462).

On 28 April and 20 May 2021, the EC fined several investment banks for participating in two cartels in the financial sector. The EC found that these banks respectively took part in cartels through core groups of traders working in US$ SSA bonds and European Government bonds divisions, who regularly exchanged commercially sensitive information on their prices and volumes in chatrooms on Bloomberg terminals. This led them to collude on prices, refrain from bidding against each other or split trades (EC, 28 April 2021, *SSA Bonds*, AT.40346 and EC, 20 May 2021, *EGB*, AT.40324 – not published yet).

On 28 May 2021, the EC fined an interdealer broker which facilitated several cartels in the yen interest rate derivatives trading market, by serving as a conduit for collusive communications between banks and by disseminating information as to, for example, the level of their upcoming submissions or their preferences for the direction of future JPY LIBOR movements (EC, 20 May 2021, *YIRD*, AT.39861 – not yet published). This decision follows the partial annulment by the GCEU of a first sanction decision of 4 February 2015, for inadequate reasoning as regards the fines.

Other recent cartel decisions issued by the EC include decisions in the sectors of euro interest rate derivatives (EC, 28 June 2021, *EIRD*, AT.39914) and technical development in the area of nitrogen oxide cleaning (EC, 8 July 2021, *Car emissions*, AT.40178). These decisions have not yet been made public.

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Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The EC is currently in the process of revising its Horizontal Guidelines and horizontal block exemption regulations for research and development and specialisation agreements. Draft revised rules are expected to be published at the beginning of 2022 and will be submitted to public consultation.

Finland

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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 and a prohibition against abuse of dominant position as well as provisions on merger control.

The current Competition Act entered into force on 1 November 2011 following a substantial review of the old law. The material provisions of the Competition Act are fully harmonised with articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Related legislation includes provisions on the functions and powers of the authorities, such as the Act on the Finnish Competition and Consumer Authority (661/2012), the Decree on the Finnish Competition and Consumer Authority (728/2012) and the Market Court Act (99/2013).

The Finnish Competition and Consumer Authority (FCCA) has also issued a set of guidelines relating to the application of the Competition Act, including guidelines on leniency and penalty payments.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The main institutions involved in cartel matters are:

- the FCCA, which is responsible for investigating competition restrictions;
- the Market Court, which may, for example, impose fines on undertakings upon the FCCA's proposal; and
- the Supreme Administrative Court (SAC), to which the decisions of the Market Court can be appealed.

The FCCA is an administrative authority that operates under the Ministry of Employment and the Economy. It was established at the beginning of 2013 by joining the operations of the Competition Authority and the Consumer Agency. The FCCA is headed by a Director General and it has five units dealing with competition matters. Unlike, for example, the European Commission, the FCCA does not itself have the authority to impose fines on undertakings for competition infringements but shall make a penalty payment proposal to the Market Court.

The Market Court is a special court for market law, competition law, public procurement and civil IPR cases in Finland. It has a dual role in competition restriction matters. On the one hand, it is the first instance ruling on the FCCA's penalty payment proposals, and on the other hand, it is the first instance of appeal for decisions made by the FCCA.

The SAC is the ultimate appellate body in competition cases. The SAC is the second and final instance of appeal for the FCCA's decisions and the first and final instance of appeal for the Market Court's decisions imposing fines.

In addition to the three main institutions, the regional state administrative agencies have powers to investigate competition infringements in cooperation with the FCCA. In practice, however, it is almost exclusively the FCCA that bears responsibility for the investigation of suspected cartels.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The Finnish competition law was more comprehensively reformed through the introduction of the new Competition Act that entered into force on 1 November 2011. The new Competition Act brought Finnish competition law even more into line with that of the EU and introduced some changes to, for example, the provisions concerning penalty payments. There have since been a few amendments to the Act, but these have not significantly 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.

In 2019, changes were made to the Competition Act, 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 most recent amendments to the Competition Act entered into force in June 2021. The amendments are mostly based on requirements set out in 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 (the ECN+ Directive). The amendments relate to, among other things, structural remedies for violations of articles 101 and 102 of the TFEU and the equivalent provisions of the Competition Act, fines for the infringement of procedural rules and sanctions that can be imposed on trade associations and their members. In addition, the Competition Act now includes guidelines on the calculation of fines that are binding for the FCCA.

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. If a restriction is considered to be 'by object', it is not necessary to show any anticompetitive effects. There are no specific provisions on the level of knowledge or intent for a finding of liability.

Competition restrictions prohibited by section 5 may be covered by the legal exemption in section 6 of the Competition Act, the criteria of which are similar to those of article 101(3) TFEU. In practice, however, hard-core restrictions are unlikely to qualify for an exemption.

If a competition restriction affects trade between member states, the FCCA and the Finnish courts apply article 101 TFEU directly.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

As in EU competition law, the creation of a full-function joint venture falls under the merger control rules, provided that the turnover thresholds are fulfilled.

Non-full-function joint ventures and strategic alliances are assessed under the rules applicable to cartels, in particular sections 5 and 6 of the Competition Act as well as article 101 TFEU if the competition restriction affects trade between member states.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Finnish Competition Act (948/2011) (the Competition Act) applies to economic activity carried out by business undertakings. According to section 4 of the Competition Act, the term 'business undertaking' comprises natural persons as well as private or public legal persons engaged in economic activity.

Extraterritoriality

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. The Competition Act is generally not applicable to anticompetitive behaviour outside Finland, unless the restrictions are directed against Finnish customers. However, the Finnish government may prescribe by decree that the Act extends to cover a competition restriction outside Finland if this is required by an agreement made with a foreign state, or if it is in the interests of Finland's foreign trade.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Competition Act does not contain any industry-specific infringements. However, according to section 4a, an undertaking with a market share of at least 30 per cent in the Finnish daily consumer goods retail trade shall be deemed to occupy a dominant position. Thus, agreements entered into by such undertakings are in addition to the prohibition against anticompetitive agreements also assessed under the prohibition against abuse of dominance.

The Competition Act is not applied to agreements or arrangements which concern the labour market. Furthermore, section 5 of the Act shall not be applied to arrangements by agricultural producers, associations of agricultural producers, sector-specific associations, and any associations formed by these sector-specific associations concerning the production or sales of agricultural products or the use of common storage, processing or refining facilities if the arrangement fulfils the substantive requirements established in accordance with article 42 of the Treaty on the Functioning of the European Union.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The Competition Act contains no specific defence or exemption for state actions, government-approved activity or regulated conduct.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

If the Finnish Competition and Consumer Authority (FCCA) suspects that an undertaking or an association of undertakings is engaged in conduct contrary to the Finnish Competition Act (948/2011) (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 investigation, 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

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The FCCA has extensive investigative powers that are largely similar to those of the European Commission.

An undertaking, an association of business undertakings or a natural person 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. As far as undertakings and associations of business undertakings are concerned, such a request may be supported by a conditional fine. As of June 2021, the Market Court may also, upon the proposal of the FCCA, impose fines of up to one per cent of the global turnover of an undertaking or association of business undertakings for the infringement of procedural rules, including the obligation to provide information. Furthermore, submitting incorrect information to an 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. The FCCA also has the right to conduct an inspection at the request of a national competition authority of another EU member state. 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 the 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 the 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 also has the right to a continued investigation (ie, to 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 the 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 other natural persons who may possess relevant information to be interviewed. 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

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Finnish Competition and Consumer Authority (FCCA) is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of European Union's competition rules throughout the EU.

The FCCA also actively cooperates for example with the Nordic competition authorities and partakes in the international cooperation conducted within the Organisation for Economic Co-operation and Development, the International Competition Network and the European Competition Authorities.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The 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

15 | How is a cartel proceeding adjudicated or determined?

The Finnish Competition and Consumer Authority (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 must make a penalty payment proposal to the Market Court. The Market Court provides the undertaking to which the proposal relates with an opportunity to respond in writing or orally. The Market Court shall include a statement of reasons in its decision that indicates which facts and evidence have affected the decision and on which legal grounds it is based. The Market Court decision may be appealed to the Supreme Administrative Court (SAC).

Burden of proof

16 | 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 that an undertaking wishes to benefit from an exemption under section 6 of the Finnish Competition Act (948/2011) (the Competition Act) (or article 101(3) of

the Treaty on the Functioning of the European Union), 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

17 | 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

18 | 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

19 | 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 Finnish Competition and Consumer Authority (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

20 | 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. Concerning an association of business undertakings, the maximum amount of the fine is 10 per cent of the combined turnover of the association and the members of the association that were active on the market on which the infringement of the association has had effects.

A fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within five years of 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, as well as by certain measures in the same matter by the European Commission or the competition authority of another EU member state. Moreover, there is an absolute limitation period according to which a fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within 10 years of the applicable dates (the date on which the restriction occurred, or on which it ended in case of a continued infringement).

The FCCA may also order an undertaking to cease the activities prohibited in the Finnish Competition Act (948/2011) (the Competition Act) (or article 101 of the Treaty on the Functioning of the European Union), 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. As of June 2021, the Market Court can also, upon proposal by the FCCA, impose fines of up to one per cent of the total turnover of the undertaking concerned based on the infringement of procedural rules.

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 it can immediately be established that the application or implementation of a competition restriction can cause serious and irreparable damage to competition. 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. An interim order can be in force for a fixed period that can be up to one year at a time.

As of June 2021, the Market Court can, upon a proposal of the FCCA, also exceptionally impose structural remedies.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to 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 June 2021 amendments to the Competition Act included several changes to the sanctions regime. The Competition Act now includes guidelines on the calculation of the amount of the fine. The guidelines largely correspond to the fining guidelines of the European Commission and thus include elements such as a basic amount of the fine as well as adjustments to the basic amount. These guidelines are binding on the FCCA when proposing a fine. When the Market Court and the Supreme Administrative Court (SAC) decide on the imposition of the fine, they take into account the aggravating and mitigating factors in section 13e of the Competition Act as well as the possible insolvency

factors in section 13f of the Competition Act as part of their overall assessment. Otherwise, the Market Court and the SAC are not bound by the guidelines on the calculation of the amount of the fine.

In any case, the penalty payment shall not exceed 10 per cent of the turnover of an undertaking or association of undertakings concerned. For the calculation of the amount of the penalty payment proposal, the relevant turnover is the turnover of the financial year preceding the FCCA's proposal to the Market Court, while the Market Court and SAC must base the maximum amount of the penalty payment on the turnover of the financial year preceding the decision of the Market Court or the SAC.

The amendments also made penalty payments harsher for trade associations. The maximum fine is no longer based solely on an association's own turnover. Instead, the maximum penalty payment is 10 per cent of the combined turnover of the association and the members of the association that were active on the market on which the infringement had effects. Under certain conditions, the members of an association might be liable to pay the fine imposed on the association in case the association itself is unable to do so.

In addition, fines of a maximum of one per cent of a group's total worldwide turnover may now be imposed for infringing certain procedural rules (such as failing to comply with an inspection, breaking seals, failing to supply the information requested, failing to appear at an interview, or failing to comply with an infringement or commitment decision or an interim measure). The FCCA will submit a penalty payment proposal to the Market Court, which will then decide on imposing the fine.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There are no provisions 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

23 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

24 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, which entered into force on 1 January 2017, debarment from government procurement procedures is available as a discretionary sanction for cartel infringements. The decision on debarment is made by the contracting entity. The Act does not provide for any set debarment time period.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Criminal 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 standalone actions irrespective of any prior FCCA investigation or court decision.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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 the distribution of the burden of proof relating to passing-on of the overcharge.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The 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

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme was first implemented in Finland in May 2004. In accordance with section 14 of the Finnish Competition Act (948/2011)

(the Competition Act), the first undertaking to expose a cartel may benefit from immunity if the undertaking:

- produces information or evidence, on the grounds of which the Finnish Competition and Consumer Authority (FCCA) may conduct a dawn raid; or
- following such a dawn raid, delivers information or evidence, on the grounds of which the FCCA can establish that section 5 of the Competition Act (or article 101 of the Treaty on the Functioning of the European Union) has been violated.

Section 14 of the Competition Act applies only where competitors have agreed to fix purchase or selling prices or other trading conditions, to limit production or sales or to share markets, customers or sources of supply. Only one undertaking can obtain full immunity. This means that the undertaking must be first to provide the required information or evidence to the FCCA. An undertaking that has coerced others to participate in the infringement cannot benefit from full immunity but can still qualify for a reduction in fine. A leading role in the formation and sustenance of the cartel does not as such debar the undertaking from applying for full immunity.

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;
- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application or the content of the application.

Once the undertaking seeking immunity has provided the FCCA with all the required information and documents in its possession, the FCCA shall inform the undertaking in writing whether it qualifies for conditional immunity. The FCCA shall issue a final written decision on the issue at the end of the procedure. This decision cannot be appealed.

The FCCA's guidelines contain further details on the FCCA's leniency programme.

Under the Finnish Act on Antitrust Damages Actions, an undertaking that has obtained immunity from fines is as a main rule responsible only for damage caused to its own direct or indirect customers or suppliers.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings that 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 have 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

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The Competition Act does not provide for an 'immunity plus' or 'amnesty plus' option. Applicants submitting significant information and evidence to the FCCA after the immunity applicant may be entitled to a reduction in the penalty payment as set out in section 15 of the Competition Act. The fine shall be reduced by 30 to 50 per cent if the undertaking is the first one to submit significant information, by 20 to 30 per cent if the undertaking is second, and by 20 per cent at most for other applicants fulfilling the criteria.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no set deadlines for 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 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 that 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 when 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

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

An immunity applicant must provide all relevant information and evidence in its possession to enable the FCCA to conduct an inspection, or following an inspection, to enable the establishment of an infringement.

To receive a reduction in fine, subsequent cooperating parties must submit to the FCCA such information and evidence that is significant for establishing an infringement or its entire extent or nature before the authority has received the information from any other source.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

As a general rule, the Act on Openness of Government Activities (621/1999, as amended) is applicable also in competition proceedings. 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 general rule, a party to the proceedings shall have access even to the content of such a document that 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.

According to section 17 of the Competition Act, information and evidence provided to the FCCA in an immunity or leniency application can, as a starting point, be used in handling a public enforcement case by the FCCA, the Market Court or the Supreme Administrative Court. The FCCA may share the documents with other members of the ECN. As of June 2021, section 38a of the Competition Act contains further stipulations on a party's right to get access to leniency documents as well as restrictions on the use of such documents.

The Finnish Act on Antitrust Damages Actions that came into force in December 2016 contains rules on the use of leniency material in private enforcement proceedings. These rules largely follow the EU Directive on Antitrust Damages Actions.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Competition Act does not provide for any settlement procedure for cartel cases.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

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

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;
- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application or the content of the application.

Once the undertaking seeking immunity has provided the FCCA with all the required information and documents in its possession, the FCCA shall inform the undertaking in writing whether it qualifies for conditional immunity. The FCCA shall issue a final written decision on the issue at the end of the procedure. This decision cannot be appealed.

There are no set deadlines for making an application for immunity or leniency. As only the first undertaking to submit the required information and evidence is entitled to full immunity, timing is essential.

It is 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 that 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 when 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 17a of the Competition Act, the FCCA may set a deadline for an applicant to provide the required information and evidence. As long as the applicant provides the information within the required time frame, the moment of application is deemed to be the point in time when the first application to the FCCA was submitted.

DEFENDING A CASE

Disclosure

37 | 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 that is not public if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

An undertaking has the right to be heard prior to the Finnish Competition and Consumer Authority (FCCA) making a proposal for a penalty payment, or a decision stating a violation of sections 5 or 7, or articles 101 or 102 of the Treaty on the Functioning of the European Union. 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

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

The FCCA's investigations of the suspected cartel infringements and the following Market Court and Supreme Administrative Court proceedings are directed against undertakings only. An undertaking's employees are therefore out of the scope of the Finnish Competition Act (948/2011) (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

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is possible for a counsel to represent multiple corporate defendants. However, a conflict of interest between the defendants may in practice prevent such representation.

Payment of penalties and legal costs

40 | 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.

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Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Under Finnish tax laws, fines are generally not tax-deductible. In contrast, recent tax authority praxis indicates that private damages are tax-deductible under certain circumstances.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

So far, there have not been any instances where the FCCA or Finnish courts would have taken into account penalties imposed in other jurisdictions. This is the case also concerning private damages claims. In such claims, Finnish courts would in any event have to apply the prohibition against unjust enrichment according to which damages shall not exceed the actual damage suffered by the claimant.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

An undertaking can take advantage of the immunity and leniency procedure. 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

44 What were the key cases, judgments and other developments of the past year?

On 20 August 2021, the Supreme Administrative Court (SAC) ruled on a matter concerning the power line design and construction sector. In 2014, the Finnish Competition and Consumer Authority (FCCA) granted full leniency to Empower, and at the same time proposed that a cartel fine amounting to €35 million be imposed on Eltel. The Market Court rejected the proposal as time-barred in March 2016. In June 2019, the SAC made a request for a preliminary ruling to the European Court of Justice. The request referred to the question of how long a competition restriction continues in a situation in which a cartel participant has entered into a construction contract, as agreed in the cartel, with a player outside the cartel. In January 2021, the European Court of Justice ruled that the infringement period corresponds to the period up to the date of signature of the contract concluded between the undertaking and the contracting authority on the basis of the concerted bid submitted by that undertaking (case C-450/19). In line with the ruling of the European Court of Justice, the SAC upheld the Market Court's decision that had dismissed the FCCA's proposal as time-barred.

The Finnish Market Court ruled on the fine proposal made by the FCCA regarding EPS insulation manufacturers in March 2021. The FCCA alleged that three EPS insulation manufacturers had participated in prohibited cooperation between 2012 and 2014. The Market Court partly dismissed the FCCA's allegations and reduced the amounts of the proposed fines, imposing fines amounting to a total of €3.2 million. An appeal is now pending before the SAC.

In a smaller case, the SAC increased the fines imposed by the Market Court on several driving schools for prohibited price recommendations on 30 August 2021. Nevertheless, the SAC dismissed the FCCA's allegations that the schools had engaged in a price cartel.

In February 2021, the FCCA made a fine proposal of €22 million to the Market Court concerning the real estate management sector. The FCCA alleges that six real estate management companies and the Finnish Real Estate Management Federation engaged in a price cartel.

On the private enforcement side, on 14 March 2019, the European Court of Justice issued its preliminary ruling (case C–724/17) related to the Finnish *Asphalt Cartel Damage* case. The Finnish Supreme Court had made a request for a preliminary ruling concerning whether economic succession is applicable in competition law damage cases, and if so, in which circumstances. The European Court of Justice and later the Finnish Supreme Court confirmed that if a company participating in a competition law infringement is dissolved, damages can also be claimed from a company that continues the economic activity of the dissolved company. On 18 June 2019 and 22 October 2019, the Supreme Court ruled on defendant YIT's appeals in three cases and partially accepted them. The Supreme Court ruled on the final pending case on 23 November 2020.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

After several years of preparation, amendments to the Finnish Competition Act (948/2011) (the Competition Act) necessitated by 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 (the ECN+ Directive) entered into force on 24 June 2021. The amendments relate inter alia to structural remedies for violations of articles 101 and 102 of the Treaty on the Functioning of the European Union and the equivalent provision of the Competition Act, fines for infringement of procedural rules and sanctions that can be imposed on trade associations and their members. In addition, the amendments include guidelines on the calculation of fines that are binding for the FCCA.

Germany

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The German Act Against Restraints of Competition (GWB) provides a regulatory framework to prevent the restraint of competition in Germany, irrespective of whether this was caused within or outside the German territory. Section 1 GWB, which has been largely aligned with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings and decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Section 2 GWB is modelled on article 101(3) TFEU and stipulates conditions under which anticompetitive agreements may be exempted from the ban on cartels.

In cases where cooperation between undertakings may affect trade between the member states, the national and EU competition rules are applied in parallel. However, as a result of the harmonisation of section 1 GWB with article 101 TFEU materially the same standards apply.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Cartels that have a domestic effect within the territory of Germany are mainly investigated, prosecuted and enforced by the Federal Cartel Office (FCO), an independent federal authority based in Bonn. The decisions of the FCO are handed down by 12 decision divisions that are primarily organised according to economic sectors. Each division takes decisions independently through a collegiate body consisting of a chairman and two associate members. Although the FCO is under the responsibility of the Ministry of Economics and Energy, it does not receive political orders and is independent in its decision-making. If a cartel only affects a specific federal state or smaller regions, which is rarely the case, the competition authority of the respective federal state is competent. Companies and individuals concerned can appeal against final decisions imposing fines rendered by the competition authority. The competent appeal court is the Higher Regional Court in the district the competition authority has its seat. For decisions of the FCO this is the Higher Regional Court in Düsseldorf.

If a cartel infringement constitutes a criminal offence (eg, bid rigging, pursuant to section 298 of the German Criminal Code), the public prosecutors have the power to investigate and initiate criminal proceedings against individuals, while the competition authorities remain in charge of the investigation of the company.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The most recent amendment of the GWB (the 10th amendment) contains especially the following changes in respect of the cartel regime:

- provisions on the mutual assistance between competition authorities of EU member states in implementing the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+);
- regulations regarding the extension of the investigative tools and of the application of the competition authority's interim measures;
- right of companies to ask the FCO for its legal assessment of the legality of cooperation under the GWB in cases of a significant legal and economic interest;
- liability of associations of undertakings for administrative fines based on the aggregated turnover of their members operating on the market affected by the cartel infringement;
- codification of more detailed criteria for calculating administrative fines for cartel infringements; and
- statutory provisions on leniency programmes that were until now governed by the FCO's Notice No. 9/2006.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Section 1 GWB prohibits horizontal and vertical agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. The undertaking and individuals concerned will be held liable for any intentional or negligent infringement of section 1 GWB.

'Agreement' within the meaning of section 1 GWB has a wide meaning and covers agreements in any form, whether legally enforceable or not. The concept of 'concerted practices' refers to collusive behaviour knowingly entered into by undertakings to prevent or restrain competition. The key difference between an agreement and a concerted practice is that a concerted practice may exist where there is only practical cooperation between undertakings without any formal decision.

'Horizontal agreements' generally refer to agreements entered into between undertakings operating on the same level of a production or distribution chain (ie, actual or potential competitors). Particularly serious types of horizontal agreements concern price fixing, market sharing, production or sales quotas, allocation of customers, the exchange of competitively sensitive information relating to prices or quantities and bid rigging (hard-core cartel).

'Vertical agreements' can be defined as agreements entered into between undertakings operating at different levels of a production or distribution chain and that concern conditions under which the parties may purchase, sell or resell certain goods or services. Vertical price fixing is a hard-core restriction, while exclusive supply or distribution agreements, selective distribution systems etc are subject to individual assessment.

A cartel infringement must have an appreciable effect on competition. In this regard, the FCO's De Minimis Notice of 13 March 2007 must be taken into account.

Section 2(1) GWB contains an exemption from the prohibition on restrictive practices if the conduct in question:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- allows consumers a fair share of the resulting benefit;

- does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; and
- does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Pursuant to section 2(2) GWB, provisions of the EU block exemption regulations are applicable irrespective of whether or not these agreements may affect trade between the member states (ie, also in purely national cases).

In addition, section 3 GWB stipulates a special exemption for certain types of horizontal agreements between small and medium-sized undertakings. As this exemption is, however, more lenient than the one laid down in article 101(3) TFEU and the corresponding section 2(2) GWB it is not applicable to any constellations which affect the trade between member states.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures can potentially fall foul of the cartel prohibition if they lead to coordination of the competitive behaviour between the independent shareholders of the joint venture or between a non-controlling shareholder and the joint venture. The risk of coordination rises if two parent companies are engaged in business activities on the same, upstream, downstream or neighbouring markets as the joint venture. But also, in cases where the joint venture is non-full-function and only takes over specific functions within the parent companies' business activities, this may lead to coordinative effects on the level of the parent companies. Notably, even if the formation of such a joint venture, be it full-function or non-full-function, can be subject to merger control, German law applies the cartel prohibition in parallel when assessing the possible effects of cooperation. This assessment does not automatically form part of a merger control assessment or a potential merger control clearance (unlike article 2(4) of the EU Merger Regulation) and is not bound to any statutory merger control deadlines. Such cartel prohibition proceedings may also be initiated at any time following the merger control clearance.

Strategic alliances include various forms of cooperation between undertakings, for example, research and development projects, optimisation of distribution channels, or joint purchasing. Generally, such strategic alliances are subject to the usual framework as set out in the GWB.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

The cartel prohibition (section 1 of the German Act Against Restraints of Competition (GWB)) applies to private undertakings as well as undertakings that are entirely or partly in public ownership or managed or operated by public authorities, except for the German Central Bank and the Reconstruction Loan Corporation, section 185(1) GWB. The term 'undertaking' is to be understood in a broad sense and includes any entity engaged in an economic activity, regardless of its legal status, the way in which it is financed and whether it has the intention to earn profits. However, section 1 GWB only applies to agreements or concerted practices entered into between at least two independent undertakings. Therefore, if the companies form an economic unit, they shall be considered as a single undertaking within the meaning of the GWB. The same applies to companies over which decisive influence is exercised by one and the same parent company. Individuals acting on behalf of the undertaking can also be fined.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

According to section 185(2) GWB, the GWB shall apply to all restraints of competition having an effect within the scope of the GWB's application (ie, Germany), also when caused outside the German territory. Therefore, it is no precondition for the imposition of sanctions or remedies that the company in question has its seat, a branch or an office in Germany. It is not entirely clear if actual effects are required or whether the likelihood of such effects occurring suffices.

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Usually, pure export cartels do not have an effect within the territory of Germany and therefore do not fall within the scope of the GWB's application (section 185(2) GWB). However, export cartels may indirectly affect competition in the domestic market. For example, a cartel may strengthen the economic power of a participating company that has its seat in Germany in a way that creates a barrier for potential competitors entering the German market, in which case the GWB will apply.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Sections 28 to 31b GWB contain industry-specific provisions regarding the agricultural, energy, press and public water supply sectors. For example, pursuant to section 30(1) GWB, vertical resale price maintenance agreements by which an undertaking producing newspapers or magazines; products which reproduce or substitute newspapers or magazines and fulfil the characteristics of a publishing product; or combined products the main feature of which is a newspaper or magazine, requires purchasers to demand certain resale prices are exempt from the prohibition of cartels. Additionally, the price-fixing of books is mandatory in Germany, according to the Law on the Fixing of Book Prices.

Also, there are EU block exemption regulations concerning specific sectors, such as the sale and repair of motor vehicles and the distribution of spare parts for motor vehicles, which also apply to purely national cases (section 2(2) GWB).

Government-approved conduct

10 Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no explicit exemptions from applying the cartel prohibition on undertakings or behaviour that are approved by the government (eg, national laws or administrative decisions) or through court decisions. However, section 1 GWB may not be enforced against an undertaking if the undertaking does not have the discretion to act differently and such government approval is compatible with the German and EU law (especially articles 101 and 102 of the Treaty on the Functioning of the European Union).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Investigations by the competition authority can be initiated by a leniency application, complaints of other market participants or ex officio (eg, based on information from sectoral inquiries, proceedings concerning a neighbouring market, or even press releases).

In cases where there are sufficient indications of an infringement of a cartel prohibition, the competition authority will initiate formal administrative proceedings and gather further evidence by, for example, executing dawn raids that include the seizure or inspection of hard copies of documents and electronic files, or the hearing of witnesses. If the competition authority suspects that an infringement is being carried out, the undertakings and individuals suspected of involvement will be informed of the authority's accusation in a statement of objections. They will be given the opportunity to state their cases and will be granted access to the case files. The proceedings may be terminated by the imposition of an administrative fine or by the issuance of a termination letter. The competition authority may also discontinue the investigation.

There is no specific time frame for cartel investigations. The duration of the proceedings depends on the circumstances of each case, but they usually last for several years. For example, in a recent cartel case involving technical building equipment, the proceedings were initiated in November 2014 following a leniency application and completed in December 2019 with the imposition of fines.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The investigative powers of the competition authority are generally laid down in the German Code of Criminal Procedure, which applies, mutatis mutandis, to administrative fine proceedings, as well as section 82b of the German Act Against Restraints of Competition (GWB). It may, for example, issue requests for information, conduct dawn raids and search premises, take testimonies from witnesses and seize objects, including data.

Information requests

As a result of the 10th amendment to the GWB, the competition authority's power to issue requests for information has been significantly extended. Accused undertakings and associations of undertakings are now obliged to provide, upon the request of the competition authority, all documents and information they can procure. While they may still not be forced into self-incrimination regarding their involvement in a cartel infringement, they may have to disclose information that can (by way of circumstantial evidence) be used as indications or evidence against them (similar to the powers of the European Commission under article 18 of Council Regulation (EC) No. 1/2003, as reinforced by the European Court of Justice in its *Orkem* judgment).

Individuals (eg, employees or representatives of the undertakings concerned) who are addressees of the competition authority's information request may refuse to answer questions if the reply would place them or a member of their family at risk of being prosecuted. However, this does not apply if the risk of prosecution is limited to an administrative fine proceeding and the competition authority has, within the scope of its discretion, committed itself not to prosecute the individual.

Dawn raids

The competition authority may carry out dawn raids on business and private premises, including private homes and cars. If evidence (both electronic and paper-based) is found, it will be secured. If the evidence is not handed over voluntarily it can be seized. Generally, dawn raids are ordered by a judge. In exigent circumstances, the competition authority may conduct searches without a warrant. This power is rarely used. Should it be necessary for the purposes of the dawn raid, the competition authority also has the power to seal rooms or documents.

In addition, employees or representatives of the undertakings concerned may be interviewed during searches and are legally obligated to cooperate. The scope of the right against self-incrimination is the same as in cases of information requests, (ie, the subject may refuse to answer questions if the reply would place them or a member of their family at risk of being prosecuted; this does not apply if the prosecution is restricted to a cartel infringement and the competition authority has committed itself not to prosecute the individual for such infringement (*Nichtverfolgungszusage*)).

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Cooperation between competition authorities is mainly based on bilateral agreements or takes place within international networks.

Bilateral agreements

The most important bilateral agreement is the one between the government of the United States and the government of Germany relating to the mutual cooperation regarding restrictive business practices (effective since 23 June 1976), which determines, in particular, the exchange of information, the cooperation during cartel investigations and a regular exchange on competition policy.

International networks

At a worldwide level, one of the most important associations of competition authorities is the International Competition Network. It was founded in 2001 by representatives of 14 jurisdictions and has now more than 130 members.

In Europe, the European Commission and the national competition authorities of the member states work closely together on ensuring the coherence of the EU competition policy in the framework of the European Competition Network (ECN). More details on the cooperation system of the ECN are provided in the Commission Notice on cooperation within the ECN of 27 April 2004 (2004/C 101/03).

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The framework for interplay between the German competition authority and other jurisdictions is mainly set out in the system of the ECN and sections 50a of the German Act Against Restraints of Competition (GWB) et seq.

Generally, if cross-border agreements or other concerted practices restricting competition also have an appreciable effect in the territory of Germany, the cartel prosecution is based on a system of parallel competences between the Federal Cartel Office and the national competition authorities of the other affected countries. However, under Council Regulation (EC) No. 1/2003, the competition authority that first receives a complaint or starts an ex officio procedure remains in charge

of the case. If the same complaint is brought before several competition authorities, others shall suspend their proceedings or reject the complaint on the grounds that another competition authority is already dealing with the case. When it is found to be necessary, especially due to the material link between the infringement and the territory of a certain member state (eg, the agreement is implemented within its territory), the case shall be reallocated to the competition authority of this member state, or to the European Commission if the infringement has effects on competition in more than three member states.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Generally, the Federal Cartel Office (FCO) is the decision-making institution. If a cartel infringement only has effects within a federal state, the competition authority of the respective state will be competent for the case. Both the FCO and the competition authorities of the federal states can only investigate and prosecute cartel infringements in the course of administrative proceedings. Should a case involve infringements of the criminal code (eg, bid rigging) the competition authority must refer these parts to the criminal prosecutor.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

In cartel proceedings, the competition authority generally bears the burden of proof. Pursuant to section 261 of the German Code of Criminal Procedure, which applies, mutatis mutandis, to the administrative fining proceedings, the level of proof shall be free judicial conviction without reasonable doubts. If the accused undertaking or individual claims an exemption (eg, pursuant to section 2 of the German Act Against Restraints of Competition (GWB) or an EU block exemption regulation), the defendant must prove that the statutory requirements for the exemption are met.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, but this is only possible if the level of proof required (eg, free judicial conviction without reasonable doubts) is reached.

Appeal process

18 | What is the appeal process?

The subject of a decision imposing a fine in a cartel case can appeal the competition authority's final decision. The appeal must be filed in writing with the competition authority within two weeks of the decision being served. The authority may initiate further investigations at this time and will then decide whether to uphold or withdraw its decision. If it does not withdraw, the files will be forwarded to the appeal court (for decisions of the FCO, this is the Higher Regional Court Düsseldorf) for the purpose of a full judicial review of the case. The appeal court will independently investigate the case and hand down its own decision (ie, the imposition of an administrative fine, acquittal of the accused undertakings or individuals, or discontinuation of the proceedings).

During the court proceedings, the competition authority has the same rights as the public prosecutor's office (section 82a(1) GWB) and is therefore fully empowered to participate in the court proceedings and to exercise all the procedural rights that the public prosecutor's office is entitled to under the rules of the German Code of Criminal Procedure, which applies mutatis mutandis. This includes:

- the right to make formal applications;
- the right to ask or object to questions to witnesses and experts;
- the right to approve a settlement between the court and the defendant independent of the approval of the public prosecutor's office;
- the right to give consent if the defendant withdraws the appeal against the decision to fine after the beginning of the main hearing;
- the right to issue an independent counter declaration; and
- the right to further appeal against the judgment of the appeal court.

A further appeal to the Federal Court of Justice on points of law against the judgment of the appeal court is possible. In this case, the functions of the prosecuting authority shall be assumed solely by the Federal Prosecutor General.

In purely administrative cases (eg, an order to desist) an appeal may be filed within one month from the rendering of the decision. An appeal to the Federal Court of Justice is only possible if the Higher Regional Court grants leave to appeal. Should the leave to appeal be denied, it is possible to file an appeal against the refusal of leave to appeal.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

In Germany, cartel infringements are generally not criminalised, unless they fulfil the requirements for bid rigging, which incurs a fine or imprisonment for a term not exceeding five years (section 298 of the German Criminal Code), or for fraud, which incurs a fine or imprisonment for a term not exceeding five years (or in especially serious cases of fraud (eg, a major financial loss was caused) a prison term of six months to 10 years (section 263 of the German Criminal Code)). Both provisions only apply to natural persons, as in Germany undertakings are not subject to criminal sanctions.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Under German civil law, any agreement which infringes the prohibition on restricting competition is null and void.

Administrative sanctions are set out in the form of fines that can be imposed by the competition authority against undertakings, associations of undertakings and their representatives in cases of the latter participating in an infringement or violating their supervisory duties. The amount of the fine is stipulated in section 81c of the German Act Against Restraints of Competition (GWB). If an administrative fine is imposed against a natural person, the fine is limited to €1 million. An undertaking can be fined up to 10 per cent of the turnover that it achieved in the business year preceding the competition authority's decision. When calculating this turnover, all the undertakings or individuals acting as one economic entity will be taken into account.

With regard to fines imposed on associations of undertakings, the 10th amendment to the GWB contains important changes.

Previously, the competition authority could impose a fine of up to 10 per cent of an association's annual turnover. Pursuant to section 81c(4) GWB, the 10 per cent threshold is now based on the aggregate turnover of the association's members operating in the market affected by the infringement. The turnover of member undertakings on which a fine has been imposed for the same infringement and of member

undertakings that have obtained full immunity is deducted when calculating the relevant turnover.

Pursuant to section 81b GWB, if the fine cannot be paid in full by the association, the competition authority may ask the association to request the necessary amount from the member undertakings, request the amount directly from undertakings whose representatives have been part of the association's bodies, or, as a last resort, demand payment from a member of the association operating in the market affected by the infringement (up to a maximum of 10 per cent of its annual group turnover).

The individual fines for the undertakings and associations involved in an infringement are usually substantial. The Federal Cartel Office imposed aggregated administrative fines of €376 million in 2018, €848 million in 2019 and €349 million in 2020.

The competition authority may also oblige undertakings to terminate a cartel infringement. This may involve behavioural measures (ie, stop the behaviour causing the infringement) as well as structural measures (eg, sale of business divisions, or parts of undertakings or shareholdings), whereby structural measures may only be imposed if there are no behavioural measures that would be equally effective, or if the behavioural measures would entail a greater burden for the undertakings concerned.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The 10th amendment to the GWB introduced statutory criteria regarding the calculation of fines. The new section 81d GWB now provides a (non-exhaustive) list of criteria for the calculation of fines, such as:

- the gravity and duration of the infringement, especially the turnover relevant to the offence;
- the importance of the products and services affected by the infringement;
- previous infringements committed by the undertaking concerned;
- adequate and effective compliance measures to avoid and detect infringements; and
- the undertaking's behaviour after the infringement (eg, establishment of a compliance programme).

Based on these criteria, the Federal Cartel Office in 2021 published new Guidelines for the Setting of Fines in Cartel Cases. These guidelines set out a structured process for the setting of fines, starting with a base amount depending on the size of the undertaking and the affected turnover that can amount to between 10 and 30 per cent of the affected turnover, but not more than 5 per cent of the overall turnover of the company. The base amount will then be adjusted to reflect other criteria concerning the violation by the undertaking, including, for example, the market position of the participating undertakings, the geographic scope of the infringement, the level of organisation of the cartel, the undertaking's role, and also efforts to prevent and make good the wrongdoing (compliance and compensation). The guidelines are not binding on the courts.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Section 81d(1) No. 4 and No. 5 GWB allow the competition authority and the court to recognise adequate and effective compliance measures to avoid and detect infringements or the establishment of a compliance programme to close existing compliance gaps as a mitigating factor when setting fines. Also, compliance programmes are essential for the early detection of infringements, which can result in full immunity or a substantial reduction of a fine under the terms of a leniency programme.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Apart from the administrative fine of up to €1 million and the criminal rules concerning bid rigging and fraud, there are no additional sanctions such as director disqualification. However, to avoid debarment from government procurement procedures, the undertaking concerned must prove that it has taken personnel measures (eg, dismissal of responsible individuals in management function) that are appropriate to prevent further misconduct (section 125(1) No. 3 GWB).

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Pursuant to section 124(1) No. 4 GWB, public contracting authorities may exclude an undertaking from participating in the procurement procedure if there are sufficient indications that the undertaking is involved in a cartel infringement, irrespective of whether the infringement is related to the specific procurement procedure.

The public authorities must exclude an undertaking from participating in the procurement procedure if they are aware that a person whose conduct is attributable to the undertaking has been convicted for a criminal offence within the meaning of section 123(1) GWB by a final decision or that a final decision imposing a fine has been issued against the undertaking on the basis of a criminal offence by its authorised representatives. This is especially the case if the cartel infringement in question qualifies as fraud (section 263 of the German Criminal Code), provided that the offence is directed against the budget of the EU or against budgets administered by the EU or on its behalf (section 123(1) No. 4 GWB).

For this purpose, the competition register was introduced (www.wettbewerbsregister.de). In this register, certain cartel infringements (such as those mentioned above) of the companies and their representatives will be recorded, preventing them from being awarded a contract in a public procurement procedure. From 1 June 2002, the authorities are obliged to inquire whether there are any entries about the bidding company in question before awarding certain contracts under the public procurement rules. Companies entered in the register can, after taking appropriate measures to deal with the misconduct (compensation for damages and cooperation with the investigating authorities) as well as measures to prevent further misconduct in the future, apply for early deletion of the entry due to 'self-cleaning'. The Federal Cartel Office is about to introduce guidelines on the specific requirements for self-cleaning.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Criminal, civil and administrative sanctions against the same cartel infringement can be pursued by competent authorities in parallel. In practice, public prosecutors will pursue the case against individuals,

while the competition authorities take the case against the undertaking. Sometimes the public prosecutors suspend the criminal investigation until the competition authority has rendered its decision.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Pursuant to section 33a(1) of the German Act Against Restraints of Competition (GWB), any person affected by a cartel infringement shall be entitled to claim damages. Therefore, indirect buyers, in addition to direct buyers, are also entitled to claim damages from cartel members, if the direct buyers passed the cartel's excessive prices on to them. In this regard, section 33c(2) GWB contains a rebuttable presumption that price increases are passed to an indirect buyer. The 10th amendment to the GWB also introduces a rebuttable presumption that contracts with cartel members falling within the cartel's product and regional scope are affected by the cartel (section 33a(2) GWB). Buyers who have purchased a product or service from a competitor of the cartel's members can also be entitled to claim damages from the cartel member if the competitor has raised his prices under the umbrella of the cartel. The same applies, mutatis mutandis, to suppliers that have become a victim of a purchasing cartel.

Individuals or undertakings damaged by a cartel infringement can claim full compensation (ie, damages and interest, reimbursement of court and legal fees and, to a certain extent, fees of economic experts).

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not available for individuals and undertakings affected by a cartel infringement. They can, however, submit bundled claims through a third party. If the third party brings the claims through a vehicle that was only established to claim damages on its own behalf, the foundation of this vehicle must comply with the rules governing legal representation and advisory services. In a recent decision (II ZR 84/20), the Federal Supreme Court (BGH) confirmed that there is no violation of the Legal Services Act if a company bundles claims of several (alleged) claimants by assignment to assert them collectively in court.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The leniency programme is regulated by sections 81h of the German Act Against Restraints of Competition (GWB) et seq. The competition authority can, under the general conditions laid down in section 81j GWB (esp. full and continuous cooperation with the competition authority), grant cartel members full immunity from, or a reduction of, administrative fines imposed by the competition authority, which will, however, not affect the criminal prosecution against the responsible individuals.

Pursuant to sections 81j, 81k GWB, full immunity from fines will be granted to a cartel member that:

- is the first providing sufficient evidence which, for the first time, enables the competition authority to obtain a search warrant;
- discloses an infringement and its participation in the infringement;
- immediately ends his or her participation in the cartel, unless asked otherwise by the authority;
- cooperates fully and continuously with the authority; and
- keeps the leniency application and its cooperation with the competition authority confidential.

The competition authority shall refrain from imposing a fine if:

- a cartel member is, even though the competition authority is already in a position to obtain a search warrant, the first one submitting evidence that allows the competition authority to prove the offence for the first time;
- no other cartel member has already been granted full immunity; and
- the applicant fulfils the other obligations laid down in section 81j GWB (the leniency applicant stops the participation in the cartel, cooperates fully and continuously with the authority and keeps the cooperation with the competition authority confidential).

An undertaking that has coerced other undertakings to participate in a cartel will not be eligible for full immunity under any circumstances.

In addition, there is a limited joint and several liability in follow-on cartel damage proceedings: an undertaking granted full immunity is generally only liable to its own buyers or suppliers for the damages they suffered from the cartel (yet not limited to own supplies).

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

If a cartel member is no longer entitled to apply for immunity, the fine can be reduced if the participant provides the competition authority with evidence that makes a decisive contribution to proving the offence. The amount of the reduction will be based on the value of the evidence provided and the position of the applicant in the sequence of leniency applications. This option is also available for the third and following applicants.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The GWB does not offer any special treatment for the second leniency applicant. The fine can be reduced if the cartel member provides the competition authority with evidence that forms a decisive contribution to proving the offence. The amount of the reduction will be based on the value of the evidence provided and the position of the applicant in the sequence of leniency applications. This option is, however, also available for the third and following applicants.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As long as the proceedings are not terminated, it is possible to place a marker or to file a leniency application. A cartel member can contact the competition authority and declare their willingness to cooperate to ensure their respective position in the sequence of leniency applicants (ie, place a marker). The contact can be made with, for example, the Special Unit for Combating Cartels or the chairman of the competent decision-making division of the Federal Cartel Office (FCO). The marker can be made orally or in writing and must contain details about the infringement, including the names of other cartel members, the products and regions concerned, the duration of the infringement and the cartel member's own involvement. The competition authority will then set an appropriate time limit for the drafting of a formal leniency application.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The leniency applicant must cooperate fully and continuously with the competition authority through the entire proceeding. In particular, it must:

- hand over all information and evidence available and answer the competition authority's requests for information in a timely manner;
- cooperate fully in the clarification of the case by making board members and employees available for interrogations;
- end its involvement in the cartel immediately unless the competition authority considers that this would be damaging with a view to preserving the integrity of the investigation;
- neither destroy, distort, nor suppress evidence, and
- keep its cooperation with the competition authority confidential until the authority relieves it from this obligation.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The current leniency programme does not include any provisions regarding confidentiality. However, the previous leniency programme of the FCO stated that the FCO will treat the identity of the leniency applicant and its trade and business secrets as confidential until a statement of objections is issued. It is to be assumed that the FCO will continue with this practice within the scope of the statutory limits. However, the FCO must disclose the identity of a leniency applicant as part of the other undertakings' right to access the case files and to the public prosecutor if the infringement may constitute a criminal offence.

It should be noted that undertakings or individuals under investigation will have access to the case files once they have received a statement of objections. The FCO can agree to remove certain trade and business secrets from the file that are irrelevant to the proceedings, but there is no guarantee that such information will not be discovered, as the FCO must not redact business secrets when granting defence counsel access to the file.

After the proceedings have been concluded by a formal decision, the FCO will publish press releases and case summaries which include the information required by law, such as information on the facts established in the decision imposing fines, information on the type of the infringement and the period during which the infringement occurred, as well as information on the undertakings which were involved in the infringement (section 53 (5) GWB). The published information must also include information on leniency applicants, including undertakings that were granted full immunity from fines.

For leniency applicants that are granted full immunity, the FCO will not issue a formal decision and usually limits the rights of third parties (eg, buyers or suppliers for the purpose of claiming damages) to access the case files, as far as the leniency statements and any evidence created during the proceedings are concerned.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The competition authority may, and regularly does, enter into settlements to terminate administrative fine proceedings.

Settlement discussions can be initiated by the competition authority and the accused individuals or undertakings at any time. If there is a general willingness to terminate the proceedings by settlement, the competition authority will inform the accused party of the facts of the infringement and grant (often limited) access to the case files. After hearing the accused individual or undertaking, the competition authority will propose a settlement declaration based on the latest state of its investigations containing:

- a description of the offence;
- information on the circumstances that are relevant for setting the fine; and
- a statement from the accused party acknowledging the facts of the alleged infringement, and accepting a fine up to the amount announced in the settlement, which usually includes a settlement discount of 10 per cent.

If a settlement is reached, the proceedings will normally be concluded through a 'short decision' that only contains the minimum information required by law, which is why the binding effect of the decision is also limited. A court's approval is not needed for the settlement to come into force. If the short decision is appealed in spite of the settlement, the competition authority will usually withdraw the short decision and hand down a detailed decision imposing a fine without the settlement rebate.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Unless stated otherwise, a leniency application filed by an undertaking will also be qualified as made on behalf of the individuals participating in the cartel (eg, former or current employees of the undertaking). This, however, does not relieve individuals from the risk of criminal prosecution for infringements that constitute bid rigging or fraud.

Dealing with the enforcement agency

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A cartel member may first contact the competent competition authority (especially the Special Unit for Combating Cartels or the chairman of one of the competent decision divisions at the FCO) on a confidential and anonymous basis. Once the cartel member has decided to cooperate, a marker should be placed as early as possible, as full immunity is generally only granted to the first-in applicant. A marker, however, is also available for subsequent applicants. The competition authority will then set an appropriate time limit for the drafting of a formal leniency application.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The competition authority shall grant the defendant full access to the case files upon request. However, the competition authority can deny access as long as the proceedings are ongoing to avoid jeopardising the purpose of the investigation. Therefore, in practice, the competition authority usually only informs the defendant that it has opened a formal investigation regarding a cartel infringement. Further information will only be disclosed after the authority has issued the statement of objections.

Besides the right of the defendant to information, the accused undertaking's defence counsel will be authorised to inspect files as well as items of evidence. However, if the cartel investigation is ongoing, the authority may deny access to inspect certain parts of the files to defence counsel if providing access could impede the investigation.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

A defence counsel can represent an undertaking and one employee of this undertaking accused of the same cartel infringement if there is no conflict of interest (section 3 (1) of the German Professional Code of Conduct for Attorneys-at-Law). The employee should be informed about his or her right to seek independent legal representation.

Different attorneys of the same law firm can represent different individuals in addition to their employer.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

No.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes, unless the payment concerns cartel infringements in the future that have not yet been committed.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Under German tax laws, fines set by a national authority are not tax-deductible unless the fines do not merely sanction the unlawful behaviour committed but also recoup economic advantages achieved by the violation of the law. According to recent decisions of German tax courts, a fine imposed by the competition authority usually does not contain an element of recoupment, unless it is explicitly stated otherwise in the decision to fine, and are therefore not tax-deductible.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The fact that an undertaking or individual has been sanctioned for the same cartel infringement in another jurisdiction does not affect the ability of a German competition authority to impose fines. In particular, the statutory criteria for calculating fines do not make explicit reference to this. However, because the criteria mentioned in section 81d of the German Act Against Restraints of Competition are not exhaustive, it is at the discretion of the competition authority whether it takes sanctions that have been imposed in other jurisdictions into account.

Also, overlapping liability for damages in other jurisdictions will not be taken into account in private damage claims brought before German courts.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Generally, only the first-in applicant can be granted full immunity. However, because the reduction of fines also depends on the sequence of the leniency applications, the prospect of success of a leniency approach should be examined as soon as possible. Besides full and continuous cooperation with the competition authority, other actions that may reduce fines are, for example, the establishment of a functional compliance programme or other measures taken by the undertaking to compensate for the damage caused by the infringement.

Also, undertakings and individuals concerned can try to reduce fines by reaching settlements with the competition authority.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

At the end of 2019, the Federal Cartel Office (FCO) imposed fines totalling €646 million on three steel manufacturers and three individuals responsible for exchanging information on and agreeing certain price supplements and surcharges for quarto plates from mid-2002 until June 2016 in Germany. The illegal agreement was based on the mutual understanding and aim of the participating companies to negotiate with their customers on the base prices only. All companies admitted the accusations made by the FCO and agreed to a settlement. One company was granted full immunity from fines.

In 2020, the FCO imposed fines totalling €154.6 million on seven wholesalers of plant protection products and their responsible employees for agreeing on price lists, discounts and some individual sales prices to retailers and end customers. Further, the FCO imposed

fines totalling €175 million on five aluminium forging companies and 10 representatives. The companies had a general agreement that their respective procurement costs and cost increases would be passed on to their customers. In meetings, senior staff members regularly exchanged information on individual costs incurred in their procurement processes and on increased costs for aluminium, energy and the processing of aluminium into an input material suitable for forging. The companies' representatives also discussed how these costs could be passed on to customers and informed each other of the progress they had made in this regard.

In 2021, the FCO imposed fines totalling approximately €35 million on three steel forging companies and two senior staff members for their involvement in an anticompetitive exchange of information. This included information, in particular, about the companies' respective cost situations, their pricing strategies and negotiations with suppliers and customers. The aim of the participating steel forging companies was to pass on cost increases to the fullest extent possible to their customers without the fear of being undercut by their competitors.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Federal Cartel Office published new Guidelines on the Setting of Fines in Cartel Cases in 2021 that apply a refined approach to the calculation of fines. The first cases applying the new rules are yet to be decided. In addition, a competition register started its operations in 2021. It will list undertakings that have been fined for violating the competition rules, so that public authorities can take this into account (and can possibly disqualify the undertaking) in public procurement proceedings. The undertakings can apply for early deletion from the register if they can establish credible 'self-cleaning'; details of the requirements for such self-cleaning will be set out in guidelines.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Competition Ordinance (the Ordinance) is the primary source of competition law in Hong Kong. The substantive provisions of the Ordinance came into effect in December 2015.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Hong Kong has a prosecutorial competition law regime. The Competition Commission is responsible for investigating alleged contraventions (including cartel conduct), and initiating enforcement proceedings before the Competition Tribunal. The Communications Authority shares concurrent jurisdiction with the Commission regarding undertakings in the telecommunications and broadcasting sectors.

The Tribunal adjudicates and decides on competition cases brought by the Commission. It is composed of judges of the Court of First Instance and has the same jurisdiction to grant remedies and reliefs, equitable or legal, as the Court of First Instance.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The Hong Kong government is conducting a review of the Ordinance. No significant changes to the Ordinance are currently anticipated. The key potential change would be to remove the existing exemptions for statutory bodies.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The First Conduct Rule is a general prohibition on anticompetitive arrangements, including cartel conduct. Knowledge is a prerequisite to an agreement or concerted practice, but this may be inferred from the facts.

The Commission regards cartels as having the object of harming competition, and therefore it is not necessary to prove any anticompetitive effects.

Undertakings may still seek to rely on the economic efficiencies exclusion to argue that the alleged cartel conduct is excluded from the First Conduct Rule. In practice, the Commission and the Tribunal have been sceptical towards such use of economic efficiencies to exclude cartel conduct.

Cartels also fall within the definition of 'serious anticompetitive conduct' under section 2 of the Ordinance. 'Serious anticompetitive conduct' is subject to a stricter enforcement procedure – the Commission may initiate Tribunal proceedings without first issuing a warning notice.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures that amount to a merger are excluded from the First Conduct Rule. Such joint ventures must be 'full function' (ie, created to perform, on a lasting basis, all the functions of an autonomous economic entity). Relevant factors include independent management, sufficient resources and the proportion of output sold to parents.

If joint ventures or strategic alliances are not full function, they are subject to the First Conduct Rule. For example, the Hong Kong Seaport Alliance, a contractual joint venture between four port terminals, has been the subject of an in-depth investigation relating to price alignment and capacity sharing.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Competition Ordinance (the Ordinance) applies to individuals, corporations and other entities that fall within the definition of an 'undertaking'. An undertaking must engage in economic activity. The definition includes corporations, partnerships and natural persons (eg, sole traders).

Individuals not acting in the capacity of an undertaking (eg, employees or directors) will not be liable for contravening the First Conduct Rule. However, the Commission has taken the view that individuals may have accessorial liability for involvement in a contravention. The Commission is currently seeking pecuniary penalties and director disqualification orders against individuals alleged to be involved in several ongoing cases. The Tribunal made its first director disqualification order in October 2020, accepting the Commission's request in the *Fungs E&M* cartel case (CTEA1/2019). In the same case, the Tribunal also imposed for the first time pecuniary penalties on 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 First Conduct Rule applies to conduct that has an impact in Hong Kong, even if such conduct is carried out outside Hong Kong, or if the parties carrying out such conduct are located outside Hong Kong.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

No. However, the First Conduct Rule is unlikely to apply if the conduct has no impact in Hong Kong.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

No. The only sector-specific issue relates to the shipping sector. In August 2017, the Commission issued a Block Exemption Order for Vessel Sharing Agreements between liner operators. The BEO is due to expire in August 2022 and the Commission commenced a review in August 2021. Based on this review, the Commission will decide whether it will renew or amend the BEO.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The conduct of the Hong Kong government is not subject to the Ordinance.

However, governmental approval or regulation of an undertaking's conduct is not a defence or exemption from the prohibition against cartel conduct under the Ordinance, unless the conduct is engaged for purposes of complying with a legal requirement imposed by or under any law in force in Hong Kong, or imposed by any national law of China that applies in Hong Kong.

In addition, the First Conduct Rule does not apply to an undertaking entrusted by the government with the operation of services of general economic interest.

These exclusions are applied narrowly. For example, in 2018, the Commission decided that the Code of Banking Practice, a banking industry code endorsed by the Hong Kong Monetary Authority, does not benefit from the legal requirement exclusion.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Commission generally conducts its investigations in two phases.

The first is the Initial Assessment Phase, during which the Commission obtains information from publicly available sources, or seeks information from parties on a voluntary basis.

The second is the Investigation Phase. This formal investigation phase begins once the Commission has formed a view that it has reasonable cause to suspect a contravention. During this phase, the Commission can exercise its compulsory investigative powers under the Competition Ordinance.

There is no specific time frame for such investigations – they vary on a case-by-case basis.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Commission has the power to:

- require the production of documents and information relevant to the investigation;
- require individuals to attend interviews before the Commission; and
- enter and search any premises with a warrant issued by a judge of the Court of First Instance.

A search warrant typically grants the Commission the power to use reasonable force to gain entry to the premises and to take possession of any documents or devices found on the premises that are relevant to the investigation.

The Commission only requires a court's approval to conduct dawn raids. It does not require such approval to exercise its other investigative powers.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Commission signed a memorandum of understanding with the Canadian Competition Bureau in December 2016 and with the Philippine Competition Commission in December 2020. The Commission also actively participates in the International Competition Network and the Organisation for Economic Co-operation and Development.

The Commission also collaborates with other Hong Kong regulators, including the Securities and Futures Commission and the Communications Authority pursuant to a memorandum of understanding.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Currently, there are no publicly known cross-border cases involving Hong Kong. However, both the Commission and the Tribunal have referred to case law in other jurisdictions. In the Tribunal's judgments handed down since 2019, it has demonstrated reliance on UK and European Union case law.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Commission will initiate Competition Tribunal proceedings if it has reasonable cause to believe that the alleged cartel contravenes the First Conduct Rule. On the basis of a trial with witness evidence, the Tribunal will determine whether a contravention has occurred and what penalties to impose.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden of proof is on the Commission. The applicable standard of proof is the criminal standard (ie, beyond a reasonable doubt).

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Generally, circumstantial evidence (eg, similar pricing behaviour of competitors over a period of time) will not be sufficient to establish cartel infringement. This has been confirmed by the Tribunal in the *Taching*

case (CTA1/2018). Parallel conduct is not in itself illegal. Where cases are built solely based on undertakings' parallel behaviour as proof of concentration, alternative explanations of such parallel conduct should be addressed.

However, the Tribunal has stated in the *Nutanix* case (CTEA1/2017) that it may draw appropriate inferences from facts to determine whether a contravention has occurred, provided that such inferences are:

- grounded on clear findings of primary fact;
- a logical consequence of those facts; and
- 'irresistible' (ie, the only inference that can be reasonably drawn based on the facts).

Appeal process

18 | What is the appeal process?

There is a right to appeal against any decision made by the Tribunal to the Court of Appeal (including pecuniary penalty decisions). An appeal must be made within 28 days after the date on which the Tribunal's decision is made.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There is no criminal cartel offence in Hong Kong. However, failure to cooperate with the Competition Commission or obstruction of an investigation may result in a criminal offence. The infringing persons may face imprisonment or financial penalties.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Competition Ordinance (the Ordinance) provides a wide range of potential sanctions, including financial penalties of up to 10 per cent of Hong Kong group turnover, for a maximum of three years of a contravention (the Ordinance does not provide any cap for financial penalties imposed on individuals (eg, employees, directors, other natural persons)) and director disqualification orders.

Schedule 3 of the Ordinance sets out the full list of other orders that may be made by the Tribunal, including disgorgement orders, injunctions and declarations that an anticompetitive agreement is void.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Ordinance sets out factors that the Tribunal must have regard to when determining the quantum of a pecuniary penalty:

- the nature and extent of the conduct;
- the loss or damage, if any, caused by the conduct;
- the circumstances in which the conduct took place; and
- whether there has been any previous contravention(s) of the Ordinance.

The Tribunal, having regard to the above factors, considers that the following four-step methodology, which is similar to the European Union's and United Kingdom's fining frameworks, should be followed when setting fines:

1 Determine the base amount of the fine, based on the value of sales, and the gravity and duration of the conduct.
2 Make adjustments for aggravating, mitigating and other factors.
3 Apply the statutory cap of 10 per cent of total group revenue in Hong Kong.
4 Apply any reductions due to the undertaking's cooperation with the investigation and consider any inability to pay fines.

In June 2020, the Commission published its Policy on Recommended Pecuniary Penalties (Recommended Pecuniary Penalties Policy), adopting the four-step methodology set out by the Tribunal.

Aggravating factors include where an undertaking acts as a leader or an instigator of the contravention, or where there is any senior management involvement.

Mitigating factors include an undertaking having limited participation in the contravention and having existing effective compliance programmes.

The Tribunal ultimately decides the level of pecuniary penalties. However, it has indicated that it will have proper regard to the Commission's penalty recommendations, including recommendations for cooperation discounts.

In its first pecuniary penalty decision against individuals, handed down in January 2021 (CTEA 1/2019), the Tribunal adopted the same four-step methodology as applied to companies when setting the fines. Given the specific circumstances of the case, it is unclear whether the Tribunal will continue to adopt the four-step methodology in future cases concerning individuals.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Yes, the Commission has indicated that genuine compliance with the Ordinance, through prior implementation of a proportionate and ongoing compliance programme, is a mitigating factor.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Tribunal may make orders to disqualify individuals involved in cartel activity from being a director, or from taking part in corporate management, for a period of up to five years.

In October 2020, the Tribunal made its first director disqualification order. As a general guideline, the Tribunal held that the duration of the disqualification order must reflect the seriousness of the anticompetitive conduct that the director was engaged in. The Tribunal will also consider fact-specific aggravating and mitigating factors (eg, the extent and methods of the director's involvement in the contravening conduct or whether the director had any personal gains from the contravening conduct).

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is not automatic under the Ordinance. While the Tribunal has the power to make such orders, it has not yet imposed any debarment orders in practice. The Hong Kong government may also delist businesses from its supplier lists under its own initiative.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

There are no criminal sanctions against cartelists under the Ordinance.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Private enforcement actions regarding cartel conduct are limited to follow-on damage claims. Such claims can only be made if a court has previously decided that there has been a contravention under the Competition Ordinance, or if an undertaking has made such an admission in a commitment accepted by the Competition Commission. As no claims for follow-on damages have been made in Hong Kong, it is unclear what the Tribunal's approach on direct and indirect purchasers, level of damages and cost awards will be.

The Competition Ordinance does not allow for standalone private enforcement actions. However, competition law contraventions can be raised as a defence in civil proceedings. In the *Taching* case (CTA1/2018), the plaintiff initiated action for outstanding payments, and the defendant, in turn, argued that the plaintiff was price fixing with its competitor and sought damages from the plaintiff.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Currently, there are no class action procedures for competition claims, or more general actions, in Hong Kong.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Commission may make a leniency agreement with an undertaking that it will not bring or continue proceedings in the Tribunal that could result in a pecuniary penalty, in exchange for an undertaking's cooperation.

The Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy) was revised in April 2020.

Leniency is not available to cartel ringleaders and is only available to the first reporting cartel member. Leniency applicants are required to continuously cooperate with the Commission throughout an investigation and in any subsequent Tribunal proceeding.

Leniency applicants are categorised as Type 1 – the first leniency applicant received when the Commission is unaware of the cartel and so has not conducted an investigation – and Type 2 Leniency Applicants – the first leniency applicant received when the Commission is already assessing or investigating the alleged cartel.

The Commission has published a Leniency Policy for Individuals Engaged in Cartel Conduct. Individuals (eg, directors or employees) may report cartel conduct to the Commission and seek immunity. Immunity will only be considered if no other individual or undertaking has already reported the same conduct to the Commission. However, the Commission has the discretion to apply immunity for further individuals reporting the same cartel conduct.

Leniency is only available for the first reporting cartel member or individual. It is therefore important to be the 'first in'.

The timing of the report may also decide whether an applicant is a Type 1 or Type 2 Leniency applicant. Type 1 Leniency applicants are unlikely to be exposed to any follow-on damage risk in Hong Kong. Type 2 Leniency applicants, on the other hand, may be required by the Commission to subsequently admit to liability via an infringement notice to facilitate follow-on actions by victims of the cartel conduct.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings engaged in cartel conduct that are not the first reporting cartel member are not eligible for immunity. They can, however, engage with the Commission within a framework of cooperation and settlement.

If satisfied with the level of assistance provided, the Commission will enter into a cooperation agreement with the cooperating party. The case will be settled on the basis of a joint application to the Tribunal. The joint application will reflect the facts as set out in a summary of facts agreed by the undertaking and the Commission. The Commission will recommend a cooperation discount to the fine of up to 50 per cent in exchange for the undertakings' cooperation throughout the investigation and in subsequent proceedings. The Commission may also agree not to take any proceedings against any current and former employees of the cooperating undertaking, provided that they fully and truthfully cooperate with the Commission.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

There are different bands of recommended discounts for cooperating parties:

- Band 1 – between 35 per cent to 50 per cent;
- Band 2 – between 20 per cent to 40 per cent; and
- Band 3 – up to 25 per cent.

The bands are applied based on the order in which undertakings express their interest in cooperating. Generally, the second cooperating party will benefit from the recommended discounts under Band 1, while the third or subsequent cooperating parties will fall within Bands 2 or 3. The actual discount within the applicable band will be decided by the Commission, having regard to the timing, nature, value and extent of the cooperation provided by the undertaking. The Commission may include more than one undertaking in each band.

An undertaking that only cooperates with the Commission after the commencement of any enforcement proceedings will be granted a lower cooperation discount (capped at 20 per cent).

The Commission also offers 'Leniency Plus', where an undertaking cooperating with the Commission in relation to its participation in one cartel (First Cartel) may find that it also has engaged in one or more

separate cartels (Second Cartel). In these cases, the Commission will apply an additional discount of up to 10 per cent of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided that:

- the undertaking has entered into a leniency agreement with the Commission in respect of the Second Cartel;
- the Second Cartel is completely separate from the First Cartel; and
- the undertaking fully and truthfully cooperates with the Commission in respect of both cartels.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The Competition Ordinance does not prescribe any deadline for initiating or completing any leniency or cooperation application.

Under the Commission's Leniency Policy, a marker system is used to hold a leniency applicant's place and allow the leniency applicant to gather the necessary information to perfect its leniency application.

An undertaking or its legal representative may make initial enquiries on the availability of markers on an anonymous basis. During initial enquiries, undertakings may be required to provide information on the broad nature of the cartel conduct, including the affected industry, product or service, the general nature of the conduct, and the time period.

After confirming that a marker is available, an applicant will need to disclose key information, such as its identity and the identities of undertakings participating in the cartel conduct. The applicant will be required to perfect the marker through a proffer process within the time period set by the Commission (at least 30 calendar days).

To perfect the marker, the applicant is required to provide a detailed description of the cartel conduct and the Commission may also ask for evidence to support the applicant's proffer.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The leniency applicant and cooperating parties are required and expected to provide the same level and nature of cooperation. Such cooperation includes:

- providing full and truthful disclosures to the Commission, including promptly providing the Commission with information relating to the cartel conduct and preserving such information;
- making the leniency and cooperation applicant's employees and directors available at the Commission's request to provide information required at the Commission's interviews and to testify during subsequent court proceedings;
- taking prompt and effective action to terminate its participation in the cartel conduct, unless requested otherwise to avoid tipping off cartel participants; and
- keeping the information relating to the leniency or cooperation application confidential.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Commission is under a general obligation to preserve the confidentiality of any confidential information provided to it.

With respect to leniency applications, it is the Commission's policy not to release any material made available to it by a leniency applicant for the purpose of making its leniency application, nor release its records of the leniency application process (including the leniency agreement), unless:

- the Commission is compelled to make a disclosure by a court order or is otherwise legally required to do so;
- the Commission has the consent of the leniency applicant to disclose the material; or
- the relevant information or document is already in the public domain.

The Commission is likely to request the directors or employees of the leniency applicant to testify in court proceedings, which will reveal the identity of the leniency applicant. The Tribunal is also likely to compel the Commission to disclose the leniency materials during the court proceedings. The respondents in the first case initiated via a successful leniency application reached a settlement with the Commission, and the name of the leniency applicant was not revealed in the Tribunal's settlement decision in November 2020 (CTEA 1/2020). It is currently unclear the extent and limits that may apply particularly in a contested hearing.

The Tribunal recognised that there is a strong public interest to encourage cartel members to apply for leniency and facilitate full and frank discussion. It has confirmed in the *Nutanix* case (CTEA1/2017) that the Commission can resist the disclosure of certain leniency materials in an unsuccessful leniency application on public interest immunity or without prejudice privileged grounds. In the *Nutanix* case, the leniency materials were without prejudice correspondences or communications between the Commission and an unsuccessful leniency applicant.

Where a leniency agreement was terminated by the Commission (eg, on the grounds that the applicant provided false or incomplete information), the Commission may use the leniency materials as evidence against the undertaking and other participants in the cartel conduct.

As set out in the Commission's Cooperation Policy, similar confidentiality protection will be offered to the cooperating parties which could not benefit from the leniency policy.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Commission may enter into cooperation or settlement agreements with undertakings engaged in cartel conduct. The cooperating undertaking and the Commission will make a joint application to the Tribunal to settle the case.

In July 2020, the Tribunal handed its first contravention decision based on a joint application by the Commission and respondents to dispose of the proceedings by way of an uncontested procedure. The Tribunal adopts the *Carecraft* procedure, which has been routinely applied in the context of directors disqualification proceedings under the Companies Ordinance and Securities and Futures Ordinance. The *Carecraft* procedure allows

the limiting of facts (by way of a statement of agreed facts) on which the Tribunal will be asked to base a judgment as to the appropriate order to be made, and thereby enables the expeditious disposal of proceedings and avoids the substantial costs that would otherwise be incurred if there is a trial. Similar procedures had been consistently applied by the Tribunal in its settlement decisions (eg, CTEA 1/2017 and CTEA 1/2020).

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Leniency extends to current (and possibly former) employees, agents, officers and partners of a successful applicant, provided that they fully and truthfully cooperate with the Commission.

Similarly, the Commission may agree to not bring any proceedings against the employees, agents, officers and partners of a cooperating party, provided that they fully and truthfully cooperate with the Commission.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The key steps for a leniency applicant are set out below:

1 The undertaking, or its legal representative, contacts the Commission to ascertain if a leniency marker is available. Such requests can be made by telephone or by email.
2 The applicant is required to perfect the marker through a proffer process, either orally or in writing.
3 The applicant enters into a leniency agreement with the Commission and is required to ensure ongoing compliance with the terms of the agreement.
4 At an appropriate stage (usually at the end of any Tribunal proceedings against other cartel members), the Commission will issue a final letter to confirm the undertaking fulfilled all conditions under the leniency agreement.

The key steps for a cooperating party are set out below:

1 An undertaking subject to an investigation may indicate its willingness to cooperate by making contact with the concerned case manager of the Commission, either orally or in writing.
2 An applicant is required to provide documents and information through a proffer process, either orally or in writing.
3 Once the Commission and the applicant reach an understanding in principle on the draft Agreed Factual Summary and the draft cooperation agreement, the Commission will indicate to the applicant the maximum recommended pecuniary penalty and the recommended discount for the cooperation provided. The applicant will be asked to confirm by signing the cooperation agreement, which will include the Agreed Factual Summary.
4 The applicant is required to ensure ongoing compliance with the terms of the cooperation agreement.
5 At an appropriate stage (usually at the end of any proceedings before the Tribunal against other cartel members), the Commission will issue a final letter to confirm that all conditions under the cooperation agreement have been fulfilled.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

During the Investigation Phase, the Competition Commission generally does not disclose any evidence or information gathered to the subject of the investigation. Where the undertaking is a cooperating party, the Commission will offer the undertaking limited disclosure of a selection of key evidence as part of the cooperation process.

Once the Commission has brought proceedings to the Competition Tribunal, the respondent may apply to the Tribunal for an order for discovery and production of a document from the Commission for inspection. The Tribunal may make or refuse to make such an order having regard to all circumstances of the case (eg, the balance between the interests of the parties and whether the document sought is necessary for the fair disposal of the proceedings).

Following the approach in directors disqualification proceedings under the Securities and Futures Ordinance, the Tribunal generally orders that the Commission disclose both used and unused materials in its possession. In certain circumstances, the Commission's internal documents, including reports concerning the investigation and enforcement steps taken, and certain internal communications, may be protected by public interest immunity and the Commission may object to the disclosure of such documents. However, the Commission is required to justify its claims for public interest immunity in each case.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

There are no legal restrictions prohibiting a law firm from representing both an undertaking and its employees under investigation. In practice, lawyers may act for both the employees and the undertaking, so long as the potential clients give informed consent to joint representation during a Commission investigation and the risk of conflict arising from joint representation has been considered.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

There are no legal restrictions restricting lawyers to represent multiple corporate defendants in the same cartel. In practice, lawyers may act for multiple corporate defendants as long as the potential clients give informed consent to joint representation during a Commission investigation and the risk of conflicts of interest arising from joint representation has been considered.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

An undertaking is prohibited from indemnifying its employees for the payment of a pecuniary penalty and costs incurred in defending proceedings. However, funds can be provided to its employees to meet expenditure incurred by them in defending proceedings, provided that the employees repay such funds in the event the employees are required by the Tribunal to pay the pecuniary penalty.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

The Competition Ordinance does not specify that fines and private damages payments are tax-deductible.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Currently, there are no publicly known cases in which multiple jurisdictions are involved.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Mitigating factors that may lead to reduction of fines include limited participation in the contravention, or the presence of a genuine and effective compliance programme prior to the cartel conduct.

The Commission may also recommend a cooperation discount to the Tribunal. The percentage of the discount would depend on the timing, nature, value and extent of the cooperation provided by the undertaking.

In exceptional circumstances, the Tribunal may also take an undertaking's inability to pay into account and reduce the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In the past year there have been a number of developments in the Hong Kong competition regime.

In October 2020, the Tribunal made its first director disqualification order. The Tribunal prohibited a director of a local decorating contractor from serving as a director for one year and 10 months. In the same case, the Tribunal also imposed for the first time pecuniary penalties on individuals in another judgment handed down in January 2021.

In October 2020, the Commission formally accepted commitments from the Hong Kong Seaport Alliance. The Alliance, a contractual joint venture between four terminals, had been under investigation for price alignment and capacity sharing. The members of the Alliance committed to cap their prices in the affected markets and implement measures to prevent the exchange of competitively sensitive information between them.

In December 2020, the Tribunal imposed its largest pecuniary penalties to date on four respondents in the first cartel case brought by the Commission. The Tribunal's penalty judgment follows its previous judgment handed down in May 2019 in which four out of five respondents were found liable for forming a cartel. Three out of four respondents reached a settlement with the Commission in respect of the level of fines. The Tribunal accepted the pecuniary penalties proposed by the Commission.

In February 2021, the Commission issued infringement notices to seven companies, including international hotel groups and a tour counter operator, for facilitating price fixing between two competing travel service providers. The case was initiated by a leniency application. The hotels admitted to the violations and made commitments to adopt compliance measures. Instead of initiating Tribunal proceedings, the Commission decided to issue infringement notices considering the hotels' role as mere facilitators. The Commission's investigation against other parties involved in this case is ongoing.

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In May 2021, the Court of Appeal dismissed an appeal by one of the respondents concerning the first decorators' cartel case handed down by the Tribunal in 2019. The Commission sought to lower the threshold for proving violations of competition law from a criminal standard of proof (beyond a reasonable doubt) to a civil standard of proof (balance of probabilities) by cross-appealing in this case. The Court of Appeal dismissed entirely the Commission's cross-appeal.

The Commission also published an advisory bulletin on trade associations' membership admission rules in July 2021. The bulletin provides guidance on how the Commission intends to apply competition rules to membership criteria of trade associations and provides recommendations to trade associations.

In August 2021, the Commission commenced a review of the block exemption order for vessel sharing between liner operators. The existing block exemption order is due to expire in August 2022. Based on this review, the Commission will decide whether it will renew or amend the order.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Hong Kong government is conducting a review of the Competition Ordinance (the Ordinance). No significant changes in the Ordinance are currently anticipated. A key potential change would be the removal of existing exemptions under the Ordinance for statutory bodies.

India

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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 CCI.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Based on the recommendations of the Competition Law Review Committee (CLRC), constituted by the Ministry of Corporate Affairs, Government of India, the draft Competition (Amendment) Bill, 2020 was released for public comments in February 2020. The Bill contains several groundbreaking amendments, some of which are described below.

- The Bill has proposed the formation of a governing board, comprised of CCI members and certain ex-officio and part-time members with the power to exercise general superintendence, direction and management of the affairs of the CCI.
- The office of the DG, which currently functions at an arm's length distance from the CCI and has certain autonomy in the investigation of cases, has been proposed to be integrated into the main body of the CCI.
- The Bill expands the definition of a cartel to include a buyer's cartel as well.
- The Bill proposes to include an entity, regardless of its legal form or status, and also including units, divisions and subsidiaries, under the purview of an 'enterprise'.
- The Bill introduces a system for settlements and commitments only in respect of offences relating to anticompetitive vertical agreements or abuse of dominance position, permitting the CCI to close the investigation on the basis of an application for settlement or commitment moved by the investigated party.
- The Bill has proposed that a cartel under investigation that discloses some relevant information of some other existing cartel will be liable to lesser punishment. The Bill also introduces the provision of compounding.
- The Bill has proposed a large number of changes to the regulation of combinations. It has authorised the CCI and the central government to lay down sector-specific thresholds, based on the size of the transaction or the deal value, for merger notifications. It has proposed a reduction in the timelines for the review of combinations.
- The Bill seeks to widen the protection offered to holders of intellectual property rights (IPR). The right of an IPR holder to restrain any infringement and to impose reasonable conditions, as may be necessary for protecting their rights, will not only be unaffected by the provisions dealing in anticompetitive agreements but also with those dealing in abuse of dominant position.

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, share markets or indulge in bid rigging. Once an agreement to indulge in any of the aforesaid prohibited conducts 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 the production and distribution of goods and services; and
- the promotion of technical, scientific and economic development.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and strategic alliances are potentially subject to the cartel laws, except for those that increase efficiency.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The law applies to individuals and corporations and to government departments except those dealing with atomic energy, currency, defence and space.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The regime applies to conduct that takes place outside India if such conduct has an effect on competition in India. The Competition Act 2002 (the Act) empowers the Competition Commission of India (CCI) to inquire into extraterritorial conduct relating to agreements, abuse of dominant position or a combination thereof if they have or are likely to have an appreciable adverse effect on competition (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. Thus, a defence that the impugned conduct does not cause an AAEC in India, but only affects customers or other parties outside India, is valid.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements and the Act applies universally to all sectors and industries.

However, sector-specific regulators, such as the Telecom Regulatory Authority of India (TRAI), the Central Electricity Regulatory Commission and the Petroleum and Natural Gas Regulatory Board, administer the respective sector-specific laws.

The Act provides for the option of mutual consultation between the CCI and such statutory authorities on a non-binding basis. In a matter involving an alleged overlap of jurisdiction between the CCI and the TRAI, the Supreme Court of India observed in the case of *Competition Commission of India v Bharti Airtel Limited and Others* (Civil Appeal No. 3546 OF 2014, judgment dated 1 October 2018) that the CCI, in the specific facts of the case, can exercise its jurisdiction and see if the same amounts to 'abuse of dominance' or 'anticompetitive agreements' once the mandate of TRAI and the Telecom Disputes Settlement and Appellate Tribunal has been exercised and they have determined that the violation of the TRAI Act was due to a concerted practice.

The Act exempts intellectual property right holders from the purview of section 3 of the Act (prohibition on anticompetitive agreements) in exercising of their right to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of the rights that have been or may be conferred upon them under:

- the Copyright Act 1957;
- the Patents Act 1970;
- the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999;
- the Geographical Indications of Goods (Registration and Protection) Act 1999;
- the Designs Act 2000; and
- the Semi-conductor Integrated Circuits Layout-Design Act 2000.

In a matter involving an alleged overlap of jurisdiction between the CCI and the Controller General of Patents, the Delhi High Court vide judgment dated 20 May 2020 in WP (C) 1776/2016 and WP (C) 3556/2017, while reaffirming the earlier judgment passed in *Telefonaktiebolaget LM Ericsson v CCI & Anr (WP(C)* 464/2014 decided on 30 March 2016, held that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. The court also clarified that the decision of the Supreme Court in *Bharti Airtel Ltd* cannot be construed to mean that wherever there is a statutory regulator, the complaint must be first brought before the statutory regulator and examination of a complaint by the CCI is contingent on the findings of the statutory regulator.

The Act exempts export cartels if such agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for export from India.

Further, the central government, vide notification dated 4 July 2018, had also extended the exemption granted to the vessel-sharing agreements of the liner shipping industry from the provisions of section 3 of the Act for a period of three years, in respect of carriers of all nationalities operating ships of any nationality from any Indian port provided that the central government may withdraw the said exemption if any complaint about the fixing of prices, limitation of capacity or sales, or allocation of markets or customers come to its notice. It is not evident from publicly available information at the time of writing whether the government has extended the aforesaid exemption or allowed it to lapse.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no defence or exemption for state actions, government-approved activity or regulated conduct except that the sovereign functions being carried out by the central government related to atomic energy, currency, defence and space are exempt from the purview of the Act. Further, the CCI has ruled that only those activities of the government that are not regulatory or policy formulation functions fall within the ambit of the Act.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Commission of India (CCI) may initiate an investigation suo moto, on reference by any statutory authority or receipt of information from any person, consumer or consumer association or trade association based on a prima facie satisfaction that the Competition Act 2002 (the Act) has been violated. On such satisfaction, the CCI directs the Director General (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 a prima facie order by the CCI, directing the DG to carry out an investigation. The DG typically sends out notices seeking exhaustive information from the charged parties, third parties and the informant, from time to time. 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 DG's report to the CCI, recommending whether a violation of the Act has occurred.

The CCI will consider such reports and may direct further investigation or forward a copy of the non-confidential version of the investigation report to the parties for comments. On receipt of such comments, the CCI will hear the parties and adjudicate the case by passing its final order.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CCI and the DG have the power to:

- summon and enforce the attendance of any person and examine such person under oath;
- require the discovery and production of documents;
- receive evidence on affidavit;
- issue commissions for the examination of witnesses or documents; and
- requisition any public record, document or copy of such record or document from any office.

Further, the DG may conduct search and seizure operations after obtaining a warrant from the chief metropolitan magistrate in Delhi.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Yes, there is cooperation with competition agencies in several jurisdictions. A proviso to section 18 of the Competition Act 2002 (the Act) states that the Competition Commission of India (CCI) may, for the purpose of discharging its duties or performing its functions under the Act, enter into any memorandum or arrangement with the prior approval of the central government, with any agency of any foreign country.

As per the information available on the CCI's website, the CCI has entered into memoranda of understanding or memoranda of cooperation with the following authorities :

- the Japan Fair Trade Commission;
- the Administrative Council for Economic Defence of Brazil;
- the Federal Trade Commission and the Department of Justice of the United States;
- the Director-General Competition of the European Union;
- the Federal Antimonopoly Service of Russia;
- the Australian Competition and Consumer Commission;
- the Competition Bureau of Canada; and
- the Competition authorities of the BRICS countries Brazil, China, and South Africa.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Information regarding the effect of cross-border cases on the investigation, prosecution and penalising of cartel activity in India is very scant.

The CCI has thus far issued only one decision involving cartel activity in a cross-border case, namely, *Suo Motu Case No. 07 (01) of 2014 in respect of Cartelisation in the supply of Electric Power Steering Systems against NSK Limited, Japan and Others*. It is noted from the public version of the order that, based on a leniency application filed by NSK Ltd Japan, the CCI ordered an inquiry into the matter on 17 September 2014. During the course of investigation by the Director General, JTEKT Corporation, Japan also filed a leniency application before the CCI. As per the CCI's decision in the matter dated 9 August 2019, the period of inquiry was from 2005 to only 25 July 2011, the date on which the Japanese Fair Trade Commission conducted an on-site inspection of four Japanese companies, including NSK and JTEKT, in connection with alleged cartelisation in another product. There are no further details regarding the said order of the CCI.

Considering the fact that NSK provided vital disclosures by submitting evidence of the cartel, which enabled the CCI to form a prima facie opinion regarding the existence of the cartel and cooperated genuinely, fully, continuously and expeditiously throughout the investigation and further proceedings before the CCI, it was granted the benefit of 100 per cent reduction in its penalty. Further, JTEKT, which was second to approach the CCI as a lesser penalty applicant was also granted the benefit of a 50 per cent reduction in penalty in terms of the Lesser Penalty Regulations. The concerned individuals of these companies, who were found liable for the infringing conduct, were granted reductions in penalty amount as granted to NSK and JTEKT respectively.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel proceedings are adjudicated by the Competition Commission of India (CCI) after considering the investigation report submitted by the Director General (DG) and the written submissions of the charged parties on the same, including on the quantum of penalty. Further, the charged parties are also accorded the opportunity to make oral submissions before the CCI.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden to prove that there is an 'agreement' among the competitors to fix prices or limit output or share markets or indulge in bid rigging is upon the DG. Thereafter, the burden shifts to the charged parties to prove that there is no agreement or that such agreement has not caused any appreciable adverse effect on competition. The level of proof required is only the balance of probabilities. As per the decisional practice of CCI, it is observed that the threshold for the same is very low.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Infringement can be established by using circumstantial evidence, in the absence of direct evidence of the actual anticompetitive 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 documentation for bids and such like, have been relied upon to infer and determine the existence of cartels, even when no direct evidence was found. An investigation into anticompetitive agreements may be instigated by the CCI based upon indirect and circumstantial evidence from which the intention and conduct of the parties can be inferred which

cannot be explained but for some sort of anticompetitive agreement or concerted action.

Appeal process

18 | What is the appeal process?

Any party aggrieved by any direction, decision or order of the CCI, passed under certain sections specified in the Competition Act 2002 (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 a copy of such direction, decision or order of the CCI. The NCLAT may entertain an appeal even after the expiry of the 60 days if it is satisfied that there was sufficient cause for not filing it within that period.

While an order of the CCI directing initiation of an investigation by the DG is not appealable, an order regarding the closure of a case or imposition of penalties on the enterprise or its officials for violation of the Act, among others, is appealable. The NCLAT may pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. In other words, there is a plenary review on the merits of fact and law. Although there are no fixed timelines for disposal of an appeal, the Act stipulates that every appeal shall be dealt with by the tribunal as expeditiously as possible and should endeavour to dispose of the appeal within six months of the date of receipt of the appeal.

Any party aggrieved by any direction, decision or order of the NCLAT may further prefer an appeal to the Supreme Court within 60 days from the date of receipt of a copy of such direction, decision or order of the NCLAT.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activities.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Apart from a cease-and-desist order, the Competition Commission of India (CCI) may impose a monetary penalty on an enterprise of up to three times its relevant profit for each year of the continuance of the cartel or 10 per cent of its relevant turnover for each year of the continuance of the cartel, whichever is higher.

Monetary penalties are invariably imposed in cases where an offence is made out.

However, the CCI has chosen not to impose any monetary penalty in a few recent cases, namely, in the *Automotive Bearings* case and in the bid-rigging case relating to the supply of composite brake blocks to the Indian Railways. In arriving at such a decision, the CCI considered that the companies not only cooperated but even admitted to their role in the anticompetitive agreement, the small annual turnover in the segment, the prevailing economic situation arising due to the outbreak of the covid-19 pandemic and the measures undertaken by the government of India to support the liquidity and credit needs of viable micro, small and medium-sized enterprises to help them withstand the impact of the current shock.

In a recent case, namely, *XYZ v Tamil Film Producers Council and Ors* (Case No. 7 of 2018), where the film producers' trade associations were found to have engaged in anticompetitive conduct of boycott calls to their respective members, the CCI refrained from imposing any monetary penalty, considering the limited participation of members and the limited duration of the strikes and boycott calls. Only a cease-and-desist order was passed, with a warning that any such future conduct would be construed as recidivism.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

No specific guidelines or sentencing principles for calculating penalties exist and it is largely at the subjective discretion of the CCI at the time of writing. However, the Competition (amendment) Bill, 2020 requires the CCI to publish guidance as to the appropriate amount of any penalty for any contravention under the Competition Act 2002 (the Act).

However, the CCI accords the opportunity to the parties to make written and oral submissions on the issue of quantum of penalties, which it considers. As a matter of principle, the CCI holds that penalties must be commensurate with the seriousness of the infringement and must also act as a deterrent.

Penalties are imposed on the basis of the relevant turnover or the relevant profit, as the case may be, of an enterprise. Individuals and officials of enterprises also receive penalties of up to 10 per cent of their average income of the preceding years as reflected in their respective income tax returns.

The Supreme Court of India, in *Excel Crop Care Limited v Competition Commission of India and Ors*, vide its order dated 8 May 2017, has laid down a non-exhaustive list of aggravating and mitigating factors to be considered while establishing the quantum of penalty:

- the nature, gravity and extent of the contravention;
- the role played by the infringer (ringleader or follower);
- the duration of participation;
- the intensity of participation;
- loss or damage suffered as a result of such contravention;
- market circumstances in which the contravention took place;
- the nature of the product;
- the market share of the entity;
- barriers to entry in the market;
- nature of involvement of the company;
- the bona fides of the company; and
- profit derived from the contravention.

The Apex Court also emphasised that these factors are only illustrative in nature and are to be taken into consideration while imposing an appropriate percentage of penalty.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The existence of a robust compliance programme at the time of the infringement would likely be considered as a mitigating factor by the CCI to grant a reduction in penalties but there is no certainty regarding the extent to which the CCI may grant any such reduction.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is no provision in the Act to the effect that individuals involved in cartel activity can be prohibited from serving as corporate directors or officers.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures in response to cartel infringement is not automatic but available as a discretionary sanction subject to a 'show cause' notice.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The Act provides for only civil sanctions.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Based on the Competition Commission of India's findings or the findings of the appellate tribunal in an appeal, a claim for compensation can be made by any authority or enterprise or any person for any loss or damage shown to have been suffered as a result of any contravention committed by an enterprise. However, to date, no case of damages has been decided by the appellate tribunal. As such, there is no clarity as to whether damage claims are limited only to direct purchasers or whether the indirect purchasers are also permitted to raise such claims, including the manner in which the pass-through would be dealt with. Similarly, there is no clarity as to whether the purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid. Further, there is no clarity also regarding the level of damages and costs that can be recovered.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

With the permission of the Appellate Tribunal, one or more such persons having the same interest may make an application for class action. Thereafter, the appellate tribunal shall give notice of the institution of the compensation case to all interested persons, either by personal service or public advertisement. Further, any person on whose behalf or for whose benefit the compensation case has been instituted may apply to the appellate tribunal to be made a party to such case.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme is available under the Competition Act 2002 (the Act). The elements of the leniency programme, which are contained in the Competition Commission of India (Lesser Penalty) Regulations 2009, stipulate that a leniency applicant must be included in the cartel and must make 'full, true and vital disclosures' to the Competition Commission of India (CCI) about the cartel. An applicant may be granted the benefit of a reduction in a penalty of up to 100 per cent if it is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion regarding the existence of the cartel, and the CCI did not have sufficient evidence to form such an opinion at the time of application.

The applicants subsequent to the first applicant may also be granted the benefit of a reduction in the penalty on making a disclosure by submitting evidence that, in the CCI's opinion, may provide significant added value to evidence already in the CCI's or Director General's (DG) possession. The applicant marked second in the priority status may be granted a penalty reduction of up to 50 per cent while the applicant marked as third, and all subsequent applicants in the priority status, may be granted a reduction of up to 30 per cent. The CCI has discretion in regard to the reduction in penalty, which may be exercised with due regard to:

- the stage at which the applicant has come forward with the disclosure;
- the evidence already in the CCI's possession;
- the quality of the information provided; and
- the full facts and circumstances of the case.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The applicants subsequent to the first applicant may also be granted the benefit of a reduction in the penalty on making a disclosure by submitting evidence that, in the CCI's opinion, may provide significant added value to evidence already in the CCI's or Director General's (DG) possession. The applicant marked second in the priority status may be granted a penalty reduction of up to 50 per cent while the applicant marked as third, and all subsequent applicants in the priority status, may be granted a reduction of up to 30 per cent. The CCI has discretion in regard to the reduction in penalty, which may be exercised with due regard to:

- the stage at which the applicant has come forward with the disclosure;
- the evidence already in the CCI's possession;
- the quality of the information provided; and
- the full facts and circumstances of the case.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The second cooperating party may be granted a penalty reduction of up to 50 per cent.

There is no provision for an 'immunity plus' or 'amnesty plus' option. However, the Draft Competition (Amendment) Bill, 2020 has proposed empowering the CCI to grant additional leniency to an enterprise if it discloses a second cartel in the first cartel proceedings in which it is already a leniency applicant (leniency plus).

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A leniency applicant may make an application containing all the material information as specified in the Schedule to the Competition Commission of India (Lesser Penalty) Regulations 2009, or may contact, orally or through email or fax, the designated authority for furnishing information and evidence relating to the existence of a cartel. However, no such application can be entertained if the DG has already submitted its investigation report to the CCI in the matter.

The CCI will consider information regarding a leniency application within five working days and shall mark a priority status to the applicant, which shall be conveyed to the party by the designated authority.

If the information received is oral or through email or fax, the CCI shall direct the applicant to submit a written application containing all the material information as specified in the schedule within a period not exceeding 15 days. The date and time of receipt of the application by the CCI shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.

Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the CCI.

Where the application, along with the necessary documents is not received within a period of 15 days or during the further period as may be extended by the CCI, the applicant may forfeit its claim for priority status and consequently for the benefit of to a lesser penalty.

Where the CCI is of the opinion that the applicant has not provided full and true disclosure of the information and evidence as referred to and described in the Schedule or as required by the CCI, from time to time, it may take a decision after considering the facts and circumstances of the case and upon providing an opportunity of hearing to such applicant, reject the application.

The CCI, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application, but merely on that basis it shall not entitle the applicant to a lesser penalty. Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the CCI.

Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the CCI and the procedure prescribed above, as in the case of the first applicant, shall apply mutatis mutandis.

Leniency applicants are required to:

- cease further participation in the cartel from the time of the disclosure, unless otherwise directed by the CCI;
- provide vital disclosure in respect of the violation;
- provide all relevant information, documents and evidence as may be required by the CCI;
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI; and
- not conceal or destroy any relevant document that may contribute to the establishment of the cartel.

Accordingly, the CCI may decline or withdraw leniency if the leniency applicant breaches any of the conditions stipulated above for grant of leniency.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Leniency applicants must furnish full, true and vital information regarding the existence of a cartel before the DG's report has been submitted 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

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The identity of the leniency applicants and the information, documents and evidence furnished by them are accorded confidentiality protection. However, the identity of an applicant or the information, documents and evidence submitted by them may be disclosed if:

- such disclosure is required by law;
- the applicant has agreed to such disclosure in writing; or
- there has been a public disclosure by the applicant.

In cases where the DG deems it necessary to disclose the information, documents or 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.

In cartel cases, the CCI issues two versions of its final order, namely, a non-confidential qua parties version and a public version with a view to protect and maintain the confidentiality of the parties.

Settlements

34 | Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Settlements, plea bargains or other negotiated resolutions are not available under the Act. However, the proposed draft of the Competition (Amendment) Bill 2020 introduces a system for settlements and commitments only in respect of offences relating to anticompetitive vertical agreements or abuse of dominance position, permitting the CCI to close the investigation on the basis of an application for settlement or commitment moved by the investigated party. The proposal is as follows.

- An application for settlement may be submitted at any time after the receipt of the DG's report but prior to a final order from the CCI. On the other hand, an application for commitments may be filed any time after a prima facie order initiating investigation has been passed but prior to the receipt of the DG's report by the CCI.
- The CCI may, at its discretion, choose to accept or reject applications for settlement or commitments after taking into consideration the nature, gravity and impact of the contravention and in accordance with the regulations to be framed in this regard under the Act.
- The CCI's order allowing or rejecting settlement or commitments will not be appealable to an appellate court.
- In addition, a settlement may also involve payment of a sum to be determined by the CCI which can also specify the way the terms of settlement or commitments will be implemented and monitored.
- Further, the order accepting settlement or commitments can be revoked if the CCI concludes that the applicant has not made full and true disclosure or there has been a material change in the facts.

Corporate defendant and employees

35 | When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When immunity is granted to an enterprise, its current and former employees are granted a reduction in penalties similar to the enterprise.

Dealing with the enforcement agency

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity applicant must reach out to the CCI at the earliest and make disclosure of the full facts. Irrespective of their marker status, the subsequent cooperating parties must cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The Director General (DG) may disclose any information or evidence to a charged party if such disclosure is deemed necessary by the DG for the purposes of the investigation. If the information or evidence is subject to any claim to confidentiality but the party has not agreed to any such disclosure, even then the DG, after recording the reasons in writing and taking prior approval from the Competition Commission of India (CCI), may make such disclosures. The non-confidential version of the DG's report is shared with parties to the case. The CCI may also grant access to any confidential information to the parties, should this be deemed necessary for the purposes of the Competition Act 2002 (the Act).

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent employees under investigation in addition to the corporation that employs them. In cases where there may be a conflict in the stand or submissions of the past or present employees with that of the corporation, it would be advisable to obtain independent legal advice or representation.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants provided there is no conflict or conflict waiver has been granted by the corporate defendants.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no prohibition in this regard under the Competition Act 2002 (the Act); accordingly, a corporation may pay the legal penalties imposed on its employees as well as their legal costs.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or penalties are not tax-deductible. Similarly, damages awards are also not tax-deductible as they are a consequence of punitive action for violating the Act.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

As per the decisional practice of the CCI dated 31 January 2018 in Case Nos. 7 and 30 of 2012 against Google LLC for abuse of dominant position, the CCI has not taken into account any penalties imposed upon Google in other jurisdictions. It is, therefore, likely that individuals or companies

that have been penalised elsewhere may be exposed to double jeopardy in India.

In its fining decisions, the CCI considers only the direct sales of the companies being fined.

As regards the issue of overlapping liability for damages in other jurisdictions, there is no clarity as no damages decision has been handed down thus far in India under the Act. It is, therefore, yet to be seen whether the Appellate Tribunal, which is empowered to decide damages and compensation claims under the Act, will take into account overlapping liability for damages in other jurisdictions or not.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The optimal way to get the fine down is to file a leniency application. Demonstrating to the CCI that the infringement has occurred despite the implementation of a very credible compliance programme may also help. Implementing the requisite corrective and remedial measures voluntarily may also help in getting the fine down. Constructive and cooperative conduct during the course of the investigation may also facilitate getting the fine down. Apart from the above, every such fact and circumstance that may justify the reduction of a fine may also help in getting the fine down.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Over the past year, the Competition Commission of India (CCI) has passed certain key orders, described below.

In Re: M/s International Subscription Agency v Federation of Publishers' and Booksellers' Associations in India (Case No. 33 of 2019)

The Informant and complainant alleged that the Good Offices Committee of the Federation of Publishers and Booksellers Association in India (FPBAI) have directed FPBAI's members to restrict discounts to purchasers, which reduced price competition in the market for the supply of books. The DG found that FPBAI's 'Terms of Supply for the Booksellers and Subscription Agents' restricted members from offering a discount of more than 10 per cent to institutional buyers. Further, FPBAI also advised members not to respond to procurement advertisements if they were not aligned with the expectations of FPBAI. The DG also found notices issued by FPBAI to its members who had refused compliance with the Discount Control Policy and the advisories on procurement advertisements.

The CCI concluded, vide its order dated 23 February 2021, that the Discount Control Policy amounted to anticompetitive price fixing because it indirectly determined the sale prices of books, journals, etc. Further, FPBAI's 'advisories' against participation in procurement contracts was also found to be anticompetitive given that it limited the supply of books, journals, etc. in India.

In Re: Alleged Cartelisation in the Airlines Industry (Case No. 3 of 2015)

The CCI investigated the pricing mechanism of airlines based on a reference made by the secretariat of the lower house of the parliament of India, alleging cartel in the airline industry. On investigation, a degree of stability in the market shares of Jet Airways, Indigo, SpiceJet, GoAir and Air India, and substantial similarities in the fares charged by the airlines was observed. However, the CCI found that the software programs could not be modified to capture unforeseen events which have a significant bearing on price fluctuations. It accordingly noted that revenue management personnel played a pivotal role in the manual determination of fares, and software merely facilitated such decision-making. The CCI also observed that the airlines followed different bucket systems and there was no fixed inventory allocated to each fare bucket. The price and inventory allocated to fare buckets changed continually due to changes in demand and competition prices, but only one fare was available to customers at a given point.

The CCI agreed, vide its order dated 22 February 2021, with the DG's findings that price parallelism in this case was a natural outcome owing to the real-time monitoring of prices of competitors and there was healthy price competition to attract passengers. The CCI further emphasised that parallel conduct was only actionable under the Competition Act 2002 (the Act) when such conduct was not carried out independently and attributable to information exchange between competitors. It was held by the CCI that an exchange of communication to be in violation of the Act could not be established.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Competition Law review Committee (CLRC) has carried out an extensive review of the existing competition law framework in India and made various recommendations to further strengthen the framework. Many of the recommendations are found in the draft Competition (Amendment) Bill, 2020, which seeks to amend the Act.

Some of the proposals with respect to cartels in the bill are:

- the definition of a cartel is proposed to be expanded to include a buyer's cartel;
- entities, though not engaged in identical or similar trade, shall be presumed to be part of an anticompetitive agreement (read cartel) if they actively participate in the furtherance of such an agreement;
- a leniency applicant may be permitted to withdraw its application for lesser penalty but the CCI and DG shall be entitled to use any evidence submitted by it save and except its admission;

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- where, during the course of investigation, a leniency applicant who has disclosed a cartel makes full, true and vital disclosure with respect to another cartel in which it is involved and such disclosure results in the CCI issuing an order of investigation into such another cartel, then the CCI may impose a lesser penalty in respect of the cartel already being investigated, without prejudice to such entity obtaining a lesser penalty in respect of the newly disclosed cartel; and
- persons involved in a cartel agreement may receive a penalty not exceeding 10 per cent of their income for each year of the continuance of such agreement.

Japan

Kaoru Hattori, Yoshitoshi Imoto and Ryohei Tanaka

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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) (AMA) is the legislation that prohibits cartels. In addition to the prohibition of cartels and the administrative and criminal sanctions under AMA, collusion in a public bid could also be subject to imprisonment, fine or both under the Criminal Code.

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 Japan Fair Trade Commission (JFTC) is the primary and sole enforcement agency to investigate cartels under the AMA. In addition to the JFTC's administrative procedures, the Public Prosecutors' Office is in charge of criminal procedures for cartels regulated under the AMA if and only if the JFTC files a criminal accusation with the Public Prosecutors' Office.

As for collusions in a public bid, a criminal offence under the Criminal Code, the Public Prosecutors' Office has the authority to investigate such offences on its own initiative and indict a defendant to a criminal court.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

In 2019, the amendment to the AMA (2019 Amendment) was enacted and the 2019 Amendment became fully effective on 25 December 2020.

The important changes under the 2019 Amendment are the increase in the amount of administrative surcharge the JFTC can impose, and the improvement of the leniency programme.

The increase in the administrative surcharge is achieved by extending the maximum period subject to the surcharge from three years to 10 years, and broadening of the scope for the basis of the surcharge calculation.

Under the new leniency programme, the reduction rate is determined not only by the order in which an applicant applies for leniency, but also by the applicant's degree of cooperation with the JFTC's investigation. In addition, to protect a leniency applicant's communication with its lawyers to ensure effective cooperation to maximise reduction rate, the JFTC has established something akin to a 'claw back' procedure, through which the JFTC has to return to the alleged cartelists documents and data containing confidential communications between the alleged cartelists and their lawyers. The investigators engaged in the investigation of the relevant case cannot have access to such documents or data.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Under the AMA, an agreement or understanding among competitors to eliminate or restrict competition that substantially restrains competition in a particular field of trade is prohibited as an unreasonable restraint of trade.

Cartels and bid rigging are typical examples of unreasonable restraint of trade. Agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels.

For cartel cases, the JFTC seems to have enforced the AMA as though the law prescribes that cartels are per se illegal. The JFTC has not accepted any arguments by defendant companies that a cartel is not illegal because it did not substantially restrain competition.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures on a contract basis and strategic alliances among competitors are also subject to the cartel laws. They are prohibited if they substantially restrain competition in the relevant market.

Although the JFTC seems to have adopted a 'per se illegal' approach in cartel and bid-rigging cases, the JFTC has taken a 'rule of reason' approach towards joint ventures formed on a contract basis and strategic alliances among competitors.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) governs conduct by 'entrepreneurs', which includes both corporations and individuals who operate a commercial, industrial, financial or other business. Trade associations are also subject to the AMA.

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 AMA contains no provision expressly setting forth the jurisdictional scope of the Japan Fair Trade Commission (JFTC). However, the JFTC considers that it has jurisdiction over conduct that has an effect on the Japanese market, irrespective of where such activities take place.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Export cartels among exporters filed with the relevant ministries under the Export and Import Transaction Law are exempted from the AMA if the relevant conduct does not involve unfair trade practices under the AMA.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The AMA applies to all businesses and there are no industry-specific infringements under the AMA. However, there are certain guidelines dealing with the cartels formed by certain trade associations, such as agricultural cooperatives.

There are systems to exempt cartels from the AMA based on the applicable business sector-specific regulations governed by other ministries (eg, the joint operation of non-life insurance, airlines and maritime transport). However, there are no industry-specific defences.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The system that permits exemptions from the AMA based on applicable sector-specific regulations governed by other ministries, in principle, requires approval from the relevant minister, and consent from and notice to the JFTC. Other than those exemptions explicitly provided for under the applicable laws, there is no defence on the basis of approval from ministries and governmental agencies.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

When the Japan Fair Trade Commission (JFTC) discovers a potential cartel, the JFTC first conducts an internal feasibility study and determines whether it will formally initiate an investigation. Once it decides to investigate, the first step by the JFTC is typically a dawn raid. Recently, the JFTC has issued written requests for information instead of a dawn raid, especially in cases where the relevant enterprise is a foreign company.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) as part of the compulsory investigation of criminal offences, typically where the suspects have repeatedly violated the AMA, or where the suspects fail to comply with a cease-and-desist order and it is difficult to correct their conduct through the JFTC's administrative measures.

If, as the result of the investigation, the JFTC is convinced that the alleged conduct constitutes a criminal offence, it will file a criminal accusation with the Public Prosecutors' Office.

Administrative investigations by the JFTC

If necessary, the JFTC may do the following during an administrative investigation on a compulsory basis:

- order persons involved in a case or any other relevant person to testify or to produce documentary evidence;
- order experts to give expert testimony;
- issue production orders; and
- conduct a dawn raid.

The JFTC usually conducts dawn raids in cartel or bid-rigging cases. The presence of a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct a dawn raid.

The JFTC removes originals of documents and materials held at the company's office during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntary basis.

It is usual for the JFTC to question implicated employees at the same time as the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of the review of materials and collection of information from other persons, to request such persons to respond to questions.

Further, the JFTC usually issues an order requesting certain information and a production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that such information, documents or both be submitted on a voluntary basis.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Yes. The Japan Fair Trade Commission (JFTC) has close relationships with most of the authorities in major jurisdictions. For example, it signed with its US counterparts the Agreement Concerning Co-operation on Anticompetitive Activities. Similar agreements exist with the European Commission and Canada.

Moreover, the JFTC has also concluded memoranda on cooperation with competition authorities in China, the Philippines, Vietnam, Brazil, India and Korea.

The JFTC may also exchange its views with other competition authorities without disclosing confidential information that the JFTC seized during its investigations, to the extent that the discussions do not breach its confidential obligation as a public servant. If the JFTC discovers an alleged cartel conducts through a leniency application, the JFTC may ask the applicant to issue a waiver to allow the JFTC to have extensive information exchange with other competition authorities.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Although the JFTC tends not to make public announcements with regard to the scope and degree of the information actually exchanged with other competition authorities pursuant to the above agreements for individual cartel cases, there have been a number of cases in which the competition authorities have apparently coordinated their investigations on a global basis.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

If the Japan Fair Trade Commission (JFTC) preliminarily believes that the alleged conduct constitutes a cartel and that criminal sanctions are appropriate, it files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) will be imposed on the corporation and individuals through the criminal procedures in the same manner as other criminal cases.

If the JFTC preliminarily determines that the alleged conduct constitutes a cartel and intends to issue a cease-and-desist order or a surcharge payment order for the administrative surcharge, or both, the JFTC is required to provide a defendant company with an opportunity to submit its opinion against the JFTC's preliminary fact findings and the legal evaluation of the facts. The JFTC will take into account such opinion if it proceeds to issue a cease-and-desist order or a surcharge payment order.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

In a criminal case, the burden of proof lies with the public prosecutors, who must prove that the alleged cartel constitutes a violation of the AMA beyond reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC's administrative decisions), the JFTC must prove the same by the preponderance of evidence standard.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. Indirect or circumstantial evidence is considered to be sufficient to prove a cartel.

Appeal process

18 | What is the appeal process?

After the JFTC issues a cease-and-desist order, a surcharge payment order for an administrative surcharge, or both, the defendant corporation has six months after the order is served to file a complaint with the Tokyo District Court to seek a judgment to quash the order. A judgment rendered by the Tokyo District Court can be further appealed to the Tokyo High Court. Tokyo High Court's judgment can be referred to the Supreme Court and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

The judicial court shall not be bound by the JFTC's findings of fact and a defendant company may submit new evidence to the judicial court proceedings under the current AMA.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Cartel activity is subject to a criminal fine of up to ¥500 million for a corporation, and imprisonment with hard labour for up to five years, a fine of up to ¥5 million, or both, for an individual (such as officers, directors or employees who played a central role in a cartel).

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Administrative sanctions – JFTC enforcement

Cartel activities are subject to a cease-and-desist order and an administrative surcharge.

Cease-and-desist order

The Japan Fair Trade Commission (JFTC) can order members of a cartel to cease and desist the cartel activities or to take any other measures necessary to eliminate the cartel activities.

The cease-and-desist order is effective upon service to its recipient. The recipient must comply with the terms of the order even if it is challenging the order, unless the enforcement of such order is suspended by a decision by the court.

Administrative surcharge

The amount of the administrative surcharge is calculated by taking the sum of the following:

- 10 per cent (or 4 per cent for certain small-size entrepreneurs) of the sales amount of the goods or services subject to the cartel for the period of the cartel;
- 10 per cent (or 4 per cent for certain small-size entrepreneurs) of the amount of consideration paid to businesses closely related to the goods or services subject to the cartel, such as the manufacturing, sale or managing of all or part of the relevant goods or services; and
- an amount equivalent to the monetary or any other property income from another person obtained by the participant in the cartel in relation to the failure to supply or purchase the goods or services subject to the cartel.

For cartel members that have repeatedly been found in violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) by engaging in a cartel or a private monopolisation and have been subject to an administrative surcharge within the past 10 years, the administrative surcharge amount increases by 50 per cent. The 50 per cent increase in administrative surcharge also applies to certain first-time violators if its wholly owned subsidiary has engaged in a cartel or a private monopolisation within the past 10 years, or it merged with a company or acquired the relevant business from another company that has engaged in a cartel or a private monopolisation within the past 10 years.

In addition, the administrative surcharge amount will increase by 50 per cent if a participant in a cartel played a leading role, including such activities as designating prices, volumes to be supplied, volumes to be purchased, market shares or customers, or demanding, requesting or soliciting other cartel members to join or not to withdraw from the

cartel, conceal or falsify evidence, submit false material to the JFTC or not to apply for leniency.

Further, if the entrepreneur that played a leading role in the cartel has repeatedly acted in violation of the AMA by engaging in a cartel or a private monopolisation within the past 10 years, the administrative surcharge will be doubled instead of an increase by 50 per cent.

The statutory limitation is seven years from the termination of cartel activities.

Private actions – private enforcement

A party (such as a competitor or a customer) who is harmed by a cartel may initiate a civil action to recover damages.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Criminal sentencing principles or guidelines of the public prosecutor's office are not publicly available. However, it is understood that the criminal penalties on defendant companies and individuals for violating the AMA seem to be based on:

- the scale of the conduct (including the size of the business and market, the number and corporate rankings of the individual participants);
- the scale of its effects (effects on the business and the market); and
- the duration and maliciousness of the conduct (including whether the participants played a leading role, and whether taxpayers' money was involved).

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There are no guidelines on the evaluation of compliance programmes in Japan. Having an adequate compliance programme in place at the time of the cartel conduct does not seem to reduce criminal penalties or administrative surcharges.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Due to the disqualification provisions under the Company Act, individuals involved in cartel activities are prohibited from serving as corporate directors or officers if they are sentenced to imprisonment or imprisonment with hard labour and have not completed their sentences, or their sentences are under appeal but not yet overturned (excluding individuals for whom the execution of the sentences is suspended).

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Each ministry, governmental agency and other public body has its own rules that set forth the requirements to take part in procurement procedures. The rules may vary and may not always be publicly available. However, based on our experience, we understand that many public procurement procedure rules contain a clause that prevents entrepreneurs from participating in procurement procedures for a certain period of time if they are found to have taken part in a cartel.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Both administrative surcharge and criminal penalties can be imposed on the same entrepreneur based on the same conduct. If both are imposed on the same entrepreneur for the same conduct, an amount equivalent to 50 per cent of the criminal fine shall be deducted from the administrative surcharge.

A plaintiff may bring a civil action in court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Damages available to plaintiffs of private damage claims are limited to actual damages that have a causal relationship with the cartel conduct. Treble damages or punitive damages are not available under Japanese laws.

As in any civil tort cases, the plaintiff bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- the amount of damages (including very modest lawyers' fee);
- a legally sufficient causal relationship between the damages and the cartel conduct; and
- the negligence or willfulness of the defendant.

Indirect purchasers or purchasers who acquired affected products from non-cartel members may file an action against cartelists. However, whether a court would award damages depends on whether they can prove the causal relationship between the damage and the cartel conduct. Given the lack of precedents, it is unclear how one can prove the causal relationship between the damage to indirect purchasers or purchasers who acquired affected products from non-cartel members and the cartel conduct. That said, a court could possibly award damages based on damage claims brought by the plaintiffs if the plaintiffs can prove that the cartel members foresaw or should have foreseen that the price increase would be passed on to indirect purchasers or parallel increases.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not possible. Each plaintiff must file its complaint individually.

That said, multiple claimants may bring claims before the civil court proceedings by filing a complaint as co-plaintiffs if the rights or obligations that are the subject matter of the lawsuit are common to the co-plaintiffs, are based on the same factual or statutory cause of action,

or are of the same kind or based on the same kind of factual or statutory cause of action. Also, a plaintiff may appoint another co-plaintiff as the representative of the plaintiff under the 'appointed party system' provided by the Civil Procedure Law.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes. The leniency programme provides immunity from administrative surcharges to the first applicant that filed a report to the Japan Fair Trade Commission (JFTC) before the JFTC has initiated its investigation and a reduction of the same for the applicants that filed reports later.

The significant changes to the leniency programme took effect on 25 December 2020. If an applicant entirely ended its cartel conduct and completed its application prior to 25 December 2020, the leniency programme before the amendment will apply. Otherwise, the amended leniency programme will apply.

The leniency programme exempts the first applicant before the initiation of an investigation by the JFTC from the administrative surcharge. Furthermore, securing the first application before the initiation of an investigation by the JFTC in effect functions as an exemption from criminal sanctions because of the JFTC's exclusive right to decide whether to file an accusation with the Public Prosecutors' Office. However, the immunity application will not relieve the first applicant of any civil liability.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The significant changes to the leniency programme took effect on 25 December 2020. If an applicant entirely ended its cartel conduct and completed its immunity or leniency application with the JFTC prior to 25 December 2020, the leniency programme before the amendment will apply. Otherwise, the amended leniency programme will apply.

Under the amended leniency programme:

- the second applicant that filed before the initiation of an investigation by the JFTC will receive a 20 per cent base reduction of the administrative surcharge;
- the third through fifth applicants that filed before the initiation of an investigation by the JFTC will receive a 10 per cent base reduction of the administrative surcharge;
- the sixth and subsequent applicants that filed before the initiation of an investigation by the JFTC will receive a 5 per cent base reduction of the administrative surcharge, meaning that there is no limitation on the number of leniency applicants in this category; and
- up to three applicants (who must be within the fifth if counted together with all of the preceding applicants) that filed on or after the initiation of an investigation by the JFTC will receive a 10 per cent base reduction of the administrative surcharge. Otherwise, applicants that filed on or after the initiation of an investigation by the JFTC will receive a 5 per cent base reduction of the administrative surcharge.

On top of the base reduction, depending on the level of cooperation with the JFTC investigation, the second and subsequent applicants that filed for leniency before the initiation of an investigation by the JFTC may further receive a reduction of up to 40 per cent, while applicants that filed for leniency on or after the initiation of an investigation by the JFTC may further receive a reduction of up to 20 per cent.

As opposed to an immunity application, the second and subsequent applications cannot enjoy any exemption from criminal sanctions. Also, the second and subsequent applications will not relieve those applicants of any civil liability.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A leniency programme is available for subsequent parties after the first to report.

There is no 'immunity plus' or 'amnesty plus' concept under the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA). There is no exemption or mitigation from criminal and civil liability for the second-in and subsequent parties.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

No deadline is provided under the AMA with regard to an application for immunity. However, as for the second and subsequent applicants, for them to be eligible for 'leniency before the initiation of an investigation', they need to file an application as soon as possible and then complete the application by submitting detailed information and related materials before the JFTC initiates its investigation (typically by a dawn raid). If the initiation of the investigation occurs before the completion of the application, such application will not be treated as leniency 'before the initiation of an investigation'.

Furthermore, as for a leniency application after the initiation of an investigation by the JFTC, the applicant must complete the application within 20 business days from the date when the JFTC initiated its investigation.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Full cooperation is required for the JFTC to grant immunity (ie, all of the relevant information must be disclosed and all of the evidence available to the immunity applicant must be produced for the JFTC). There is no difference in the required level of cooperation among the immunity applicant and the second and subsequent leniency applicants.

That said, the degree of cooperation has now become a significant factor for the second and subsequent applicants for them to enjoy the statutorily designated maximum discount on administrative surcharges. More specifically, they need to demonstrate that their reports satisfy the following qualitative cooperation elements as much as possible: (1) 'specific and detailed'; (2) 'comprehensive' with regard to the items listed in the leniency applicants' reporting rules such as the goods or services in question, how the collusive conduct occurred and was implemented, participants, temporal scope of the conduct and so forth; and (3) supported by evidence and materials submitted by them.

The JFTC will determine the discount rate depending on how many qualitative cooperation elements in (1) through (3) above the second and subsequent applicants have satisfied through their reports. The table below shows the cooperation credit rates (on top of the base reduction rate):

Number of elements satisfied	Applicants before the initiation of investigation by the JFTC	Applicants after the initiation of investigation by the JFTC
3	40 per cent	20 per cent
2	20 per cent	10 per cent
1	10 per cent	5 per cent

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

There is no specific confidentiality rule in cases of immunity and leniency. Before the JFTC publicises a case result, the JFTC tends to accept the entrepreneur's secret designation relatively broadly. There is no difference as to the level of confidentiality protection between an immunity applicant and subsequent cooperating parties.

Furthermore, upon the publication of orders, the JFTC discloses the names of the immunity and leniency applicants for which administrative surcharges do not apply or have been reduced, and the exemption or reduced ratio thereof under the leniency programme if it issues a surcharge payment order.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Criminal Procedure has newly introduced the plea bargaining system for certain types of crimes including violation of the AMA in 2018. Defence lawyers of a criminal suspect or a criminally indicted defendant are required to be involved in negotiations on the terms of a plea agreement and the defence lawyers' consent to the terms of the plea agreement must be obtained. Because the plea bargaining system is only for criminal cases, it does not apply to the JFTC's administrative investigations.

Apart from the foregoing, no settlements, commitment procedure or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are permitted.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If immunity is granted to a corporate defendant, its current and former directors, officers or employees who were involved in the cartel conduct of such corporate defendant may also be exempt from criminal accusations. Individuals are not subject to the administrative surcharge regardless of whether their company is an immunity applicant or a leniency applicant.

There is no distinction of treatment under the AMA between former employees and current employees.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A party who is considering filing an application for immunity or leniency can make a prior consultation on an anonymous basis with the JFTC by at least identifying the specific goods or services for which a collusive agreement might have been formed. If the party asks the JFTC about the expected rank (marker) of the leniency application, JFTC discloses the expected rank. If that party actually files an application before the JFTC initiates its investigation, that party may use a very simple format for the purposes of the marker. The JFTC will inform the applicant of the deadline for submission of evidence and materials to complete the application. The applicant must complete the report using another reporting format with supporting evidence and materials before the designated deadline. When the JFTC officially decides to initiate the investigation it will issue documents to the applicants that filed before the initiation of the investigation describing the provisional ranks of their applications. On the other hand, applicants after the JFTC initiates the investigation must use a more detailed report format from the outset. It is typically the case that applicants after the JFTC initiates the investigations file an application as soon as possible with the JFTC and then supplement the application with the supporting evidence and materials on a rolling basis, but by no later than the statutorily provided deadline of 20 business days from the investigation start date.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

When the Japan Fair Trade Commission (JFTC) provides a defendant company with an opportunity to submit its opinion against the JFTC's fact findings and the legal evaluation of the facts before the JFTC issues a cease-and-desist order or a surcharge payment order, the defendant company may request that JFTC allow the defendant company to review or transcribe the evidence that supports the JFTC's fact findings (eg, diaries seized in the course of a dawn raid, or statements signed by an implicated individual during interviews). Some of the evidence has redacted portions to keep the business secrets of the holder of the evidence and keep the identity of the individuals confidential.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Yes. Unless there is a conflict of interest or a difference in the defence strategy between the corporation and its employee(s), the counsel who represents the corporation may also represent that corporation's employees during the process of investigation by the JFTC. However, in practice, if it becomes likely that the case will evolve into a criminal case, key persons who were directly involved in the conducts should be represented by independent counsel.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Unless a conflict of interest exists, it is theoretically possible. However, it has become very difficult to jointly represent multiple suspected companies due to lawyers' ethical rules because the conflict typically arises when each of the corporate defendants considers whether to file an immunity or a leniency application and consults with their 'common' counsel.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation may pay legal fees and expenses to defend its employees. However, it could trigger the liability of the management of the corporation under the shareholders' derivative suits unless such payment is for the purpose of and results in the mitigation of the company's liability. A company may not bear the criminal penalties on behalf of individual directors, officers or employees.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

No. Neither criminal fines nor administrative surcharges are tax-deductible. Income tax is not imposed on the compensation awarded to a plaintiff due to the conduct in violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA).

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There are no such rules in Japan that take into account any penalties imposed in other jurisdictions.

In private damages claims 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 proceedings in other jurisdictions.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

To lower the fine, the suspected corporation must cease the cartel conduct and any dubious information exchange with its competitors as soon as possible to avoid any additional surcharge exposure in the future. If the suspected corporation finds that the conduct in question actually constitutes cartel activity, it needs to seriously consider filing an application for immunity or leniency. Once it files an application with the JFTC, applicants need to fully cooperate with the JFTC's investigation.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In December 2020, the Japan Fair Trade Commission issued cease-and-desist orders and surcharge payment orders in connection with a bid-rigging case in the construction of new stations for maglev trains. Four of the biggest construction companies in Japan were involved. Criminal cases proceeded in parallel since 2018 and among the four companies, two of them (that each won the tenders for two stations) had already admitted their wrongdoing and had been found guilty in 2018 in their criminal trial. The other two companies with no turnover from the tenders vigorously disputed the prosecutors' case, primarily arguing that the customer, JR Central, did not expect any competition and therefore their conduct did not constitute a cartel activity. The Tokyo District Court issued judgment against the two disputing companies in March 2021 and found that they were also guilty because JR Central had the intention of having four companies compete with each other and lowering the contract price. This case was unique in that none of the four companies was a whistle-blower and two of them disputed (and are still disputing) the decisions of both administrative and criminal cases.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Competition Act 2010 (the Competition Act), which came into effect on 1 January 2012, aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers, and to provide for matters connected therewith. The Competition Act has introduced general competition law for all markets in Malaysia, except those carved out for sector regulators under the Communications and Multimedia Act 1998 in relation to network communications and broadcast sectors, and the Energy Commission Act 2001 in relation to the energy sector. The Gas Supply (Amendment) Act 2016 also introduced general competition law provisions to the Gas Supply Act 1993, which are applicable to the Malaysian gas market. There is an exclusion for upstream oil and gas activities.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012, which came into force on 1 April 2013, has introduced general competition law that 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 notes or notices as it considers appropriate. Following public consultation, MAVCOM issued the following guidelines on competition in the aviation service market:

- Guidelines on Aviation Service Market Definition (published on 19 January 2018);
- Guidelines on Anticompetitive Agreements (published on 19 January 2018);
- Guidelines on Abuse of Dominant Position (published on 19 January 2018);
- Guidelines on Substantive Assessment of Mergers (published on 20 April 2018);
- Guidelines on Notification and Application Procedure for an Anticipated Merger or Merger (published on 20 April 2018);
- Guidelines on the Determination of Financial Penalties (published on 22 June 2018); and
- Guidelines on Leniency Regime (published on 22 June 2018).

Following the amendment to the Gas Supply Act 1993, the Energy Commission has published Guidelines on Competition for the Gas Market in relation to Market Definition, Anticompetitive Agreements and Abuse of a Dominant Position.

MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010 and had carried out a public consultation on 16 May 2016 on the proposed amendments, but the proposed amendments have yet to be tabled in parliament.

In its early days of enforcement, MyCC has concentrated its efforts on competition advocacy and issuing guidelines to shape its interpretation of the substantive provisions of the Competition Act and procedural requirements. MyCC had issued the following guidelines following public consultation:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Guidelines on Financial Penalties (published on 14 October 2014);
- Guidelines on Leniency Regime (published on 14 October 2014); and
- Guidelines on Intellectual Property Rights and Competition Law (published 4 May 2019).

The guidelines are non-exhaustive and do not set a limit on MyCC's powers of investigation and enforcement under the Competition Act.

MCMC has 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.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The Competition Act does not have a merger control regime. Therefore, joint ventures and strategic alliances would not require approval from MyCC under the Competition Act. That said, joint ventures and strategic alliances must not violate the Chapter 1 Prohibition on anticompetitive agreements.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The competition law provisions in the Competition Act 2010 (the Competition Act) apply to agreements between enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This means that the competition law provisions in the Competition Act do not apply to individuals.

The provisions in the Competition Act on investigation powers and enforcement, however, apply to individuals, corporations and other entities.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes. The Competition Act applies to commercial activity transacted outside Malaysia that has an effect on competition in any market in Malaysia.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such express exemption or defence under the Competition Act. There have also been no reported cases of anticompetitive conduct that affect only customers or other parties outside Malaysia.

The Competition Act applies to any commercial activity within and outside Malaysia. For commercial activities transacted outside Malaysia, the Competition Act would only apply if the conduct has an effect on competition in any market in Malaysia.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Competition Act applies to any commercial activity both within and outside of Malaysia that has an effect on competition in any market in Malaysia. The definition of 'commercial activity' does not include:

- any activity, directly or indirectly in the exercise of governmental authority;
- any activity conducted based on the principle of solidarity; or
- any purchase of goods or services not for the purposes of offering goods and services as part of economic activity.

Commercial activities regulated by the Communications and Multimedia Act 1998, Energy Commission Act 2001, the Petroleum Development Act 1974, the Petroleum Regulations 1974, the Gas Supply Act 1993 and the Malaysian Aviation Commission Act 2015 are excluded from the application of the Competition Act.

Under the Communications and Multimedia Act 1998, licensees must not engage in any of the following:

- conduct that has the purpose of substantially lessening competition in a communications market;
- agreements that provide for rate fixing, market sharing or boycotts; or
- tying or linking arrangements.

A licensee that has been determined to be in a dominant position can be directed to cease conduct that has the effect of substantially lessening competition in a communications market.

The Competition (Amendment of First Schedule) Order 2016 provides further exclusion on any activities regulated under the Malaysian Aviation Commission Act 2015.

The Malaysia Competition Commission (MyCC) may grant individual or block exemptions where the criteria in section 5 of the Competition Act have been satisfied. Exemptions are made public. They will be made for a limited time period and may be subjected to conditions. MyCC has granted a conditional block exemption to liner shipping agreements in respect of voluntary discussion agreements and vessel sharing agreements made within Malaysia or that have an effect on the liner shipping services in Malaysia.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The Competition Act applies to commercial activities. The definition of 'commercial activity' in the Competition Act expressly excludes:

- any activity, directly or indirectly in the exercise of governmental authority;
- any activity conducted based on the principle of solidarity; or
- any purchase of goods or services not for the purposes of offering goods and services as part of economic activity.

An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly is excluded from the application of the Competition Act insofar as the Chapter 1 Prohibition and Chapter 2 Prohibition (with respect to an abuse of dominant position) would obstruct the performance, in law or in fact, of the particular task assigned to the enterprise.

In addition, the following activities are not subject to Chapter 1 Prohibitions or Chapter 2 Prohibitions:

- an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement; and
- collective bargaining activities or collective agreements in respect of employment terms and conditions, which are negotiated or concluded between parties that include both employers and employees or organisations established to represent the interests of employers or employees.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Trigger

The Malaysia Competition Commission (MyCC) may conduct any investigation it thinks expedient where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Competition Act 2010 (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 several market reviews, including the Market Review for Selected Transportation Sectors in Malaysia published in October 2021.

In December 2017, MyCC carried out a review of the pharmaceutical sector in Malaysia that examined industry issues such as:

- market structure and supply chain issues;
- the level of competition among players at different levels of the supply chain;
- identification of anticompetitive practices; and
- whether governmental intervention in the industry would be necessary.

MyCC carried out a review of building materials in the construction industry. The specific objectives of the market review include:

- determine the market structure, supply chain and profile of industry players that are involved in the manufacturing and distribution of selected key building materials;
- identify the prices of selected key building materials at the manufacturing and wholesale levels;
- assess competition in the manufacturing and distribution levels of selected key building materials;
- identify anticompetitive practices among the industry players in the manufacturing and distribution levels of selected key building materials; and
- determine the extent of market distortion and whether government intervention is necessary for curbing anticompetitive conduct in the selected key building materials' market.

MyCC also carried out a market review of five selected sub-sectors of the food sector and the services sector (wholesale and retail for selected products).

Collection of evidence

MyCC has wide powers of investigation. It may request information by written notice and conduct unannounced raids.

Notice of proposed decision

If, after the completion of the investigation, MyCC proposes to take enforcement action, it must give written notice of its proposed infringement decision to each enterprise that may be directly affected by the decision. The notice will:

- set out the reasons for MyCC's proposed decision in sufficient detail to enable such enterprise to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
- set out the penalties or remedial action; and
- present an opportunity for the enterprise to make written or oral representations to MyCC and the deadline for such representations.

MyCC may also conduct hearings to determine whether an enterprise has infringed the Chapter 1 Prohibition.

Decision

If MyCC determines that there has been an infringement, it must notify the persons affected by the decision and require that the infringement be ceased immediately. It is empowered, among other things, to impose a financial penalty of up to 10 per cent of the enterprise's worldwide turnover during the period of the infringement.

If MyCC finds that there is no infringement, it must give notice of such decision and specify its reasons.

Investigative powers of the authorities

12 What investigative powers do the authorities have? Is court approval required to invoke these powers?

MyCC has wide powers to collect evidence and may direct a person to give MyCC access to his or her books, records, accounts and computerised data. However, these powers are subject to lawyer-client privilege and may, at the request of the person disclosing, be protected by confidentiality. As anticompetitive conduct is not a criminal offence, there is no privilege against self-incrimination.

Information requests

MyCC may, by written notice, require any person (not only those suspected of being in a cartel but also third parties) whom MyCC believes to be acquainted with the facts and circumstances of the case to produce relevant information or documents. MyCC may also require the person to provide a written explanation of such information or documents. Where the document is not in the custody of the person, he or she must, to the best of his or her knowledge and belief, identify the last person who had custody of the document and state where the document may be found. A person required to provide information has the responsibility to ensure that the information is true, accurate and complete, and may be required to provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading.

Dawn raids

MyCC may search premises with a warrant issued by a magistrate where there is reasonable cause to believe that any premises have been used for infringing the Competition Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named on the warrant to enter the premises at any time of day or night, and by force if necessary. During such searches, MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in these powers regarding business or residential premises. Where it is impractical to seize the evidence, MyCC may seal the evidence to safeguard it. Attempts to break or tamper with the seal may be prosecuted as a criminal offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation, or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Competition Act, MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Competition Commission Act 2010 empowers the Malaysia Competition Commission (MyCC) to cooperate with any body corporate or government agency for the purpose of performing its functions. We understand that MyCC cooperates with authorities in other jurisdictions. A number of cooperation initiatives that the MyCC has undertaken include:

- East Asia Top Level Official's Meeting on Competition Policy;
- ASEAN Competition Action Plan 2016-2025;
- Malaysia–Japan International Cooperation Agency: Economic Partnership Programme – Capacity Building for Competition Law;
- ASEAN–Australia–New Zealand Free Trade Area Economic Cooperation Work Programme; and
- Malaysia Competition Commission Attachment Programme to the Australian Competition and Consumer Commission, Australia.

Interplay between jurisdictions

14 Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Competition Act 2010 came into effect on 1 January 2012 in Malaysia. To date, no cross-border cases have been investigated by MyCC. However, MyCC is highly likely to take note of investigations by other competition authorities, particularly in closely related markets.

CARTEL PROCEEDINGS

Decisions

15 How is a cartel proceeding adjudicated or determined?

Cartel conduct is investigated and adjudicated by the Malaysia Competition Commission (MyCC), which has the power to impose fines and give directions as it sees fit to bring the infringement to an end.

Burden of proof

16 Which party has the burden of proof? What is the level of proof required?

The burden of proof in establishing that an infringement has occurred lies with MyCC.

An enterprise that seeks to rely on any exclusion, exemption or other defence (ie, the criteria under section 5 of the Competition Act 2010 for relief of liability) bears the burden of proving that such exclusion, exemption or other defence applies.

The standard of proof is a balance of probabilities (ie, the same evidential standard for civil claims).

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The rule on admissibility of evidence is relevance. Circumstantial evidence can be relied on to prove cartel conduct provided that the evidence is relevant.

Appeal process

18 | What is the appeal process?

Appeals against MyCC decisions are made to the Competition Appeal Tribunal (CAT), which has exclusive jurisdiction to review on appeal any findings of infringement or non-infringement made by MyCC. The president of CAT is a judge of the High Court, and the CAT comprises between seven and 20 other members appointed by the prime minister on the recommendation of the minister in charge of domestic trade.

A person aggrieved by MyCC's decision may appeal to the CAT by filing a notice of appeal to the CAT within 30 days of the decision. This means that the right of appeal is not limited only to the enterprise made subject to MyCC's decision, but extends to third parties who are aggrieved or whose interests are affected by that decision (which may include third-party consumers). This notice of appeal shall state in summary form the substance of the decision of MyCC being appealed against, and an address for service of notices related to the appeal.

CAT may confirm or set aside the decision being appealed against, or any part of it, and may:

- remit the matter to MyCC;
- impose or revoke, or vary the amount of, a financial penalty; and
- exercise MyCC's powers to make decisions, give directions or take such other appropriate actions.

The CAT's decision is decided on a majority of its members and is final and binding on the parties to the appeal. Nonetheless, the CAT's decision may be subjected to judicial review by the High Court. MyCC had in 2014 found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement that saw the two airlines sharing markets in the air transport services sector within Malaysia. MyCC's final decision was subsequently overturned on appeal by the CAT, and the fines imposed on the airlines were set aside. MyCC subsequently filed for an application to the High Court for judicial review against the CAT's decision. The High Court allowed MyCC's application for judicial review and upheld the decision made by MyCC in the first instance.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Currently, cartel conduct under the Competition Act 2010 (the Competition Act) is not a criminal offence. However, obstructing a Malaysia Competition Commission (MyCC) investigation may lead to criminal sanctions. Among other things, it is an offence to:

- refuse to give access to documents when directed by MyCC;
- provide false or misleading information, evidence or documents;
- destroy, conceal, mutilate or alter any evidence with the intent to defraud MyCC or obstruct MyCC's investigation;
- tamper with or break a seal affixed to protect the integrity of evidence;
- tip off others in a manner that is likely to prejudice any investigation or proposed investigation; or
- threaten reprisals on persons who file complaints of infringements or cooperate with MyCC in its investigations.

On conviction of any of the above, the penalty for a body corporate is a fine of up to 5 million ringgit, and for subsequent offences up to 10 million ringgit. For individuals, the fine is up to 1 million ringgit or imprisonment of up to five years, or both; and for subsequent offences, a fine of up to 2 million ringgit and imprisonment of up to five years, or both.

To date, there have been no such criminal sanctions imposed under the Competition Act and reported in case law.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

On finding an infringement, MyCC may impose a financial penalty of up to 10 per cent of the worldwide turnover of an enterprise over the period during which the infringement occurred. There is no minimum financial penalty that MyCC may impose under the Competition Act.

The concept of a single economic unit is recognised under the definition of 'enterprise', and this may enlarge the turnover of the relevant enterprise to include parents with decisive influence, and subsidiaries that do not have autonomy to determine their actions on the market.

MyCC must require that the infringement be ceased immediately, and may specify steps to be taken to achieve this or give any other appropriate direction.

The financial penalty is potentially higher than that in other jurisdictions where the fine is limited to a specified number of years, whereas in Malaysia it may be for the entire duration of an infringement. However, the magnitude of this may not be felt for a while, as it applies only from 1 January 2012, the date on which the Competition Act came into force.

MyCC may bring proceedings before the High Court against any person who fails to comply with its directions.

To date, the financial penalties that have been proposed or imposed by MyCC ranged from 20,000 to 174 million ringgit. In September 2020, MyCC published its final decision to an aggregate penalty of 173,655,300 million ringgit against several members of the General Insurance Association of Malaysia (PIAM) 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 given financial penalties, it appears from recent trend 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 financial penalties for each manufacturer ranged from 1,080 to 106,000 ringgit. Before issuing the proposed decision, MyCC had issued interim measures to the ice manufacturers seeking to prevent them from acting in accordance with their plan (which was advertised through local newspapers in December 2013) to collectively increase the price of edible tube ice by 0.50 ringgit per bag and 2.50 ringgit per block from 1 January 2014. In determining the level of financial penalty, MyCC stated that it took into account the seriousness of the infringement, duration of the infringement and mitigating factors, such as being cooperative during the investigation.

In another price-fixing case involving the Pan-Malaysia Lorry Owners Association (PMLOA), MyCC did not impose financial penalties but issued 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 Competition Appeal Tribunal (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 CAT's decision. The High Court allowed MyCC's application for judicial review and upheld the decision of MyCC at the first instance. However, in April 2021, the Court of Appeal overturned the High Court's decision and ruled that the MyCC cannot review a decision by CAT. As such, it was reported that MyCC will file an application for leave to appeal to the Federal Court (apex court) to challenge the decision by CAT and determine the finality of the case.

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 hardcore 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 had issued a proposed decision against eight companies proposing fines totalling 1.94 million ringgit in penalties for bid rigging through tenders offered by the National Academy of Arts, Culture and Heritage.

Most recently, in August 2021, the MyCC issued fines of over 1 million ringgit to seven warehouse operators for price-fixing. The seven operators had formed a cartel and colluded in fixing surcharges for handling services of import and export cargoes. The operators had formed a group chat and began their discussions on fixing the surcharges for handling services despite acknowledging they were all competitors in the warehouse services market.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Yes. MyCC issued its Guidelines on Financial Penalties, which explain how MyCC determines the appropriate fine and the factors that it may take into account in doing so. In imposing financial penalties, MyCC aims to reflect the seriousness of the infringement and deter future anticompetitive practices. In determining the amount of any financial penalty in a specific case, MyCC may take into account aggravating factors and mitigating factors.

The aggravating factors include:

- the role of the enterprise as an instigator or leader or having engaged in coercive behaviour with others;
- obstruction of or lack of cooperation in the investigation;
- the enterprise has a record of committing similar infringements or other infringements under the Competition Act (recidivism);
- continuance of the infringement after the start of investigation; and
- involvement of board members or senior management in the infringement.

Meanwhile, the following non-exhaustive list of mitigating factors may also be taken into consideration:

- low degree of fault;
- relatively minor role in the infringement especially if involvement is secured by threats or coercion;
- cooperation by the enterprise in the investigation;
- existence of a corporate compliance programme that is appropriate having regard to the nature and size of the business of the enterprise; and
- any compensation made to victims of the infringements.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Yes. In determining the amount of financial penalty to impose, MyCC has indicated in its Guidelines on Financial Penalties that it will take into account mitigating factors. Mitigating factors include the existence of a

compliance programme that is appropriate having regard to the nature and size of the business of the enterprise.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

We are not aware of any published orders being issued by any regulatory authority or court to disqualify a director as a result of any cartel activities.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

No.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The competition law provisions in the Competition Act are not punishable as criminal offences.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any person who suffers loss or damage directly as a result of any anti-competitive conduct under the Competition Act 2010 may bring a private action against the infringing enterprises in the civil courts regardless of whether such person dealt directly or indirectly with the enterprise. As such, indirect purchaser claims are actionable.

Such civil action may be initiated even if the Malaysia Competition Commission (MyCC) has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not possible in Malaysia. The only form of group litigation in Malaysia is representative actions.

Where numerous persons have the same interest in any proceedings, the proceedings can be commenced and (unless the court orders otherwise) continued by any one or more claimants, otherwise known as 'representative proceedings'. The representative must satisfy the following criteria to initiate a representative action:

- common interest;
- common grievance; and
- the relief sought must be beneficial to all.

A member of a class who is not represented by the representative may apply to the court to be added as a co-plaintiff.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes. This immunity, under section 41 of the Competition Act 2010 (the Competition Act), is only available for a breach of the Chapter 1 Prohibition and particularly an admission of an infringement under section 4(2) which deems certain agreements between competing enterprises as having the object of significantly restricting competition.

The Competition Act empowers the Malaysia Competition Commission (MyCC) to grant differing percentages of reductions and provide for the reduction of up to a maximum of 100 per cent of any penalties that 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 and the stage in the investigation at which it admits its involvement in the infringement as well as information or another form of cooperation to be provided and the information already in possession of MyCC.

The leniency regime is only available in cases where the enterprise has:

- admitted its involvement in an infringement of section 4(2) of the Competition Act; and
- provided information or another form of cooperation to MyCC that significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement against any other enterprises.

Based on MyCC's Guidelines on Leniency, what would be considered as 'significant assistance' will be determined by MyCC on the specific circumstance of the case under consideration.

Note that leniency would not be able to protect a successful applicant from other legal consequences, such as private actions in court brought by an aggrieved person who has suffered loss or damage directly caused by the infringement.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

There is no separate programme, and any subsequent leniency applicant may still benefit from the leniency regime. The percentage of reduction would depend largely on the stage in the investigation at which it admits its involvement in the infringement, and the value of the incremental information or other cooperation it is able to provide. Such percentage of reduction is expected to be commensurate with the additional information and assistance that such enterprise is able to provide MyCC.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The leniency regime is designed to encourage cartelists to be the 'first in' to supply as much information as possible to expedite MyCC's investigation. By being the second as opposed to the 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 an 'amnesty plus' option comparatively similar to that applied in the EU. However, the scope and operational mechanism may differ.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Yes. Based on MyCC's Guidelines on Leniency Regime, an applicant has 30 days to complete its leniency assessment from the date on which it receives a marker, which gives the applicant priority in receiving leniency while its 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.

The possibility of liability from follow-on actions should also be considered. MyCC cannot provide immunity from third-party damages actions in court.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Only an enterprise that admits its involvement in a cartel infringement under the Competition Act (particularly under section 4(2)) and provides information to MyCC that significantly assists in the identification or investigation of the cartel infringement 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 to bring the suspected infringement to the attention of MyCC and the stage of the investigation at which the enterprise provides information or admits involvement in the infringement.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Generally, confidentiality, including the identity of the applicant, will be maintained as the Competition Act prohibits the unauthorised disclosure of confidential information. However, MyCC is authorised to make disclosures to other competition authorities in conjunction with their investigations and where necessary for the performance of MyCC's functions.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

As infringement of the Chapter 1 Prohibition is not a criminal offence, there is no applicable plea bargain concept.

However, MyCC may accept an undertaking from an enterprise to take remedial action subject to conditions that MyCC may impose. Where this is the case, MyCC shall close the investigation without any finding of infringement, and it cannot impose a penalty on the enterprise. The undertaking will be made public. MyCC may apply to the High Court for an order that the enterprise complies with the terms of the undertaking accepted by MyCC. A breach of the High Court order may be punished as a contempt of court.

Offering a suitable undertaking is particularly useful to avoid a finding of infringement. It may however potentially trigger follow-on civil actions.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

There is no effect, as there is no liability for infringement of the Chapter 1 Prohibition on employees. Nor are there criminal sanctions under the Competition Act on individuals involved in a cartel.

Note, however, that individuals can have personal liability for offences under the Competition Act, such as:

- refusing to give access to documents when directed by MyCC;
- providing false or misleading information, evidence or documents;
- destroying, concealing, mutilating or altering any evidence with the intent to defraud MyCC or obstruct MyCC's investigation;
- tampering with or breaking a seal affixed to protect the integrity of evidence;
- tipping off others in a manner that is likely to prejudice any investigation or proposed investigation; or
- threatening reprisals on persons who file complaints of infringements or cooperate with MyCC in its investigations.

Dealing with the enforcement agency

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

It would be important for a leniency applicant to come forward at an early stage in the investigation as his or her application would be assessed in light of information that MyCC has in its possession, including that received from leniency applicants who have received leniency.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

There is no automatic right under the Competition Act 2010 (the Competition Act) for disclosure of information or evidence by the Malaysia Competition Commission (MyCC). However, MyCC may allow reasonable access to its investigation file, in the interest of procedural fairness and to ensure that the enterprise can properly defend itself against the allegations raised in a proposed decision and to enable the effective exercise of the rights of defence. Certain documents may not be disclosed on the grounds of confidentiality.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

The Competition Act does not impose personal liability on employees involved in a cartel. Typically, therefore, representation is at the enterprise level. A present or past employee would be advised to obtain independent legal advice where the employee is suspected to have committed a criminal offence: for example, where he or she has given bribes to influence the bidding of a project.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants, subject to strict adherence to statutory obligations on legal professional conduct. Counsel would need to check whether there is any legal conflict to act for multiple corporate defendants in a cartel.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Not applicable. The Competition Act does not impose personal liability for employees involved in a cartel.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

No.

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International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Based on recent cases, it is also particularly helpful for the enterprise to cooperate with MyCC in the investigation. MyCC's Guidelines on Financial Penalties state that MyCC may take into account the existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives that were undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is relatively new in Malaysia, MyCC is keen to encourage compliance and is likely to take into account genuine efforts to comply with the Competition Act.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In August 2021, the Malaysia Competition Commission (MyCC) issued a decision against seven warehouse operators for infringing the Chapter 1 Prohibition in relation to price fixing of rates for Long Length Handling Surcharges and Heavy Lift Handling Surcharges for all import and export cargoes. In addition, MyCC found, through an online platform conversation, that most of the warehouse operators had implemented the price-fixing rates upon their respective customers. The MyCC had also uncovered the operators' cartel agreement in the form of a document called 'Surcharge Memorandum', where all operators agreed that all of them would charge the agreed rates effective on a specified date. The fine imposed by MyCC totalled 1.04 million ringgit. The

penalties ranged between 26,363.03 ringgit and 336,369.13 ringgit for each company. According to MyCC, the respective fines imposed on the warehouse operators were not more than 10 per cent of their world-wide turnover.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

In April 2021, it was reported that MyCC has initiated the process to amend the Competition Act to include merger control provisions. MyCC is planning to table the amendments in Parliament by the end of 2021.

Mexico

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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 detailed regulation on, among other things, merger control, relative monopolistic practices (abuse of dominance practices and vertical restraints) and absolute monopolistic practices (cartel conduct) with the aim of promoting competition and preventing anticompetitive conduct.

Cartels are covered by article 53 of the LFCE, which prohibits absolute monopolistic practices. Criminal responsibility for a cartel is established in article 254-bis of the Federal Criminal Code and is prosecuted according to the National Code of Criminal Proceedings, while civil responsibility is regulated by the Federal Civil Code, the Federal Code of Civil Proceedings and article 134 of the LFCE.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Federal Economic Competition Commission (COFECE) enforces the LFCE and is in charge of preventing, investigating and sanctioning administrative infringements derived from cartel conduct. COFECE has jurisdiction over all industries, with the exception of the broadcasting and telecommunications industries, where the Federal Telecommunications Institute (IFT) enforces the LFCE.

COFECE and IFT decisions may be challenged before competition, broadcasting and telecommunications specialised federal courts through an amparo proceeding.

COFECE and IFT may bring criminal charges before the public prosecutor. Criminal prosecution and adjudication correspond to the Mexican Attorney-General and the federal criminal courts, respectively.

Federal specialised courts in competition, broadcasting and telecommunications have jurisdiction over individuals' and collective damage claims.

Except as mentioned otherwise, any references made in this chapter to COFECE will also apply to the IFT in the context of the broadcasting and telecommunications industries.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

In October 2019, the Regulatory Provisions for the qualification of information derived from legal counsel provided to economic agents came into force. This regulates the procedure that COFECE must follow when, for example, COFECE seizes documentation that contains legal advice protected by attorney-client privilege during a dawn raid.

Also, in March 2020, the Regulatory Provisions for the Immunity and Sanction Reduction Programme foreseen in article 103 of the Federal Economic Competition Law came into force, which establishes, among other things, the procedure that economic agents must follow to enter into the leniency programme.

In February 2021, the Guidelines for the Immunity and Sanction Reduction Program were published in the Federal Official Gazette. These Guidelines explain how COFECE interprets and applies the regulation regarding the leniency programme (for example, the benefits that will be granted to every applicant to such programme).

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 53 of the LFCE prohibits absolute monopolistic practices (cartels), which are defined as any contract, arrangement or combination between competitors, whenever its purpose or effect is one of the following:

- to fix, raise, coordinate or manipulate the purchase or sale price of goods or services (price-fixing);
- to limit the production, processing, distribution, marketing or purchasing of goods, or to limit services, including their frequency (restriction of output);
- to divide, distribute, allocate or impose specific portions or segments of a current or potential market of goods or services by means of clients, suppliers, time spans or certain territories (allocation of markets);
- to establish, arrange or coordinate bids or abstentions in tenders, contests, auctions or purchase calls (bid rigging); or
- to exchange information having as a purpose or an effect any of the above-mentioned conducts.

According to the LFCE, cartels are per se illegal. Thus, the authority does not need to assess market power or any adverse effect over the market. In other words, the restriction of competition is presumed whenever the above conduct takes place, without the opportunity to demonstrate efficiencies.

According to COFECE's Regulatory Provisions, the following will be considered cartel conduct indicia and, as such, may be used for initiating a cartel conduct investigation:

- the invitation or recommendation addressed to one or more competitors to coordinate prices, output, or production, distribution and commercialisation terms and conditions, or to exchange information with the same purpose or effect;
- a situation where the price offered in Mexico by two or more competitors regarding internationally interchangeable goods or services is considerably higher or lower than the international reference price, as well as a situation where the tendency of its evolution in a specific time span is considerably distinct from the tendency of international prices in the same period, except when such difference derives from the application of tax laws, or from transport or distribution costs;
- the instructions, recommendations or business standards adopted by chambers of commerce or professional associations to coordinate prices, output, or production, distribution and commercialisation terms and conditions of a certain product or service, or to exchange information with the same purpose or effect;
- a situation where two or more competitors establish the same maximum or minimum prices for certain good or service;
- a situation where competitors adhere to the prices issued by a competitor, certain chambers of commerce or associations; and
- regarding broadcasting and telecommunications industries, a situation where two or more competitors refrain from participating from bidding or coordinate their bids in certain geographic areas.

With respect to information exchange, the Guidelines for Information Exchange among Economic Agents 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 on a frequent basis, is more likely to restrain competition and, as such, the exchange of the aforesaid information is more likely to be investigated by COFECE. Likewise, the Guidelines explain that the market structure is also a key element to take into consideration: concentrated and more static markets, with symmetric participants and homogeneous products, are more propitious to collusion and, as such, strategic information exchange in those markets is riskier and more likely to be investigated by COFECE.

Also, the Guidelines for Information Exchange among Economic Agents include the following recommendations regarding information exchange in a due diligence process in the context of a horizontal concentration.

- Each economic agent must identify strategic information – therefore, all non-public information that would not be shared normally with third parties regarding prices, discounts, sales and purchase terms and conditions, clients and suppliers, must be identified.
- The use of strategic information must be limited to indispensable matters and as long as it is strictly needed for an adequate evaluation of the transaction. Such an exchange is indispensable when the information is reasonably related to the parties' understanding of the future profits of the concentration and to determine the value of the transaction.
- When possible, the use of historic and aggregated information to evaluate the relevant aspects of the transaction and for planning the final integration should be preferred.
- The economic agents must establish protocols or strict rules regarding access to strategic information and sign a confidentiality agreement regarding such information. Such rules must:
  - limit the use of information only to previous audits;
  - indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not include strategic operational decision-making or sales; and
  - create an integrated, isolated and compact team that is in charge of the concentration.

Such a team will control the use and generation of the strategic information required by the horizontal concentration. It is recommended that this team:

- be integrated by persons that:
  - do not work for the commercial areas of the economic agents and avoid contact with such areas; and
  - have signed confidentiality agreements obliging them to protect and maintain the confidentiality of the information;
- if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate the information in its most disaggregated level and then aggregate it for analysis by the concentration; and
- maintain real-time records of all information exchanges and contact between the parties (such records must be sequential and detailed to the extent that it is possible to rebuild in a reliable way the source of information, the moment in which the information was sent and received by the parties, and the use that was given to the information).

Whenever it becomes necessary to impose restrictions regarding the use and disposal of certain assets or to increase liabilities in the phase that goes from the execution of the purchase agreement to the closing of the transaction:

- restrictions must be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or rig bids before closing, nor impose future decisions to another party; and
- parties must inform the individuals involved in the concentration of the legal framework regarding merger control and cartel conduct.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The LFCE does not provide an exception regarding its applicability to joint ventures and strategic alliances. However, according to the latest Guidelines for Notification of Concentrations issued by COFECE, collaboration agreements (such as joint ventures and strategic alliances) may be reviewed under the merger control procedure whenever the agreements meet the characteristics of a concentration. This implies that an agreement could be analysed under a rule-of-reason basis and it represents an opportunity for the parties to obtain certainty regarding the legality of a collaboration agreement if they submit it to scrutiny by COFECE before its closing.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

The Federal Law of Economic Competition (LFCE) applies to individuals, corporations and other entities. Moreover, if the Federal Economic Competition Commission (COFECE) determines that a corporation has been party to a cartel, individuals who have contributed to or represented the corporation can be sanctioned for those actions, in addition to the fine imposed on the corporation.

Government entities are also subject to the LFCE, and government officials may be sanctioned if they contribute to anticompetitive

practices. For example, the Rural Development Minister of the state of Jalisco was sanctioned by COFECE owing to his alleged collaboration with tortilla producers and retailers to fix the price of tortillas (COFECE decision DE–009–2016).

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

This matter has hardly been addressed by Mexican authorities, but there are some precedents in which the Mexican Federal Competition Commission (CFC; which was replaced by COFECE in 2013) intervened with respect to conduct that took place abroad. In IO–09–99, the CFC learned that two foreign companies had pleaded guilty before a Texas court to participating in an agreement to fix the price of various types of vitamins, with an international scope. Since the companies had affiliates and subsidiaries in Mexico, the CFC initiated a cartel investigation, given the possible extensive effects of the cartel in Mexico's national territory.

In IO–002–2009, 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). COFECE determined that the Mexican hermetic compressors market was affected by the global cartel as such products were imported to Mexico for their commercialisation. COFECE fined the non-Mexican companies and their Mexican subsidiaries.

In IO–001–2013, 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. COFECE determined that the Mexican air-conditioning compressors for automobiles market was affected by the global cartel as such products were used in the manufacture of cars that were produced and sold in Mexico. COFECE fined the non-Mexican companies.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

If an export cartel agreement has been reached within the Mexican territory but does not produce effects within this territory, the economic agents may argue lack of jurisdiction.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements, defences or exemptions for cartel conduct. The LFCE has transversal effect and includes all branches of economic activity, whether regulated or not.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

In the event that two or more competing economic agents engage in cartel conduct due to a provision or rule that forces them, for example, to exchange information, such economic agents can defend themselves by alleging the unenforceability of other conduct, which is a substantive principle of criminal law that we consider applicable to cartel cases.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the Federal Economic Competition Commission (COFECE), ex officio or through a complaint that can be lodged by any person.

The investigation may last up to 120 business days. This period can be extended by COFECE up to four times, but only for justified causes.

During this time, COFECE can issue information requests as well as subpoenas and may practise dawn raids and obtain all the information it needs to prosecute a suspected infringer of Federal Law of Economic Competition (LFCE). During the investigation, case files may not be accessed.

Once the investigation has finished, if COFECE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to COFECE's plenary a statement of probable responsibility (DPR) describing the charges. The defendant is summoned with the DPR and, thereafter, the proceeding follows the basic rules of a trial, in which the defendant has the constitutional rights of due process; the investigative authority acts as a prosecutor and the complainant may cooperate with the latter. The LFCE grants 45 business days to the defendant to respond to the DPR and enclose the proof in his or her possession to rebut the accusation. After all the evidence is submitted, the defendant and the investigative authority may present written arguments in a 10-business-day term. Also, the defendant and the complainant have the right to ask for a hearing before COFECE's plenary. Once this proceeding is concluded, COFECE's plenary issues its final decision.

At any time, the investigative authority may ask the plenary to issue a precautionary measure. The investigated party or defendant may ask the plenary to determine a caution to avoid the precautionary measure, and the amount should be enough to compensate for possible damages caused to the competition process by the anticompetitive conduct.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

COFECE is empowered to perform dawn raids, which cannot last more than four months. If the implicated party is not at the corresponding place, these proceedings can be carried out with any person found at the premises; there is no need to leave any kind of subpoena.

It is also empowered to request any person to provide the information and documents deemed necessary to carry out the investigation. The authority can subpoena any person as well, to testify about facts under investigation. The implications of being requested or subpoenaed as the 'denounced agent', as a 'third adjuvant' or as a 'person related to the investigated market' are unclear, and thus it is unclear what rights these requested or summoned people have. There are no judicial binding specific criteria for competition and antitrust that suggests that requested or deponents' information may not be used to incriminate them. Notwithstanding, the Supreme Court determined that the principle of presumption of innocence and the right to remain silent are applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by COFECE's investigative authority without the approval of COFECE's plenary or any court.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Rules regarding cooperation between jurisdictions are contained in specific chapters of various free trade agreements that Mexico has entered into (with Chile, Colombia, European Free Trade Association, the European Union, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the United States. Among these jurisdictions, the most significant interplay takes place with the United States.

People cooperating under the leniency programme established in article 103 of the Federal Law of Economic Competition are entitled to object to the Federal Economic Competition Commission (COFECE) about sharing their data and the information provided under this programme. COFECE may ask some economic agents under the leniency programme to grant an authorisation or waiver to share information with other agencies.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the Federal Economic Competition Commission (COFECE). This body consists of seven commissioners, and decisions are taken by a simple majority.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

A systematic interpretation of articles 73 and 79 of the Federal Law of Economic Competition (LFCE) indicates that COFECE has the burden of proof in cartel cases. Indeed, the law empowers it to issue requests for information and documents, to perform dawn raids and to subpoena parties to testify with the purpose of gathering evidence to prove the responsibility of the alleged infringers. Moreover, article 79 establishes that the statement of probable responsibility (DPR) shall contain the evidence that COFECE considered subpoenaing from the party to the administrative trial. In short, COFECE must not issue a DPR without sufficient evidence.

Defendants have 45 business days to answer a DPR and submit the necessary evidence to rebut the accusation. It should not, however, be understood that the burden of proof is thus passed on to the defendant; rather, defendants have the opportunity to prove a different theory of the case.

Certainly, not presenting evidence does not entitle COFECE to presume responsibility. Nevertheless, amparo trials do not allow parties to submit different evidence from that provided to the administrative authority – hence the importance of taking advantage of this opportunity when answering the DPR (however, evidence can be submitted in an amparo trial against the final decision of COFECE).

The LFCE does not establish standards of proof to be satisfied by COFECE. Nevertheless, there are precedents in which the Mexican Federal Competition Commission (which was replaced by COFECE in 2013) acknowledged the existence of such standards (DE–22–2006 and IO–01–2007). In terms of these resolutions, the evidence contained in the file must dismiss alternative hypotheses that could reasonably explain the situations observed in the market.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

A cartel can be sanctioned using circumstantial evidence. Considering that all participants in a cartel have the incentive to hide or destroy any proof of their conduct, the Supreme Court has determined that there is no need to prove the arrangement through direct evidence. Accordingly, a presumption of the existence of a cartel is enough to sanction it under the terms of the LFCE, as long as such presumption relies on facts that have been proven through direct evidence.

Appeal process

18 | What is the appeal process?

The parties can initiate an amparo trial before a federal district judge against a decision of COFECE, who will rule on violations of fundamental rights during the administrative proceeding or in the adjudication. The amparo ruling may be appealed before the circuit courts. Only after this latter decision can the cartel case be considered legally settled.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

According to article 254-bis of the Federal Criminal Code, individuals face sanctions of between five and 10 years' imprisonment for entering, ordering or executing any contract or arrangement between competitors for one or more of the purposes or effects listed under article 53 of the Federal Law of Economic Competition (LFCE).

For a criminal action to be lodged, the Federal Economic Competition Commission (COFECE) must bring charges before the public prosecutor. Charges may be pressed with the statement of probable responsibility (DPR). The term in which the criminal action expires is seven-and-a-half years.

Considering that criminal sanctions for cartel conduct were enacted in 2011 and that the main procedural obstacle to pressing charges was recently removed (prior to 2014, for COFECE to press charges, a final judgment of administrative responsibility was needed), there is no experience in Mexico regarding criminal sanctions for cartel conduct. There are only two cases in which COFECE has brought charges before the public prosecutor, which are currently under way.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Cartel conduct is sanctioned with a fine of up to the equivalent of 10 per cent of the infringer's income. In the case of recidivism, COFECE may impose a fine of up to two times the applicable fine or order the divestiture of assets.

Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive fines of up to 17.4 million Mexican pesos. Such individuals also face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.

Individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to 15.6 million pesos.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 130 of the LFCE, when determining the fine to be imposed for anticompetitive conduct, COFECE must consider the infringer's economic capacity as well as the gravity of the conduct. To determine the latter, COFECE shall assess the following elements:

- the damage derived from the conduct;
- the indicia of intention;
- the defendant's market share;
- the size of the affected market;
- the duration of the conduct; and
- possible obstruction of COFECE actions.

Although COFECE has the discretion to determine the amount of the fine, said authority, in addition to considering the aforementioned elements, must also take into account the principles established in articles 176 to 186 of the Regulatory Provisions of the LFCE.

In the case of recidivism, COFECE may impose a penalty of up to two times the applicable fine or order the divestiture of assets. Alternatively, in 2018, a collegiate court solved that the unenforceability of another conduct as a defence against criminal liability may also apply in antitrust matters. Also, the court pointed out that such defence may only apply when the unenforceability of another conduct was proven sufficiently.

Criminal sanctions shall be imposed by the corresponding federal criminal judge. As provided by the Federal Criminal Code, prison punishments will range from five to 10 years, depending on the aggravating or mitigating circumstances of each case.

According to article 134 of the LFCE, monetary relief equivalent to the actual damages and losses caused by the defendants may be claimed by the affected parties before the specialised courts.

Consideration of the elements listed in article 130 of the LFCE is binding upon COFECE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Although the LFCE does not explicitly state that a compliance programme can reduce the sanction, article 130 states that one of the criteria for the imposition of a sanction can be the intention of the conduct. Article 182 of COFECE's Regulatory Provisions states that to analyse the indicia of intention, the following circumstances shall be taken into account:

- the moment of termination of the conduct, whether it was before, during or after the investigation or before, during or after the proceeding;
- confirmation that said illegal conduct was committed as a result of suggestion, instigation or encouragement of any public authority;
- actions taken to hide the conduct; and
- confirmation that said illegal conduct was committed as a result of instigation of another economic agent, clearing the fact that the offender played a leadership role in the adoption of the conduct.

In the decision issued on file IO–004–2012, an economic agent that was sanctioned for participating in a cartel claimed to have taken measures to prevent activities that imply or that may imply the execution of an absolute monopolistic practice; to have implemented a series of actions to capacitate the staff; and improve their procedures and internal controls to monitor the enforcement of the law. However, the economic agent did not present evidence of these actions; thus COFECE pointed out that it was not possible to consider that element to calculate the applicable sanctions. This consideration was formulated in the section in which the indicium of intention was analysed as an element to individualise the corresponding sanction.

Given this, it would seem that the existence of a compliance programme might be taken into account by COFECE when imposing a fine on the economic agent that implemented the programme.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals that represent or collaborate with the company in committing anticompetitive practices could face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years. According to article 178 of the Regulatory Provision of the LFCE, to impose that sanction COFECE must prove the existence of malice of these individuals.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is not explicitly covered by competition law. Notwithstanding, if cartel conduct (more likely bid rigging) is committed against government entities, the Ministry of Public Services may debar the infringers under article 60 of the Law of Procurement, Leasing and Services for the Public Sector.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Yes. Once COFECE's investigative authority has issued a DPR, it may bring criminal charges before the public prosecutor.

According to article 134, administrative responsibility is a condition to initiate individual or class actions before civil courts to claim compensation for the damages derived from the anticompetitive practice.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Yes, private damage claims are available.

Damages claims for antitrust infringements have not been frequent in Mexico, since a decision from the competition authority judging a party to be responsible (as a legally settled matter) is necessary for initiating a civil process on the matter. Thus, private antitrust tort practice is still under development.

Administrative responsibility is a condition to initiate individual or class actions before civil courts, which means that, according to article 134, it is not possible to claim damages to economic agents that have not been a part of a cartel.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

As provided in article 585 of the Federal Code of Civil Proceedings, class actions can be lodged by:

- the Federal Economic Competition Commission;
- no fewer than 30 members of a class;
- not-for-profit civil associations whose purpose is the defence of rights and interests in antitrust matters; and
- the Attorney-General of Mexico.

This regime came into force in February 2012 and there has only been one class action since then. Therefore, the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Article 103 of the Federal Law of Economic Competition (LFCE), as well as the Mexican Federal Competition Commission's Regulatory Provisions for the Immunity and Sanction Reduction Program foreseen in article 103 of the LFCE (which came into force in March 2020) contemplate the leniency, immunity or amnesty programme and the procedure to access to such programme. In June 2015, the Federal Economic Competition Commission (COFECE) issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which COFECE applies the law and regulations regarding leniency.

Any corporation or individual who has been or is involved in cartel activity may apply for leniency.

To qualify for the programme, the applicant must submit evidence, fully and continuously cooperate with COFECE during the corresponding proceeding, and cease its participation in the cartel activity.

One of the benefits of the programme consists of reductions in the applicable administrative fines. The fines may be fixed at the symbolic amount of one unit of measurement (the basis for calculating fines in Mexico) and are updated, so that the first applicant is, in practice, awarded full immunity, while the applicable fines of second and subsequent applicants are reduced by up to 50, 30 or 20 per cent. The level of reduction depends on the amount and quality of the evidence provided to COFECE and the cooperation provided during the proceedings.

All qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, but will still be subject to private monetary damage claims through individual or class actions.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes. The applicable fine for the second and subsequent applicants may be reduced by up to 50, 30 or 20 per cent and they will be exempted from criminal responsibility.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Second and subsequent applicants who provide the Federal Economic Competition Commission (COFECE) with additional evidence may get reductions of up to 50, 30 or 20 per cent of the applicable fine, considering the timing of the application and the sufficiency of the evidence they provide to the authority. Also, as previously stated, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, notwithstanding the time at which they applied.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Leniency may be sought at any moment before COFECE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity and the order in which subsequent applicants approach COFECE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. COFECE uses markers to determine who the first applicant is and who the subsequent applicants are.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The applicant must submit evidence, cooperate fully and continuously with COFECE during the corresponding proceeding, and cease its participation in the cartel activity. All applicants, to qualify, must submit more information than is available in the records of the investigation and the information submitted by the previous applicant(s).

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

COFECE will keep confidential the identity of all leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, COFECE will not share the identity of or the information provided by the applicants with other jurisdictions unless it is authorised to do so in writing by the applicant, only when such disclosure does not hinder the powers of COFECE.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

If the requirements are fulfilled by the applicant, COFECE issues a resolution expressing the applicant's place in line and the corresponding fine reduction. The benefit will be conditional upon the cooperation of the applicant during the investigation and sanction proceedings. If applicants fail to cooperate (eg, if the applicant destroys or hides evidence or alerts other cartel participants to the investigation), they will lose the benefits of the leniency programme.

Also, the plenary of COFECE is entitled to request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent, as long as the following criteria are met: an absence of pending appeals against COFECE's decisions, and the economic agent is a first-time offender in the terms provided by article 127 of the LFCE and in the terms provided by article 254-bis of the Federal Criminal Code.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous cooperation with COFECE. If the corporation fails to provide full and continuous cooperation, but employees who received the extension provide such cooperation, then these employees will remain protected as if they were the applicants themselves.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

If a corporation detects potential cartel activity, it should conduct an internal investigation to assess the existence of enough elements to prove such activity. If so, it should move quickly to apply for the leniency programme. Since providing COFECE with enough evidence is a requirement to qualify for the programme, in the absence of such evidence, it will be better to prepare a strong defence instead of applying for the programme.

According to the Guidelines on the Immunity and Reduction of Sanctions Programme, the following are examples of the information and documents that may be submitted during the application:

- a detailed description of the good or service, including its use, characteristics and price;
- a narrative of the collusive agreement or information exchange, describing the conduct or conducts that are being performed or that were performed. In this narrative, it must be admitted that the applicant participated in such conduct. Also, to back up such narrative the applicant can provide agreements, memoranda, minutes, activity reports, correspondence, emails, telephone records, personal reports and signed testimonies of the participants, among other documents. When the applicant provides digital evidence from computers, laptops, smartphones and other electronic devices, the source and extraction method of the information must be provided;
- the identities of the individuals and legal entities involved in the collusive agreement or in the information exchange;
- the duration of the conduct, the geographical reach of such conduct and the specific time of the agreements including the status of the applicant's participation (whether its participation has ceased or not);
- a narrative regarding how the agreements worked (eg, how the participants communicated, the methods for the information exchange, etc);
- details of the meetings, communications and agreements, including dates, places, participants, objectives and the achieved results;
- actions taken to ensure, follow up and verify compliance of the agreements entered into by competitors;
- a statement about the existence of hard copies of information exchange or agreements, if applicable; and
- 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 COFECE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by COFECE;
- cooperating during the investigation errands;
- implementing all possible actions to make the involved individuals participate in the investigation (ie, when they are subpoenaed); and
- refraining from destroying, falsifying or hiding information.

Also, according to the guidelines, cooperation during the sanction proceeding includes:

- refraining from denying, directly or through the submission of evidence, the participation in the cartel;
- submitting useful new evidence;
- refraining from destroying, falsifying or hiding information; and
- cooperating during the procedural errands.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

According to article 79 of the Federal Law of Economic Competition (LFCE), the following information or evidence should be contained in the authority's statement of probable responsibility (DPR):

- the identification of the economic agents under investigation and, if possible, the corresponding persons;
- the matter under investigation and the probable purpose or effects on the market;
- the evidence and other elements of conviction available on the file and its analysis; and
- the elements that support the DPR and the legal provisions that are considered infringed, as well as the consequences that may result from such infringements.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent both the corporation and its employees if a conflict of interest does not exist or a potential conflict of interest is not foreseeable.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants to the extent that a conflict of interest does not exist or a potential conflict of interest is not foreseeable. If evidence of the cartel activity exists, counsel should not represent multiple defendants, since each of them will be interested in applying for the leniency programme.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes, if it is not prohibited by the corporation's policies.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Private damages awards are tax-deductible while fines are not.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Mexican competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, sanctions for non-compliance with local legislation can co-exist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The best way to get the fine down is to apply for the leniency programme. However, for those who do not qualify for the programme, immediately ceasing participation in the alleged cartel and cooperating with the Federal Economic Competition Commission (COFECE) during investigation and sanction proceedings may lead the authority to consider a lower fine.

For a fine to be applied, the requirements under the LFCE for confirmation of the existence of cartel conduct must be satisfied. An economic agent's conduct towards COFECE (ie, interfering or cooperating with the Commission in the execution of its powers) are considered mitigating factors when calculating the fine. Mitigation does not apply if an economic agent seeks to obtain the benefit of the leniency programme.

The existence of a compliance programme may help reduce a fine, as it is one of the elements that COFECE may consider as indicia of intention when imposing a fine.

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UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In April 2019, a specialised federal court issued a decision ruling that two economic agents that belong to the same economic interest group, in the context of a public procurement, can be considered competitors to each other and, therefore, can engage in cartel conduct. Considering the sense of this ruling, the Federal Economic Competition Commission (COFECE) sanctioned the economic agents for cartel behaviour. It is important to mention that, historically, it has been considered that the economic agents that belong to the same economic interest group cannot be considered competitors among themselves, so they cannot collude in absolute monopolistic practices.

Also, in recent decisions, the specialised federal courts have established that COFECE, in the context of the imposition of the fine, cannot apply factors to the damage derived from the conduct that are not contemplated in the law. The foregoing was decided because COFECE, in several decisions, multiplied the damage caused by two if the offence was classified as grave and, again, by two if it had been determined that there were indicia of intention.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

We do not expect that the current regime will be subject to any modification soon.

Portugal

Mário Marques Mendes and Alexandra Dias Henriques

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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.

With regard to 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 its 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 with regard to matters that the AdC is called to assess under the competition legal regime;
- releasing, notably among economic operators, guidelines deemed relevant for the competition policy;
- following the activity of, and establishing cooperation links with, the EU institutions, national, foreign and international entities with responsibilities in the area of competition;
- promoting research in the area of competition law;
- contributing to the improvement of Portuguese legal regimes in all areas relevant to competition;
- carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition; and
- ensuring the technical representation of the Portuguese state in EU or international institutions in competition policy matters, without prejudice to the powers of the Foreign Affairs Ministry.

The AdC is composed of two bodies: the Board of Directors and the Sole Supervisor, supported by the organisation required for the performance of the AdC's responsibilities, established in an internal regulation.

The Board of Directors is the highest body of the AdC and is responsible for the definition of the AdC's action and by the management of the AdC's services. The Board of Directors consists of a chair and up to three other members. A vice president may also be appointed as long as in total an odd number of members is maintained. The members are appointed by the Council of Ministers upon the proposal of the minister for economic affairs and pursuant to the hearing of the competent parliament commission.

The Sole Supervisor is responsible for the control of the legal, regular and sound management of the AdC's assets and financial management, and also carries out an advisory role to the Board of Directors. The Sole Supervisor is a chartered accountant or a chartered accountancy firm appointed by joint decision of the ministers responsible for financial and economic affairs. The Sole Supervisor must be an auditor registered with the Securities Market Commission or, if this is not adequate, a chartered accountant or a chartered accountancy firm member of the Chartered Accountants Chamber.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Law No. 19/2012 of 8 May superseded the previous regime put in place by Law No. 18/2003 of 11 June. Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition regime. Meanwhile, Decree-Law No. 125/2014 of 18 August has enacted the AdC's statutes, superseding Decree-Law No. 10/2003 of 18 January.

It is also worth underlining the long-awaited implementation of the EU Private Enforcement Directive through the Private Damages Act, which introduced changes to a number of articles of the Act, notably regarding confidentiality and access to documents.

The Act is expected to be amended along with the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (ECN+ Directive), which aims to give the member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the internal market. The deadline for the transposition of the Directive into the member states' national legislation was 4 February 2021. However, the Law Proposal already submitted by the Portuguese government to the Parliament is under discussion and has still not been approved.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 9 of the Act, in line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, having as their object or effect to prevent, distort or restrict competition in the whole or part of the national market to a considerable extent. It then lists some of the behaviour that may be prohibited, including:

- directly or indirectly fixing purchase or sale prices or any other transaction conditions;
- limiting or controlling production, distribution, technical development or investments;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making a condition of the signing of contracts the acceptance, by the other parties, of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Cartels are likely to correspond to one or more of these situations. Furthermore, acts not listed under article 9 may naturally fall within its scope, provided that the conditions for its application are fulfilled.

Only significant restrictions of competition are relevant, excluding *de minimis* infringements.

The AdC has already interpreted article 9 of the Act in the sense that infringements the object of which is to prevent, distort or restrict competition (as opposed to infringements the effects of which are to prevent, distort or restrict competition) are infringements per se, insofar as they are prohibited because they represent a danger to competition whether or not they produce the effects that they potentiate (see, for instance, the AdC's decision in case 1/2011 regarding competitive restrictive practices in the production, processing and marketing of flexible polyurethane foam).

Infringements to article 9 of the Act constitute quasi-criminal minor offences and are punished as either intentional (cases where undertakings act intentionally and aware of the unlawfulness of their conduct) or negligent (violation of duties of care) behaviours (see articles 67 and 68 of the Act).

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and other forms of business collaboration can raise competition law issues. The Act may need to be considered and cartel risks may arise depending on the joint ventures and strategic alliances specific features. Attention must be paid notably if the parties could be competitors on their own for the goods or services to be offered by the joint venture or the strategic alliance in the absence of their arrangement or agreement. Competition rules need also to be considered regarding the level of separation between the parents of the joint venture and the potential information sharing between them.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The definition of 'undertaking' adopted in the Competition Act, Law No. 19/2012 of 8 May (the Act) is very broad and in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it is financed. Groups of undertakings are treated as a single undertaking where they make up an economic unit or maintain ties of interdependence or subordination among themselves.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Act applies to restrictive practices occurring in Portugal or that may have an effect within it.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

No.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Under the Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

According to article 10(1) of the Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly to the provisions of article 101(3) of the Treaty on the Functioning of the European Union (TFEU), this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings invoking the above justification most prove they meet these conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between member states, they satisfy the remaining application requirements of a block exemption regulation adopted under article 101(3) TFEU. This benefit may be withdrawn by the Competition Authority (*Autoridade da Concorrência* – the AdC) if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no specific defence or exemption provided for in the Act in this respect. As far as regulated sectors are concerned, the AdC's responsibilities are carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors that establishes the terms of their reciprocal cooperation.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Competition Act, Law No. 19/2012 of 8 May (the Act), as well as infringements of article 101 Treaty on the Functioning of the European Union (TFEU) that the Competition Authority (*Autoridade da Concorrência* – the AdC) initiates or in which it is called to intervene, are governed by the Act and, on a subsidiary basis, by the quasi-criminal minor offences regime. The most relevant steps are as follows.

Inquiry

Initiating an inquiry: principle of opportunity

Under the Act, the AdC may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Act has adopted the principle of opportunity, pursuant to which, in exercising its powers, the AdC shall be subject to the criteria of public interest in the promotion and defence of competition, and on the basis of such criteria it may grant different degrees of priority in handling the matters it is called to assess. In deciding whether proceedings for infringement of competition rules shall be initiated, the AdC shall take into account:

- the competition policy priorities;
- the elements of fact and of law that are submitted to the AdC;
- the seriousness of the possible infringement;
- the likelihood of proving the existence of the infringement; and
- the scope of the investigation activity required to perform the mission of ensuring compliance with national and EU competition rules.

The AdC has adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

The AdC shall register all complaints received and initiate the corresponding proceedings. However, if, on the basis of the information available, the AdC considers that there are no sufficient grounds for action, it shall inform the complainant and grant a delay of no fewer than 10 working days to submit observations. If such observations are submitted by the complainant within the prescribed deadline, but the AdC does not change its position, declaring that the complaint has no grounds or should not be granted priority, such a decision may be appealed to the Specialised Court. In the absence of a timely submission of observations, the case is closed.

Scope

Within the framework of the inquiry, the AdC shall carry out all the investigation actions required to establish the existence of an infringement and the infringers and to collect evidence.

Settlement proceedings

During the inquiry phase, the AdC may fix a deadline to the concerned undertaking of no fewer 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 a fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings.

Closure with conditions

The AdC may also accept commitments offered by a concerned undertaking that are likely to eliminate the effects on competition of the practices under scrutiny, closing the case with conditions attached aimed at guaranteeing compliance with the commitments offered. Before approving a decision to close the case with conditions attached, the AdC shall publish on its website and in two major national newspapers, at the expense of the concerned undertaking, a summary of the case, fixing a deadline of no fewer than 20 working days for submission of observations by interested third parties. The AdC may reopen a case closed within two years with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the closure decision was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months. However, if such deadline cannot be met, the Council of the AdC (the AdC's decision-making body) shall inform the concerned undertaking of that fact, indicating the period required for the completion of the inquiry. Upon completion of the inquiry, the AdC may:

- start the investigation phase notifying the concerned undertaking of the statement of objections, when the AdC concludes that, on the basis of the findings, there is a reasonable possibility of adoption of a sanctioning decision;
- close the case when the findings do not allow for the conclusion that there is a reasonable possibility of adoption of a sanctioning decision;
- put an end to the proceedings adopting a sanctioning decision within settlement proceedings; or
- close the file with conditions attached, under the terms referred to above.

If the inquiry has been initiated following a complaint and the AdC considers, on the basis of the findings, that there is no reasonable possibility of adoption of a sanctioning decision, the AdC informs the complainant thereof, fixing a deadline of no fewer than 10 working days for the submission of observations. If such observations are submitted and the AdC's position remains unchanged, the latter shall adopt an express closure decision, which may be appealed to the Specialised Court.

Investigation

Scope

In the statement of objections, the AdC shall fix to the concerned undertaking a deadline of no fewer than 20 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, and to request complementary evidence it may deem convenient. Within its submitted observations, the concerned undertaking may request an oral hearing. Upon a reasoned decision, the AdC may refuse to undertake additional action with regard to complementary evidence if it considers that the request has mere delaying purposes. The AdC may also carry out additional evidence collection, even after the submission of the written observations by the concerned undertaking and its oral hearing. In this latter case, the AdC shall notify the concerned undertaking of the evidence gathered, fixing a deadline of no fewer than 10 working days for submission of observations. Furthermore, whenever the new evidence substantially changes the facts initially attributed to the concerned undertaking, the AdC shall issue a new statement of objections, the above applying mutatis mutandis. Pursuant to the Act, the AdC has adopted guidelines on the investigations and procedural steps.

Settlement proceedings

In its observations regarding the statement of objections, the concerned undertaking may also submit a settlement proposal, in which case the proceedings shall be suspended for a period established by the AdC that cannot exceed 30 working days. The remaining steps of the settlement proceedings are largely similar to those indicated above in respect of the submission of a settlement proposal during the inquiry phase.

Closure with conditions

During the investigation phase, the AdC may also close the case with conditions attached, under the same terms as those referred to above.

Decision

The investigation must be concluded within a maximum deadline of 12 months from the notification of the statement of objections. However, if such deadline cannot be met, the Council of the AdC shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the AdC may:

- declare the existence of restrictive practice and, if applicable, consider such practice justified under article 10 of the Act;
- adopt a sanctioning decision within settlement proceedings;
- close the case with conditions attached, under the terms referred to above; or
- close the case without conditions.

Decisions declaring the existence of a restrictive practice may include the admonition or the application of fines and other sanctions set in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

Interim measures

The AdC may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause serious damage that is irreparable or difficult to repair.

The interim measures may be adopted by the AdC ex officio or upon request by any interested party and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. The imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

Liaison with sectoral regulators

Whenever the infringement occurs in a sector subject to specific regulation, the AdC shall immediately inform the corresponding regulatory authority, so that the latter may submit observations. Furthermore, prior to the adoption of the final decision, the AdC shall obtain a prior opinion from the relevant regulatory authority, except in the case of a decision of closure of the case without conditions. Likewise, when a sectoral regulatory authority assesses a practice that may amount to a violation of competition rules, it shall immediately inform the AdC. In this latter case, the sectoral authority, before issuing a final decision, shall submit a draft thereof to the AdC to obtain its opinion.

Investigative powers of the authorities

12 What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Act enhanced the extensive powers of investigation already granted to the AdC by Law No. 18/2003 of 11 June (the former Competition Act). Under the Act, in investigating restrictive practices the AdC may:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examine, collect and seize extracts from accounting records or other documentation at the premises, land or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application); or
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the AdC's functions.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees, or of other workforces of undertakings or associations of undertakings, evidence of infringements to article 9 of the Act or to article 101 TFEU may be found, the AdC may, upon a decision by the competent judge issued upon a substantiated application by the AdC, carry out searches in such domiciles. A search in an inhabited house, or in a locked part thereof, may only be carried out from 7am to 9pm, otherwise it being null and void. Searches in the office of an attorney-at-law or doctor may only be carried out in the presence of a judge, who shall previously inform the chair of the local attorneys' bar or doctors' association, as applicable, so that he or she, or a delegate thereof, may be present. These rules apply, mutatis mutandis, to searches elsewhere, including vehicles of shareholders, board members or employees, or of other workforces of undertakings or associations of undertakings.

Seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. Seizure of documents in the office of an attorney-at-law or doctor, which are subject to professional secrecy, is not permitted unless such documents are the object or an element of the infringement, otherwise being null and void. Seizure of documents in a credit institution, which are subject to banking secrecy, is carried out by the competent judge when there are grounded reasons to believe that such documents are related to the infringement or are of great interest to establish the facts.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Following the decentralisation carried out under Council Regulation No. 1/2003, cooperation between national competition authorities, including the Competition Authority (*Autoridade da Concorrência* – the AdC) and the European Commission, takes place in the framework of the European Competition Network (ECN). According to the last Activity Report made available, in 2020 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 notably on restrictive practices. According to the same Activity Report, in 2020 the AdC announced the opening of six infringement cases regarding potential infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to the ECN Network. The AdC also emphasises its position as coordinator of the Working Group on Cooperation Issues and Due Process, together with the national competition authorities of Germany and Hungary. This working group closely monitored the developments in the preparation and negotiation of the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive), which aims to give EU member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the internal market.

Besides such cooperation, the AdC is also a member of the European Competition Authorities Association (ECA). Furthermore, at a multilateral level, the AdC cooperates with international organisations, including the OECD and the United Nations Conference on Trade and Development (UNCTAD). The AdC also participates in multilateral cooperation networks, such as the International Competition Network (ICN) (where the AdC's president, Margarida Matos Rosa, assumes a place in the Directive Committee), 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. It is worth mentioning the memorandum of understanding celebrated in 2020 between the AdC and the Angolan Competition Regulator (ARC).

Interplay between jurisdictions

14 Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Recently, the AdC and the Spanish Competition Authority (CNMC) carried out simultaneous unannounced inspections at companies providing commercial and financial information services for businesses.

According to the AdC (press release 09/2021), both Authorities are investigating possible market sharing and price-fixing agreements regarding those services, the investigations being conducted by the AdC and the CNMC in parallel, respectively in Portugal and in Spain, with the Authorities cooperating within the ECN together with the European Commission.

As part of this cooperation, the AdC and the CNMC conducted simultaneous unannounced inspections at the headquarters of the companies under investigation in their respective territories.

Such inspections are a preliminary step in the investigation process and the AdC has declared the secrecy of the process to preserve the interests of the investigation.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Authority (*Autoridade da Concorrência* – the AdC) both investigates and adjudicates on cartel matters. After the investigation phase by the officials of the restrictive practices department, the final decision is taken by the Council of the AdC (its decision-making body).

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden of proof concerning accusations of anticompetitive behaviour rests with the AdC. However, exemptions must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase, the decision to start the investigation phase is taken on the basis of a balance of probabilities; conversely, taking into account criminal procedure principles, such as the *in dubio pro reo* principle, which apply to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences, the level of proof required for the final decision is that the decision-maker comes to a conclusion without any reasonable doubt.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Pursuant to article 31(4) of the Competition Act, Law No. 19/2012 of 8 May (the Act), the evidence will be assessed in accordance with the rules of experience and the free opinion of the AdC. In its guidelines for the investigation of cases relating to the application of articles 9, 11 and 12 of the Act and 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the AdC underlines such legal principles and invokes the rules of experience connected with social and economic relations that are the subject of the competition rules.

According to the AdC, such rules of experience allow account to be taken of the specific aspects resulting from the nature and context of the practices in question, in particular the difficulty of obtaining direct evidence in relation to certain infringements, such as concerted practices, and the need to consider circumstantial evidence.

Appeal process

18 | What is the appeal process?

Law No. 46/2011 of 24 June determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court) as of 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the AdC.

Under the current regime, the AdC's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the AdC's decision, except for decisions that impose structural remedies as established in the Act.

Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis that enforcement would cause it considerable harm and the party offers a guarantee, provided the guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment and can reduce or increase the corresponding amounts.

An appeal of the AdC's final decision condemning the concerned undertaking must be lodged within a non-extendable deadline of 30 working days. The AdC has a deadline of 30 working days, which also cannot be extended, to forward the file to the public prosecutor. The AdC may attach to the file written conclusions, together with elements or information it deems relevant for the court's decision, and shall also indicate and submit the relevant evidence. The AdC shall further be given the opportunity to bring to the hearing any elements deemed relevant for the decision and to have a representative participating in such hearing. Although the court may in certain cases decide by means of a court order without a prior hearing, the AdC, the public prosecutor or the concerned undertaking may oppose such decision. The court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or the recognition of any right, must be notified to the AdC. The withdrawal of the case by the public prosecutor depends on the AdC's agreement. The AdC has standing to autonomously appeal from the court's decisions (other than routine decisions).

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

The duration of the appeal proceedings depends on the complexity of the cases and of the concerned courts' workload. It may nevertheless last longer than 12 months.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

The application of general criminal law can only derive from behaviour also corresponding to a penal offence (eg, fraud, extortion, disturbance of public auction or tender), as there are no criminal sanctions for competition law offences. Cartel activity per se is considered a minor quasi-criminal offence.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

In relation to sanctions for quasi-criminal minor offences, under the Act, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority (*Autoridade da Concorrência* – the AdC) for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 9 of the Act or article 101 the Treaty on the Functioning of the European Union (TFEU);
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase;
- for non-compliance with the behavioural or structural remedies imposed by the AdC; or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements are carried out by individuals held responsible under the Act, the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full calendar year in which the infringement took place.

In addition, refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the AdC, are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the AdC for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In cases where any of these infringements are carried out by individuals held responsible under the Act, the applicable fine ranges from 10 to 50 'account units' (each 'account unit' currently amounts to €102).

Furthermore, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from two to 10 account units.

Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed double the higher limit of the fines applicable to the infringements in question.

Additionally, should the infringement be considered sufficiently serious, the AdC can impose, as ancillary sanctions:

- the publication, at the offender's expense, of an extract of the sanctioning decision in the official gazette of Portugal and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market; or
- in cases of competition law infringements carried out during, or due to, public procurement proceedings, the prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

The AdC may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in Portugal in the year immediately preceding that of the final decision, per day of delay counted from the date established in the notification, where the undertakings do not comply with an AdC decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out:

- on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity); or
- by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out, are also liable when:

- holding leading positions, they act on behalf or on the account of the legal entity; or
- knowing, or having the obligation to know, the infringement, they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings, with representatives that were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment, are jointly and severally responsible for paying the fine unless they have expressed in writing their opposition to the infringement.

In relation to civil sanctions, anticompetitive agreements, decisions and practices are considered null and void (except where they are considered justified), and civil liability may also arise for the damage caused.

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act. In addition, on 20 December 2012, the AdC published guidelines regarding the methodology to be used in the application of fines. In drafting these guidelines, the AdC took into consideration the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003. The AdC's guidelines only apply to cases in which the inquiry phase was initiated after the Act came into force. Furthermore, the AdC states in the guidelines that they are not aimed at allowing for the prior calculation of the actual fines to be applied but rather at providing information necessary for the understanding of the methodology followed by the AdC in fixing such fines.

According to the AdC's public decision record, which appears on the AdC's website and only includes definitive decisions (ie, decisions that were not subject to judicial review or were subject to appeal and the final judicial decision has already been adopted), and in cases where the AdC has determined that an infringement occurred, the AdC has imposed fines except in those cases where it has exempted the concerned undertakings from the fines pursuant to the application of the leniency regime.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Under the Act, the following circumstances may be considered relevant for setting the amount of the fines:

- the seriousness of the infringement in terms of affecting effective competition in the Portuguese market;
- the nature and size of the market affected by the infringement;
- the duration of the infringement;
- the level of participation in the infringement by the concerned undertakings;
- the advantages that the offending concerned undertakings have enjoyed as a result of the infringement, if possible to determine;
- the behaviour of the concerned undertakings in putting an end to the restrictive practices and in repairing the damages caused to competition, notably through the payment of compensation to those injured following an out-of-court agreement;
- the economic situation of the concerned undertakings;
- records of previous competition infringements carried out by the concerned undertakings; and
- cooperation with the AdC until the close of the administrative proceedings.

Consideration of the above circumstances is mandatory for the AdC. However, the absence of a hierarchy and the consideration of circumstances not listed above leave room for discretion.

Furthermore, as stated above, on 20 December 2012 the AdC published guidelines regarding the methodology to be used in the application of fines.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There is no legal rule or express indication from the AdC recognising the existence of a compliance programme as a direct motive for sanction reductions. We are not aware of any decisions in which the AdC has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Directors' disqualification is not covered in the Act. According to our knowledge, there is no record of orders from the AdC prohibiting individuals involved in cartel activity from serving as corporate bodies or officers.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

In the case of competition law infringements carried out during, or due to, public procurement proceedings, the AdC can impose, as an ancillary sanction, a prohibition, for a maximum of two years, on participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Cartel activity per se is considered a quasi-criminal minor offence and does not involve the application of criminal sanctions, without prejudice to the application of general criminal law if the behaviour in question also corresponds to a specific criminal offence.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Before the entry into force of the Private Damages Act (4 August 2018), third-party claims for damages were dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. The standard liability requirements are the existence of an illicit act (the anticompetitive behaviour), injury to the claimant and a causal link between the two.

With the implementation of the EU Private Enforcement Directive through the Damages Act, those standard liability requests do not change. Also, the purpose of this liability is still merely to repair damage (ie, to restore the situation that would have existed if the event that determines the need for the reparation had not occurred). The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action.

Any injured party has individual standing.

In actions for damages whose request is based on the repercussion of the additional costs on an indirect customer, the latter has the burden of proof of the existence and of the scope of such repercussion. However, unless evidence is provided to the contrary, it is presumed that the additional costs were passed on to the indirect customer, whenever this shows that:

- the defendant had committed an infringement of competition law;
- this infringement had an additional cost for the direct client of the defendant; and
- the defendant acquired the goods or services affected by the infringement, goods or services derived from the goods or services affected by the infringement or that contain them.

A novelty resulting from the new damages actions regime is the presumption that the cartels are responsible for damages caused by the infringements that they practise unless proven otherwise. According to the Damages Act, if it is practically impossible or excessively difficult to calculate accurately the total damage suffered by the injured person or the value of the repercussions, taking into account the available evidence, the court shall calculate it with recourse to the Commission Communication (2013/C 167/07) of 13 June 2013 on the quantification of damages in actions for damages on the grounds of infringements of articles 101 and 102 of the Treaty on the Functioning of the European Union. Moreover, the Competition Authority shall assist the court, at the latter's request, in quantifying damages resulting from an infringement of competition law, and may request the court to provide a reasoned exemption from providing such assistance.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions, whereby individual litigants or associations may, under certain conditions, sue as representatives of injured parties, were already provided for in Law No. 83/95 of 31 August and article 31 of the Code of Civil Procedure, being applicable to competition law injuries. The Damages Act restated the application of the said regime and added some rules in this respect. The process is now governed by ordinary civil procedure rules and by the Damages Act itself. In addition to the entities mentioned in Law 83/95 of 31 August, the following now have standing to bring actions for compensation for infringements of competition law:

- associations and foundations for the protection of consumers; and
- associations of undertakings whose members are adversely affected by the infringement of the competition law in question, even if their statutory objectives do not include the defence of competition.

Until recently, class actions were not a very popular or frequently chosen course of action in Portugal, and only one case involving competition law, from 2015, was known. In 2020, Ius Omnibus, a non-profit association announced as having the purpose of defending European Union consumers, was created and since then a number of class actions have

been submitted before the Competition, Regulation and Supervision Court, notably following condemning decisions for anticompetitive practices from the Competition Authority (*Autoridade da Concorrência*) (*Ius Omnibus v Super Bock*; *Ius Omnibus v ANT*; *Ius Omnibus v EDP*) and from the European Commission (*Ius Omnibus v Mastercard*). Any consumer who does not wish to be represented in these actions may exercise the right to opt out, communicating this intention to the court. Consumers may also decide to intervene in the process in support of Ius Omnibus.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Act, Law No. 19/2012 of 8 May (the Act) establishes the leniency rules in article 75 et seq In addition, Competition Authority (*Autoridade da Concorrência* – the AdC) has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Act, the AdC can grant immunity or reduction of fines in procedures for quasi-criminal minor offences that concern agreements and concerted practices between competitors prohibited by article 9 of the Act and (where applicable) article 101 of the Treaty on the Functioning of the European Union (TFEU), which are aimed at coordinating the competitive behaviour of the undertakings or at influencing relevant competitive conditions.

To obtain full immunity, an applicant must:

- be the first undertaking to inform the AdC of its participation in an agreement or a concerted practice, as long as it provides information and evidence that, in the AdC's discretion, enables the regulator:
  - to substantiate a request for searches or seizure of data, provided that the AdC, at the time the information and evidence are submitted, does not have sufficient elements to perform such acts; or
  - to establish the existence of an infringement, provided that, at that moment, the AdC does not have sufficient evidence of the infringement available;
- cooperate fully and continuously with the AdC from the moment of the initial request by:
  - providing all data and evidence already obtained or to be obtained in the future;
  - responding immediately to any request for information;
  - avoiding acts that may endanger the investigation; and
  - not informing the other participants in the concerted practice;
- put an end to its participation in the infringement before it provides the AdC with the information and evidence, except as reasonably required, in the AdC's opinion, to preserve the investigation effectiveness; and
- not have coerced other undertakings to participate in the breach.

The information and evidence to be provided must contain complete and precise information on:

- the agreement or concerted practice;
- the undertakings involved, including the objectives, activity and ways of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Under the leniency rules set forth in the Act, the AdC can grant immunity from or a reduction of fines.

The AdC shall grant a reduction of fines to undertakings which, not being eligible to immunity, submit information and evidence that adds significant value to those already in the possession of the AdC and provided the conditions are met regarding cooperation with the AdC and putting an end to the infringement.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

As regards full immunity, only the first undertaking to provide information and evidence may obtain full immunity from fines.

Concerning the reduction of the fine, the corresponding level of reduction is determined by the AdC as follows:

- a reduction from 30 to 50 per cent granted to the first undertaking that provides information and evidence;
- a reduction from 20 to 30 per cent granted to the second undertaking that provides information and evidence; or
- a reduction of up to 20 per cent granted to the subsequent undertakings that provide information and evidence.

In fixing the fine, the AdC shall take into account the order of submission of the information and evidence, as well as their added value for the investigation. If a leniency application is submitted after the notification of the statement of objections the above reduction limits are reduced by half.

There is currently no 'immunity plus' or 'amnesty plus' option.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There is no specific deadline for immunity or partial leniency applications, but an undertaking that wishes to take advantage of the leniency programme should approach the AdC as early as possible. It is possible to obtain a marker securing the applicant's position in relation to other possible applicants. Upon receipt of a written or oral application for immunity or reduction of a fine, the AdC may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of up to 15 days for the applicant to complete their application.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

An equivalent level of cooperation applies to all leniency applicants and they must cooperate fully and continuously with the AdC from the moment of the initial request, notably by:

- providing all data and evidence already obtained or to be obtained in the future;
- responding immediately to any request for information;
- avoiding acts that may endanger the investigation; and
- not informing the other participants in the concerted practice.

The applicants must also put an end to their participation in the infringement, except as reasonably required, in the AdC's opinion, to preserve the investigation effectiveness.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The AdC shall classify as confidential the leniency application as well as the documents and information provided by the applicant.

The rules apply to both full (immunity) and partial (reduction of fines) leniency.

For the purpose of preparing the observations in response to the statement of objections, a concerned undertaking shall be granted access to the leniency application and to the related documents and information by the AdC. However, the concerned undertaking shall not be allowed to make copies of such elements unless authorised by the leniency applicant. Third parties' access to the leniency application and to the related documents and information shall require the leniency applicant's consent, without prejudice to the right of access under the terms established in the Damages Act. The Damages Act has introduced amendments to the Act in respect of confidentiality applicable to leniency applications. In any event, leniency statements (regarding an exemption from or reduction of the fine) are protected.

The concerned undertaking shall not be granted access to copies of its oral statements and third parties shall have no access to them.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Under the Portuguese leniency regime, the AdC is not granted the power to enter into arrangements such as plea bargains or similar agreements. Settlements are permitted under the terms described above, and a reduction in fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings. In its most recent cartel decisions, the AdC, in determining the amount of the fines, took into account the cooperation of the companies during the investigation through the use of both the leniency regime and the settlement proceedings. The facts confessed by a concerned undertaking in a settlement procedure cannot be subject to judicial review for the purposes of any appeal.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Individuals and employees of an undertaking who are responsible for the direction or surveillance of the area of activity in which an infringement occurred, may be granted immunity or reduction of fines if they fully and continuously cooperate with the AdC, even if they have not requested such benefits.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Regulation No. 1/2013 sets out the leniency administrative procedure.

Under Regulation No. 1/2013, a leniency request is made by means of an application addressed to the AdC and must include:

- the object of the application, specifying whether it is a request for immunity or for a reduction in fine, or both;
- the identification of the applicant, the capacity in which the application is filed (ie, a company or the members of its board of directors or equivalent entities, or the individuals responsible for the management or supervision of the sector of activity concerned in the infringement) and the corresponding contacts;
  - legal entities must include the identification of the current members of the board of directors, as well as of the members of such board during the duration of the infringement;
- detailed information on the alleged cartel;
- the identification and contact details of the undertakings involved in the alleged cartel, as well as of the current members of their boards of directors and of the members of such boards during the duration of the infringement;
- identification of other jurisdictions where a leniency application has been filed in respect of the same infringement; and
- other information deemed relevant for the request for immunity or reduction of the fine.

Together with the leniency application, the applicant shall submit all the evidence in its possession or under its control.

The leniency application must be submitted at the AdC's head office by any means, notably:

- fax (to +351 21 790 20 93/30);
- postal mail addressed to the AdC's head office;
- email sent to the address clemencia@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 a reasoned request, the AdC may accept a simplified leniency application if the applicant has filed, or is filing, a leniency application with the European Commission and the Commission is in the situation provided for in the Commission Notice on cooperation within the network of competition authorities (2004/C

101/03). The application shall, in these cases, be made in Portuguese or English according to the form attached to Regulation No. 1/2013 or by oral statements. The AdC shall provide a document confirming the receipt of the simplified application and the date and hour of its submission. If the AdC starts an investigation of the infringement, it shall request that the applicant completes the application within a time frame of at least 15 days, which, if applicable, shall include a Portuguese translation of a simplified application filed in English. If the application is not completed or the Portuguese translation is not filed within the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and this latter is no longer available, the AdC shall inform the applicant that the application may be withdrawn or completed for the purposes of reduction of the fine. If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed.

Upon receipt of a written or oral application for immunity or reduction of fine, the AdC may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of at least 15 days for the completion of the application by the applicant. To benefit from the marker, the applicant must indicate in the application:

- its name and address;
- information on the alleged cartel, and on the products, services and territory affected;
- an estimate of the duration of the alleged cartel;
- whether other applications for immunity or reduction of fines have been filed or are planned to be filed with other competition authorities regarding the alleged cartel; and
- the justification for the marker.

If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed. If the application is not completed, the application shall be refused. Following an analysis of the application, the AdC shall notify the applicant if it considers that the requirements for immunity are not met, in which case the applicant may, within 10 days of such notification, withdraw the application or request the AdC that this latter is considered for the purposes of reduction of the fine.

As regards an application for reduction of a fine, if the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant add significant value to that already in its possession, it shall inform the applicant of its intention to grant a reduction of the fine, indicating the level of the applicable reduction. The aforementioned rules governing the application for immunity or reduction of fine apply. If the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant do not add significant value to those already in its possession, it shall notify the applicant, in which case this latter may, within 10 days of such notification, withdraw the application.

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled. The final decision on immunity or reduction of fines shall be taken in the final decision of the procedure adopted by the AdC at the end of the investigation.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The defendant can request the consultation of the case file and obtain, at his or her own expense, any extracts, copies or certificates. Nevertheless, the Competition Authority (*Autoridade da Concorrência* – the AdC) can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. The AdC shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets. To respond to the statement of objections, the defendant may also have access to the application for immunity from the fine or reduction of the fine, and to the documents and information submitted for the purpose of immunity or reduction, though no copy can be made unless authorised by the applicant.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Employees can be interviewed or requested to provide information or documents relevant to an investigation by the AdC. In such cases, joint representation of a corporation and employees by the same counsel may constitute a conflict of interest under article 99 of the Portuguese Bar Association Legal Regime.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The representation by counsel of multiple corporate defendants may be acceptable to the extent that it does not raise any conflicts of interest under article 99 of the Portuguese Bar Association Legal Regime.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

In principle, nothing seems to prevent a corporation from voluntarily paying the costs or penalties (or both) imposed on its employees, or from reimbursing employees for such costs or penalties.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or other penalties and private damages awards are not tax-deductible.

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The ne bis in idem principle, which is essentially the equivalent of the double jeopardy principle, applies in the framework of quasi-criminal minor offences and therefore applies to cartel infringements. However, in applying the principle, the AdC shall take into account whether the infringement previously sanctioned is the same as that subject to its assessment, in terms of both the specific behaviour in question and the territory where it occurred or had an effect.

As regards liability for private damage claims, the overlapping liability for damages shall be taken into account, notably in the determination of the actual amount of damages that may be claimed in the Portuguese jurisdiction.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Timely leniency applications and thorough collaboration with the AdC as well as the settlement proceedings may avoid or reduce the amount of the fine. In addition, the behaviour of the undertaking concerned in putting an end to the restrictive practices and in repairing the damage caused to competition may be taken into account in the determination of the amount of the fine. We are not aware of any decisions in which the AdC has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

We underline the wide-ranging activity of the Competition Authority (the AdC) in the past 12 months, notably the following.

In late October 2020, the AdC imposed a fine of €3.6 million on the Portuguese advertising agencies association (APAP) for allegedly restraining its associates from freely participating in procurement tenders for advertising services.

In November 2020, the AdC issued two Statements of Objections (SO): the first one to the National Association of Land Surveyors (ANT), for possible price fixing of the services of land surveying, and the second to supermarket chains and a beverage supplier for alleged price fixing in supermarkets. This last SO integrates the third set of 'hub-and-spoke' cases investigated in Portugal.

In December 2020 the AdC imposed a fine of €84 million on two telecommunications operators for market sharing and price fixing of mobile and fixed telecommunications services. In the same month, the AdC continued its hub-and-spoke saga, issuing, on the one hand, another SO regarding supermarket chains and a supplier of cosmetics and personal care products and, on the other, two condemning decisions imposing a total fine of circa €304 million on six supermarket chains and two beverage suppliers, also condemning a board member and a director.

In March 2021, the AdC concluded the investigation on the ANT with the imposition of a fine of €50,000. Within a settlement procedure, the ANT benefited from a reduction of the fine for admitting the practice, collaborating with the AdC and renouncing judicial litigation.

In April 2021, the Authority issued an SO for an agreement not to hire workers, involving the Portuguese Professional Football League and 31 sports companies, this being the first investigation regarding an anticompetitive practice in the labour market. According to the AdC, through a non-hiring (no-poach) agreement, companies abstained from hiring each other's workers, therefore renouncing competition for the acquisition of human resources, in addition to depriving workers of labour mobility.

Interestingly enough, in June 2021 the AdC and the Spanish Competition Authority (carried out simultaneous unannounced inspections at companies providing commercial and financial information services on businesses. Both authorities are investigating possible market sharing and price fixing agreements regarding those services.

In July 2021, the Authority announced that it had sanctioned five companies with a total fine of €2.9 million for implementing a non-compete agreement in the market for the provision of services to waste management systems in Portugal. In this case, the AdC also sanctioned six managers and board members with fines that totalled approximately €27,000.

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Also in July 2021, two more SOs were issued by the AdC: the first one to seven companies allegedly for taking part in a cartel in public tenders for the provision of surveillance and security services and the second to private hospitals and their business association for an alleged anticompetitive agreement or concerted practice regarding the convention of private hospital health services.

Finally, we note the publication by the AdC, in September 2021, of its final Report and Best Practices Guide on anticompetitive agreements in the labour market aimed notably at preventing horizontal agreements regarding no-poach and wage fixing that may infringe the Competition Act and, if applicable, the Treaty on the Functioning of the European Union by limiting the individual freedom of firms to define their strategic commercial conditions (e.g. hiring and setting wage conditions), thus being responsible for negative effects on workers and consumers.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The Competition Act, Law No. 19/2012 of 8 May is expected to be amended along with the transposition of the Empowering National Competition Authorities Directive (EU) No. 2019/1, which aims to give the member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the European internal market.

Singapore

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Competition law in Singapore is governed by the Singapore Competition Act (Cap 50B) (the Act). Cartel activities are prohibited by section 34 of the Act (the section 34 prohibition), which provides that:

> *[Agreements] between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited.*

The section 34 prohibition became effective on 1 January 2006, and since its introduction, the following infringement decisions in respect of the prohibition have been issued:

- bid rigging in the provision of termite control services in Singapore, 9 January 2008 (the *Pest-Busters* case);
- price fixing in the provision of coach tickets for travelling between Singapore and destinations in Malaysia, 3 November 2009 (the *Express Bus* case);
- bid rigging in electrical and building works, 4 June 2010 (the *Electrical Works* case);
- price fixing of monthly salaries of new Indonesian foreign domestic workers in Singapore, 30 September 2011 (the *Domestic Workers* case);
- price fixing of modelling services in Singapore, 23 November 2011 (the *Modelling Services* case);
- information sharing in the provision of ferry services between Batam and Singapore, 18 July 2012 (the *Ferry Services* case);
- bid rigging by motor vehicle traders at public auctions, 28 March 2013 (the *Motor Vehicle Traders* case);
- price fixing of ball and roller bearings sold to aftermarket customers, 27 May 2014 (the *Ball Bearings* case);
- infringement of the section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore, 11 December 2014 (the *Freight Forwarding* case);
- infringement of the section 34 prohibition in relation to the distribution of life insurance products in Singapore, 17 March 2016 (the *Financial Advisers* case);
- bid rigging in the provision of electrical services and asset tagging tenders, 28 November 2017 (the *Electrical Services* case);
- infringement of the section 34 prohibition in relation to the market for the sale, distribution and pricing of aluminium electrolytic capacitors in Singapore, 5 January 2018 (the *Capacitors* case);
- infringement of the section 34 prohibition in relation to the fresh chicken distribution industry, 12 September 2018;
- information sharing between competing hotels in relation to the provision of hotel room accommodation to corporate customers In Singapore, 30 January 2019;
- bid rigging in the provision of construction and maintenance services for Wildlife Reserves Singapore, 4 June 2020; and
- bid rigging in tenders for maintenance services for swimming pools, spas, fountains and water features, 14 December 2020.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition and Consumer Commission of Singapore (CCCS), a statutory body established under Part II of the Act, is the agency responsible for enforcing the Act and investigating cartel matters. Previously known as the Competition Commission of Singapore (CCS), the CCS was renamed the CCCS and took on the additional function of administering the Consumer Protection (Fair Trading) Act (Cap 52A) with effect from 1 April 2018.

Cartel matters are adjudicated by the CCCS, but its decisions can be appealed to the Competition Appeal Board (CAB). A decision of the CAB can subsequently be appealed to the High Court on a point of law arising from the decision, or from any decision as to the amount of a financial penalty.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

On 10 September 2020, the CCCS announced that it was seeking public feedback on proposed changes to the CCCS Guidelines on Market Definition (Market Definition Guidelines), among other items, after conducting a review of its Guidelines on the Act. The proposed changes to the Market Definition Guidelines seek to provide greater clarity on issues related to market definition that may be relevant in the digital era.

Between 16 July 2021 and 5 August 2021, the CCCS carried out a public consultation on proposed changes to the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 (Penalty Guidelines). The proposed changes seek to include clarificatory amendments to the list of mitigating factors contained in the Penalty Guidelines, including stating that it would be a mitigating factor if an undertaking provides evidence that its involvement in the infringement was substantially limited and demonstrates that, during the period in which it was party to the infringement, it actually avoided applying the agreement by adopting competitive conduct in the market. Further, the CCCS has proposed to clarify that:

- the fact that an undertaking did not play a leader or instigator role in the infringement or that it was not a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor; and
- the fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating factor.

Between 30 July 2021 and 27 August 2021, the CCCS conducted a public consultation on the proposed issuance of the Business Collaboration Guidance Note. The note seeks to enable businesses to work together with greater confidence by providing greater clarity on methods of collaboration that do not harm competition. The note focuses on six common types of collaborations, namely: information sharing, joint production, joint commercialisation, joint purchasing, joint research and development, and standardisation.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Section 34 of the Act prohibits 'agreements, decisions by associations of undertakings, and concerted practices', which have as their 'object or effect' the 'prevention, restriction or distortion' of competition in Singapore. Specifically, section 34(2) provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The illustrative list in section 34(2) is not intended to be exhaustive, and the CCCS has specified in its Guidelines on the Section 34 Prohibition 2016 (Section 34 Guidelines) that many other types of arrangements may have the effect of preventing, restricting or distorting competition (including, among other things, information-sharing agreements in some circumstances).

The CCCS has also stated that agreements, decisions and concerted practices will fall within the ambit of the section 34 prohibition only where they have an 'appreciable' effect on competition. The Section 34 Guidelines, paragraphs 2.21 to 2.28, provide further details on when an arrangement might give rise to an appreciable effect on competition. Arrangements involving price fixing, bid rigging, market sharing or output limitation will always be considered, by their very nature, to have an appreciable effect on competition such that it is not necessary for the CCCS to proceed to analyse the actual effects of such arrangements.

One important qualification on the application of the section 34 prohibition is that it does not apply to arrangements that give rise to net economic benefit (an exclusion that is provided for at paragraph 9 of the Third Schedule to the Act). To qualify for the exclusion, it must be shown that the arrangement:

- contributes to improving production or distribution, or promoting technical or economic progress; and
- does not:
  - impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; or
  - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

In determining whether an agreement has the object of preventing, restricting or distorting competition, the CCCS is not concerned with the subjective intention of the parties when entering into an agreement. Instead, it will determine if the section 34 prohibition has been breached based on the content and objective aims of the agreement considered in the economic context in which it is to be applied. The CCCS will also consider the actual conduct and behaviour of the parties in the relevant market.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Whether a joint venture would be subject to cartel laws depends on, among other things, the function that the joint venture performs. Section 54(5) of the Act provides that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity, constitutes a merger and would thus fall within the merger provisions of the Act.

However, a joint venture would not be considered a merger and would likely be subject to the section 34 prohibition if it merely undertakes a specific function of its parent companies' business activities without having access to the market.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The prohibition on activities contained in section 34 Singapore Competition Act (Cap 50B) (the Act) (the section 34 prohibition) applies in respect of 'undertakings', which is defined in section 2 of the Act as 'any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services'. Where employees engage in conduct that would be contrary to the section 34 prohibition, liability would be imputed to, and assessed in respect of, the employing undertaking.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes. Section 33 of the Act specifically states that conduct that takes place outside Singapore will also be prohibited by the section 34 prohibition if it has the object or effect of preventing, restricting or distorting competition within Singapore. More specifically, section 33 of the Act specifies that section 34 of the Act may apply, notwithstanding that:

- an agreement referred to in section 34 has been entered into outside Singapore;
- any party to such agreement is outside Singapore; or
- any other matter, practice or action arising out of such agreement is outside Singapore.

To date, the Competition and Consumer Commission of Singapore (CCCS) has issued infringement decisions in respect of three international cartels, namely the *Ball Bearings* case, the *Freight Forwarding* case and the *Capacitors* case. In all three cases, the Japanese parent companies engaged in conduct in Japan that had an anticompetitive effect within a Singapore market.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

To the extent that the conduct has the object or effect of preventing, restricting or distorting competition within Singapore, there is no applicable exemption or defence from the section 34 prohibition on the grounds that the conduct affects only customers or other parties outside the jurisdiction. However, the section 34 prohibition will not apply if such conduct does not have as its object or effect the prevention, restriction or distortion of competition within Singapore.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Certain liner shipping agreements are exempted from the application of the section 34 prohibition by way of a block exemption order (BEO). The BEO initially took effect on 1 July 2006 for a period of five years, and its first extension until 2015 was granted by the Minister for Trade and Industry on 16 December 2010 and a second extension until 2020 was granted by the Minister on 25 November 2015. On 26 August 2020, the Minister extended the BEO for one year until 31 December 2021. The liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law. Between 14 July 2021 and 4 August 2021, the CCCS sought public feedback on its proposed recommendation to extend the BEO for three years (from 1 January 2022 to 31 December 2024) in respect of vessel sharing agreements for liner shipping services and price discussion agreements for feeder services. In support of its recommendations, the CCCS explained that both types of agreements meet the net economic benefit criteria.

Some other specific activities and industries are excluded from the application of the section 34 prohibition, as specified in paragraphs 5, 6 and 7 of the Third Schedule to the Act. In particular, the section 34 prohibition will not apply to:

- any agreement or conduct that relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law relating to competition, gives another regulatory authority jurisdiction in the matter;
- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap 237A);
- the supply of piped potable water;
- the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- the supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015 (Act 30 of 2015);
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap 263A);
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A);
- the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; or
- any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

Most of the exclusions were made on the basis that the specified activities would be subject to robust sector-specific regulation. Full explanations can be found within Annex B of the CCCS's Second Consultation Paper on the Draft Competition Bill.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Section 33(4) of the Act states that the substantive prohibitions will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the government, any statutory body or any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

In the usual course, parties generally become aware that they are being investigated for a potential contravention of activities prohibited by section 34 of the Singapore Competition Act (Cap 50B) (the Act) (the section 34 prohibition) in one of two ways. First, the Competition and Consumer Commission of Singapore (CCCS) may issue a formal notice, pursuant to section 63 of the Act, requiring the production of information or documents. This notice will set out the details of the potential contravention that the CCCS has reasonable grounds for suspecting has occurred. Second, the CCCS may conduct unannounced searches (dawn raids) of business premises (under a warrant and pursuant to section 65 of the Act) where it has reasonable grounds for believing that there are relevant documents on the premises that would be concealed, removed, tampered with or destroyed if requested by formal notice. The CCCS may also enter premises without a warrant under section 64 of the Act; however, in such cases the CCCS is required to first give written notice of at least two working days of its intended entry, and it will not have the ability to actively search the premises.

Following on from this, it is not uncommon for multiple formal notices (for the provision of information, documents, or both) to be issued by the CCCS to either the infringing parties or any other parties that might have information that is relevant to the investigation. In requesting such information, under section 63(3) of the Act, the CCCS may specify the time, place, manner and form of the provision of such, and it is not uncommon that parties are required to attend formal interviews to provide the information or explain documents.

Upon completion of the investigation, and where the CCCS is proceeding to take enforcement action, the CCCS will give notice to the infringing parties of the directions it intends to impose. These directions will be encapsulated within a proposed infringement decision (PID), which will set out the facts on which the CCCS relies and its reasons for the proposed decision. Upon receipt of the PID, parties are given an opportunity (usually within six to eight weeks) to make written representations to the CCCS on the findings in the PID. Parties, and their authorised representatives, are also afforded a reasonable opportunity to inspect the documents in the CCCS's file relating to the matters referred to in the PID. Parties may also request the ability to make oral representations to elaborate on their written representations.

Thereafter, and having regard to the written representations, the CCCS will issue its final infringement decision.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CCCS has the following investigatory powers:

- order the production of specific documents or information;
- carry out compulsory interviews with individuals;
- carry out unannounced searches of business premises (requires the authorisation by a court or another body independent of the competition authority);
- carry out unannounced limited searches of residential premises (requires the authorisation by a court or another body independent of the competition authority);
- right to 'image' computer hard drives using forensic IT tools;
- right to retain original documents (in certain circumstances);
- right to require an explanation of documents or information supplied; and
- right to secure premises overnight (eg, by seal)

The CCCS has the power to issue a formal notice to request documents or information from any person where it considers that such document or information would be relevant to its investigations. The CCCS also has the ability to enter business premises to request the provision of documents or information, and where it has a court-obtained warrant, it may also proceed to search business premises. Specifically, where the CCCS has obtained a warrant, it may:

- enter the premises specified in the warrant and use such force as is reasonably necessary for the purpose of gaining entry;
- search any person on the premises if there are reasonable grounds for believing the person has in his or her possession any document, equipment or article that has a bearing on the investigation;
- search the premises and take copies or extracts from any document appearing to be the kind in respect of which the warrant was granted;
- take possession of any document appearing to be the kind in respect of which the warrant was granted if necessary for preserving the document or prevent tampering, or if it is not reasonably practicable to take copies of the document on the premises;
- take any other step necessary to preserve the documents or prevent interference with them, including the sealing of premises, offices or files;
- require any person to provide an explanation of any document appearing to be the kind in respect of which the warrant was granted or state to the best of his or her knowledge where it could be found;
- require any person on the premises to produce any document of the relevant kind at the time and place, and in the form and manner, required by the CCCS;
- require any information stored in electronic form to be produced in a form that could be taken away and read; and
- remove from the premises equipment or article relating to any matter relevant to the investigation (eg, computers).

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Competition and Consumer Commission of Singapore (CCCS) has the ability, under section 88 of Singapore Competition Act (Cap 50B) (the Act) and with the approval of the Minister for Trade and Industry, to enter into arrangements with any foreign competition body under which each party may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performing any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, the CCCS is required under section 88 of the Act to take certain precautions (including obtaining an undertaking from the relevant counterparty) relating to the subsequent disclosure of any information provided. To date, the CCCS has entered into three cooperation agreements with overseas enforcement agencies, namely, a memorandum of understanding to facilitate cooperation on competition enforcement with Indonesia's Commission for the Supervision of Business Competition, a memorandum of cooperation with the Japan Fair Trade Commission to increase cross-border enforcement cooperation between both authorities, and a memorandum of understanding to facilitate competition and consumer protection law enforcement between the CCCS and the Competition Bureau Canada. The CCCS has also joined multilateral frameworks that facilitate cooperation on competition cases, such as the ASEAN Competition Enforcers' Network and the International Competition Network's Framework on Competition Agency Procedures.

It has been publicly acknowledged by the CCCS that to date there has been at least one occasion where dawn raids performed by the CCCS in respect of a potential violation of the section 34 prohibition have been coordinated with overseas competition authorities. It is also a condition of leniency that the leniency applicant grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct so that the CCCS may communicate with these authorities for the purposes of its investigations.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As competition law in Singapore is still at a relatively early stage, it is too early to draw any meaningful conclusions relating to how the interplay between jurisdictions might affect the investigation, prosecution and punishment of cartel activity in Singapore.

Some of the parties of the international cartel in the *Ball Bearings* case were also investigated and penalised by other competition authorities and courts in other jurisdictions, both before and after the CCCS had issued its infringement decision in May 2014 (eg, Japan (March 2013), Canada (January 2014), Australia (May 2014) and China (August 2014)). However, the CCCS infringement decision does not specify that there was direct cooperation between the CCCS and other foreign authorities in respect of investigations.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel matters are investigated and prosecuted by the Competition and Consumer Commission of Singapore (CCCS), which has the ability to impose fines up to a statutory maximum or to make other directions it deems fit to bring the infringement to an end. Appeals of the CCCS's decisions can be made to the Competition Appeal Board (CAB).

Thereafter, a more limited right of appeal (in respect of a point of law or the calculation of the financial penalty) is available to the High Court and the Court of Appeal.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

In establishing that an infringement of competition law has occurred (ie, that the section 34 prohibition has been infringed), the evidential burden of proof is borne by the CCCS. However, in establishing the application of a statutorily provided exclusion, exemption or other defence (ie, that the arrangement in question gives rise to net economic benefit and thus should be excluded through the application of paragraph 9 of the Third Schedule to the Singapore Competition Act (Cap 50B) (the Act)), the onus would fall on the party seeking to apply the exclusion, exemption or defence.

The standard of proof is the balance of probabilities. However, the CCCS has consistently noted that the standard would depend on the facts and circumstances of the case. In *JJB Sports plc and Allsports Limited v OFT* [2004] CAT 17) it stated that:

> *[Given] the hidden and secret nature of cartels where little or nothing may be committed in writing, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard.*

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes.

Appeal process

18 | What is the appeal process?

Appeals of the CCCS's decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members, including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Parties to an agreement or persons whose conduct in respect of which the CCCS has made a decision as to the infringement of the section 34 prohibition may appeal against (or with respect to) that decision, the imposition or amount of any financial penalty, or any directions issued by the CCCS, to the CAB. An appellant would be required to prove its case on a balance of probabilities to succeed in its appeal.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCCS's infringement decision. Thereafter, the CCCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in Order 55 of the Rules of Court (Cap 322, R 5, 2014 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Currently, involvement in cartel activity does not give rise to criminal liability in Singapore. However, criminal prosecutions may arise in the context of cartel investigations where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys or falsifies documents;
- provides false or misleading information; or
- obstructs an officer of the Competition and Consumer Commission of Singapore (CCCS) in the discharge of his or her duties.

An offence of a nature described above is punishable by a prison sentence not exceeding 12 months, a fine not exceeding S$10,000, or both. To date, we are not aware of any such criminal sanctions being imposed in Singapore.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The CCCS, under section 69 of the Singapore Competition Act (Cap 50B) (the Act), can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement. While section 69 provides a general discretion to the CCCS in making directions, it provides specific examples of the directions that the CCCS may make, including:

- requiring parties to the agreement to modify or terminate the agreement;
- to pay to the CCCS such financial penalty in respect of the infringement as the CCCS may determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years;
- to enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCCS; and
- to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

In determining the amount of financial penalty to impose, in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 (Penalty Guidelines) the CCCS has stated that it will adopt the following six-step approach:

- calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year;
- adjustment for the duration of the infringement;

- adjustment for other relevant factors (eg, deterrent value);
- adjustment for aggravating or mitigating factors;
- adjustment if the statutory maximum penalty is exceeded; and
- adjustment for immunity, leniency reductions or fast-track procedure discounts.

In every infringement decision published to date, the CCCS has imposed financial penalties on the parties involved in cartel activity, unless they enjoyed immunity under the leniency programme.

The maximum amount of financial penalty imposed may not exceed 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. There are no minimum penalties (in absolute terms) stipulated in the Act.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Apart from the broad requirement that directions issued by the CCCS must bring an infringement to an end, or remedy, mitigate or eliminate any adverse effect of an infringement, there are currently no publicly available guidelines on how the CCCS will exercise its power to make directions. The CCCS has published guidelines on how it will calculate the appropriate amount of financial penalty to impose on infringing undertakings (namely, the Penalty Guidelines). While these guidelines do not have the force of law, they will generally be followed by the CCCS, subject to any relevant decisions of the Competition Appeal Board relating to calculation of the financial penalty.

Besides setting out the approach that it will adopt in the calculation of penalty, the Penalty Guidelines also provide examples of aggravating and mitigating factors that are considered.

As regards aggravating factors, these include:

- the undertaking's role as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;
- unreasonable failure by an undertaking to respond to a request for financial information on business turnover or relevant turnover;
- in the case of bid rigging or collusive tendering, the CCCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements that are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

As regards mitigating factors, these include:

- the undertaking's role, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps are taken with a view to ensuring compliance with the section 34 prohibition, for example, the existence of any compliance programme;
- termination of the infringement as soon as the CCCS intervenes; and
- cooperation that enables the enforcement process to be concluded more effectively or speedily.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CCCS has stated in its Penalty Guidelines that the existence of a compliance programme is a mitigating factor that can be taken into consideration in the adjustment of a financial penalty. In considering the mitigating value to be accorded to the existence of a compliance programme, the CCCS will take into account the following:

- whether there are appropriate compliance policies and procedures in place;
- whether the programme has been actively implemented;
- whether the programme has the support of and is observed by senior management;
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
- whether the programme is evaluated and reviewed at regular intervals.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The Act does not contain any provisions that expressly prescribe for orders to be issued to disqualify individuals involved in cartel activity from serving as corporate directors or officers. However, involvement in cartel activity may constitute a breach of directors' duties in company law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

It is understood that in cases where the CCCS has issued an infringement decision finding that two or more undertakings have been involved in bid rigging in connection with a government tender, the CCCS will issue a recommendation for debarment action to be taken by the Standing Committee on Debarment, which decides on all cases of debarment. The recommendation will be made by the CCCS as soon as possible after the time frame for the filing of an appeal against the infringement decision has expired. Where an appeal has been filed, the recommendation will be made as soon as possible after the resolution of the appeal, where appropriate. In general, the debarment period will be commensurate with the financial or material losses suffered by the government agency.

Notwithstanding the above, we note that undertakings that infringe the section 34 prohibition may potentially be regarded as ineligible to participate in specific government procurement exercises by the relevant procuring authorities if such infringement is considered a breach of the applicable terms and conditions of the procurement exercise.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

There are currently no criminal sanctions for cartel activities in Singapore. It is open to the CCCS to impose multiple administrative sanctions where it considers that such sanctions are necessary or appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Parties may bring private actions for a breach of competition law under section 86 of the Singapore Competition Act (Cap 50B) (the Act), which provides that any person who suffers loss or damage directly as a result of an infringement (including, among other things, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the Competition and Consumer Commission of Singapore, 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 Competition Appeal Board.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The only form of group litigation in Singapore is through a representative action (under Order 15, Rule 12 of the Rules of Court). Under this action, proceedings may be commenced without the leave of the court, under the usual court processes. However, the defendant may apply for the representative proceedings to be discontinued, and the court may decide whether a representative action is appropriate and whether it is properly constituted. Notwithstanding the fact that representative actions may be brought, it would still be necessary for parties to establish that they have suffered direct loss, as required by section 86 of the Act. To date, we are not aware of any such proceedings being taken in Singapore with respect to competition-related matters.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition and Consumer Commission of Singapore (CCCS) operates a leniency programme, which encompasses the prospect of full immunity in certain circumstances. The CCCS's leniency programme is described in detail in its Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016 (Revised Leniency Guidelines).

Under the leniency programme, where a party provides information to the CCCS about a cartel before the CCCS has opened an investigation, that party may benefit from full immunity from financial penalties imposed by the CCCS in respect of such. Paragraphs 2.2 and 2.4 of the Revised Leniency Guidelines state that an undertaking will benefit from full immunity from financial penalties if all of the following conditions are satisfied:

- the undertaking is the first to provide the CCCS with evidence of the cartel activity before an investigation has commenced, provided that the CCCS does not already have sufficient information to establish the existence of the alleged cartel activity; and
- the undertaking:
  - provides the CCCS with all the information, documents and evidence available to it regarding the cartel activity immediately and such information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;
  - grants an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where it has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
  - unconditionally admits to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
  - maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation;
  - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS);
  - must not have been the one to initiate the cartel; and
  - must not have taken any steps to coerce another undertaking to take part in the cartel activity.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Where a party who is not the first to come forward provides information to the CCCS about a cartel, after the CCCS has opened its investigation but before the CCCS has sufficient information to issue a written notice that it proposes to issue an infringement decision, the party cannot benefit from immunity, but may benefit from lenient treatment by way of a reduction of up to 50 per cent of the financial penalties (partial leniency).

To enjoy partial leniency, the following conditions must be fulfilled:

- the undertaking is required to:
  - provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity immediately and such information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;
  - grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where it has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
  - admit unconditionally to the conduct for which leniency is sought and details the extent to which this had an impact in

Singapore by preventing, restricting or distorting competition within Singapore;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation; and
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS); and

- the information adds significant value to the CCCS's investigation.

Any reduction in financial penalties under these circumstances is discretionary on the part of the CCCS. While the Revised Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCCS's possession; and
- the quality of the information provided by the undertaking.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The undertaking that is 'second in' may benefit from a reduction in financial penalties of up to 50 per cent. While the Revised Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCCS will take into account the stage at which the undertaking comes forward, the evidence already in the CCCS's possession and the quality of the information provided by the undertaking.

To date, we are not aware of any public disclosure by the CCCS of the amount of reduction in financial penalties enjoyed by leniency applicants. Accordingly, it may be difficult in practice to make general observations about the difference in treatment between the 'second in' party and those that applied for leniency later. However, on the understanding that the CCCS will take into account the stage at which the undertaking comes forward, and the evidence that it already has in its possession before deciding on the level of reduction in penalties, it is likely that parties that come in later may find it more difficult to produce crucial and quality evidence to justify a significant reduction. To the extent that the 'first in' party has failed to perfect its marker, it is also possible for the 'second in' party to be provided an opportunity to perfect it and benefit from either full immunity or full leniency (where such party may obtain a reduction of up to 100 per cent in financial penalties).

A 'leniency plus' system, whereby a party may benefit from further reductions in financial penalties in respect of one cartel investigation by providing information to the CCCS in respect of another cartel, is available in Singapore. To benefit from this programme, the CCCS states in its Revised Leniency Guidelines that the following conditions must be met:

- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
- the undertaking would qualify (in accordance with the usual qualification criteria for leniency applications) for total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty in relation to its activities in the second market.

If a party can satisfy the above conditions, then it could benefit from a reduction in financial penalties in respect of the first cartel, which is in addition to any reduction that it already stands to receive for its cooperation in respect of the first cartel.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Immunity may only be sought from the CCCS if the applicant is first to provide evidence of cartel activity before an investigation has commenced. Accordingly, such applications should be made as soon as possible. The marker system has facilitated such early applications, as there is now no need for an applicant to ensure that it has all of the evidence collated and ready for submission to the CCCS at the time it makes its application.

While applications for leniency may be made after the CCCS has commenced its investigation, full leniency can only be granted to the first applicant that provides the CCCS with evidence of cartel activity. While there is no requirement for the applicant to be the first to provide information in a partial leniency application, it is still advisable in every case to approach the CCCS as soon as possible because in both full leniency and partial leniency applications, the CCCS will consider the stage at which the undertaking comes forward and the evidence already in the CCCS's possession before assessing the level of leniency to grant. The earlier the party makes such an application and the higher up the leniency queue they are, the more likely that the information provided will be of value to the CCCS and the more likely that the party will stand to benefit from lenient treatment.

To qualify for a 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 Singapore Competition Act (Cap 50B) (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

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The CCCS's Revised Leniency Guidelines provide that in every leniency and immunity application, the applicant must provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity, and must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation. It does not appear from the Guidelines that different requirements or expectations as to the nature, level and timing of cooperation apply to subsequent leniency applicants. However, any reduction in the level of financial penalty is subject to the CCCS's discretion, which will take into account the stage at which an applicant comes forward, the evidence already in the CCCS's possession, and the quality of information provided by the applicant.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Revised Leniency Guidelines provide, at paragraph 8.1, that the CCCS will:

> *Endeavour, to the extent consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until the CCCS issues a written notice under section 68(1) of the Act of its intention to make a decision that the section 34 prohibition has been infringed'.*

To the extent that information is provided to the CCCS in the course of making a leniency application (regardless of whether it is an immunity, full leniency or partial leniency application), in responding to a notice of the CCCS to provide information or in otherwise cooperating with the CCCS, the disclosing party can request confidential treatment in respect of such information, or the relevant parts thereof, in accordance with section 89(3) of the Act.

At the point that the CCCS issues its proposed infringement decision (PID), information provided to the CCCS that is not subject to confidential treatment, as outlined above, will be available for inspection by all parties subject to the CCCS's PID.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

With effect from 1 December 2016, the CCCS has introduced a fast-track procedure for cases involving the infringement of the section 34 prohibition. The CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases (Fast Track Procedure Practice Statement) explains that under this procedure, 'parties who admit liability for their infringement will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay pursuant to section 69(2)(d) of the Act'. This procedure is not mutually exclusive from the leniency regime and it is possible for a leniency applicant to benefit from discounts arising from both leniency and the fast-track procedure.

While investigated parties may indicate to the CCCS their willingness to participate in the fast-track procedure, the CCCS retains 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 Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016; 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 Competition Appeal Board (CAB) in respect of the CCCS's decision, the CCCS reserves the right to make an application to the CAB for a penalty amount that differs from that calculated in its infringement decision, and may require the party to pay the full costs of the CCCS's appeal regardless of the outcome of the CCCS's appeal; and
  - acceptance, which will involve the CCCS adopting a streamlined PID or infringement decision (as appropriate) reflecting the content agreed between the CCCS and each party in the fast-track agreement, and providing for a reduction of 10 per cent on the financial penalty that would have otherwise been imposed but for the party's participation in the fast-track procedure.

Parties to such a procedure may not disclose to any third party any information received from their participation in this procedure unless express prior authorisation by the CCCS has been obtained.

As this procedure has been introduced only recently, it is as yet untested in the courts but it would appear from the language of the Fast Track Procedure Practice Statement that the level of judicial oversight that applies to matters handled under the fast-track procedure would not differ materially from other cases.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Employees contravening the prohibited actions contained in section 34 of the Act (the section 34 prohibition) would be considered contraventions by their employing undertaking in Singapore. In this regard, and given that there are no criminal sanctions for engaging in activity in breach of the section 34 prohibition, there is no distinction between an undertaking and its employees from the perspective of a leniency or immunity application.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Leniency or immunity applications may be made orally or in writing by an undertaking or its authorised representative. In the usual course, initial contact is made by phone and a time is arranged for the application to be made in person.

The Revised Leniency Guidelines indicate that it is possible that anonymous enquiries can be made to the CCCS to see if leniency is still available in respect of a particular matter, but that any subsequent application cannot be made anonymously.

To qualify for leniency or immunity, undertakings must, among other things, maintain continuous and complete cooperation with the CCCS throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation. Such undertakings must also provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The Competition and Consumer Commission of Singapore (CCCS) will provide all parties that are subject to a PID with a copy of it. The PID contains the CCCS's arguments of fact and law with regard to the proposed decision and refers to the evidence on which the CCCS proposes to rely. Such parties are also provided with a copy of the CCCS's file on the matter, save for the fact that confidential information of all parties will be redacted, and the CCCS's internal documents will not be disclosed.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Cartel involvement does not give rise to liability for individuals or employees. Accordingly, representation is at the corporation level.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is possible for counsel to represent more than one party, subject to adherence to the standard professional and ethical responsibilities. Usually, in representing multiple parties, such parties must have a common interest in the proceedings, and this is more likely to be the case if the corporations represented are affiliated.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

Penalties are imposed only at the corporation level in Singapore.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties are generally not considered to be tax-deductible. To date, there has been no follow-on private action for competition law infringements, so the position regarding tax-deductibility of awards of private damages remains untested in the context of competition law infringements. However, it is unlikely that such private damages will be considered to be tax-deductible.

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Neither the Singapore Competition Act (Cap 50B) (the Act) nor the CCCS's Revised Leniency Guidelines specify that sanctions imposed in other jurisdictions will be taken into account in determining the amount of financial penalties to impose. To date, the CCCS has also not considered this factor directly in any of its infringement decisions.

There have been no private actions brought in Singapore to date in respect of competition law infringements. However, it is noteworthy that section 86 of the Act provides third parties a right to damages only where they have suffered loss directly as a result of the infringing conduct.

Getting the fine down

43 What is the optimal way in which to get the fine down?

An application for leniency may result in full immunity from prosecution or a reduction of up to 100 per cent of the financial penalty imposed. Furthermore, the use of the leniency plus system is another avenue open to parties in seeking to further reduce their penalties.

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 Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 that the existence of a compliance programme may be taken into consideration as a mitigating factor in the context of calculating the financial penalty.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

On 14 December 2020, the Competition and Consumer Commission of Singapore (CCCS) issued an infringement decision against three maintenance companies for infringing the section 34 prohibition by participating in bid-rigging conduct relating to tenders for the provision of maintenance services for swimming pools, spas and other water features. In coming to its decision, the CCCS found that the parties' bid-rigging conduct severely undermined the independence of bids submitted by the parties. The CCCS imposed a total of S$419,014 in financial penalties on the parties involved. Notably, the CCCS applied, for the first time, discounts to the penalties for two companies for their participation in the fast-track procedure by admitting liability for their infringement.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Currently, there are no specific proposed changes to the legal framework relating to cartels or the immunity and leniency programmes.

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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 in the territory of the Republic of Slovenia, in particular, the following non-exhaustively listed agreements:

- direct or indirect fixing of purchase or selling prices or other trading conditions;
- limiting or controlling production, sales, technical progress or investment;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts; and
- sharing markets or sources of supply.

When an agreement may affect trade between European Union member states, the provisions of article 101 of the Treaty on the Functioning of the European Union (TFEU) shall also apply.

Acting in contravention of the prohibition of restrictive agreements in article 6 of the Competition Act or article 101 TFEU may represent a minor offence pursuant to the Competition Act.

Cartels may also amount to a criminal offence pursuant article 225 of the Slovenian Criminal Code, which defines an illegal restriction of competition as a criminal offence. Whoever, in pursuing an economic activity contrary to regulations governing the protection of competition, violates the prohibition of restrictive agreements between companies, abuses the dominant position of one or more companies, or creates a forbidden concentration of companies and thus prevents or significantly impedes or distorts competition in Slovenia, or in the EU market, or its significant part, or significantly influences trade between member states, which results in a large property benefit for such a company or companies, or a large property damage for another company, shall be sentenced to imprisonment for not less than six months and not more than five years. Intent of the perpetrator must be proven. Legal persons may be liable and sentenced for a criminal offence pursuant to the provisions of the Liability of Legal Persons for Criminal Offences Act.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

There are no specific provisions regarding joint ventures in the context of cartel regulation. Joint ventures and strategic alliances may be subject to cartel regulation or merger control provisions if the respective conditions are met.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Pursuant to the Competition Act, an 'undertaking' means any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. Therefore, the Competition Act applies to both individuals and corporations and also to an association of undertakings that is not directly engaged in economic activity but affects or may affect the behaviour on the market of undertakings.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Competition Act prohibits restrictive agreements that have as their object or effect the prevention, restriction or distortion of competition in the territory of Slovenia, irrespective of where they occurred or were entered into.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such exemption foreseen in the Competition Act.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements or industry-specific defences foreseen in the Competition Act.

The Competition Act recognises the following exemptions: the article 6(3) exemption, de minimis exemption and block exemption.

According to article 6(3) of the Competition Act, similar to article 101(3) of the Treaty on the Functioning of the European Union (TFEU), the undertaking invoking the exception must demonstrate and bear the burden of proving the following cumulative conditions for the exception to the prohibition of restrictive agreements in article 6(1) of the Competition Act:

- agreements must contribute to improving the production or distribution of goods or to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit;
- shall not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; and
- shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services that are the subject of the agreement.

Under the de minimis exemption, regulated in article 7 of the Competition Act, the prohibition of restrictive agreements shall not apply to agreements of minor importance, which are agreements between undertakings whose cumulative market share does not exceed 10 per cent in the case of horizontal agreements and mixed agreements or agreements where it is difficult to determine whether they are horizontal or vertical, or 15 per cent in the case of vertical agreements. In the case of cumulative effects, thresholds are decreased by 5 per cent. But even if these thresholds are not met, de minimis exemption shall not apply to horizontal agreements having as their object fixing of prices, limiting of the production or sales or sharing of markets or sources of supply, and to vertical agreements having as their object fixing of retail prices or granting territorial protection to the participating undertakings or to third persons.

Regarding block exemptions, the provisions of the Regulations of the European Commission or the Council of the European Union shall apply with the necessary changes, even if there is no indication of an effect on the trade between EU states. The Agency may withdraw the benefit of the block exemption if it finds that an agreement has certain effects incompatible with article 6(3) of the Competition Act or article 101(3) TFEU.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The regulated conduct defence is not an established legal term or concept under Slovenian law. However, depending on the facts of a specific case, this defence could be used as justification for the behaviour of the undertakings.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Slovenian Competition Agency (the Agency) initiates the procedure ex officio with an order on the commencement of the procedure, although it may exercise certain investigative powers prior to that. An extract of the order on the commencement of procedure is published on the Agency's website.

The Agency is obliged to perform a fact-finding procedure in accordance with the principle of material truth and free assessment of evidence. The Agency shall decide without an oral hearing unless established otherwise. In cases of urgency, interim measures may be adopted.

The Agency notifies the parties about findings on relevant facts and evidence prior to issuing a decision with a statement of objections on which parties may comment within a time limit set by the Agency and not longer than 45 days.

At the closing of the administrative procedure, the Agency may issue a decision establishing the existence of an infringement and require the undertaking to bring such infringement to an end, or a decision by which the Agency accepts the commitments offered by the undertaking and makes them binding. The Agency may terminate the procedure with an order in case the infringement is not found or if the procedure would not be reasonable.

Liability for minor offences is established and fines are imposed by the Agency in a minor offences procedure.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Agency may address a request for information to each undertaking, partners, members of management or supervisory boards and persons employed with the undertaking. If the Agency requests the information with a special order, an undertaking is obliged to submit all requested documents and information, but not to admit an infringement. If an undertaking to which such an order was issued provides incorrect, incomplete or misleading information or does not supply the requested information within the set time limit, a penalty up to €50,000 may be imposed.

The Agency may also carry out an inspection on the premises of an undertaking, either upon consent given by an undertaking or person

whose data is being inspected or upon a court order, issued by the judge of the Regional Court in Ljubljana upon the Agency's proposal if there are reasonable grounds for suspicion of an infringement and the probability of finding relevant evidence with investigation exists.

The inspection is conducted by employees of the Agency, whereby specific professional tasks may be carried out by special organisations, institutions or individuals, and with police assistance, if the undertaking obstructs the investigation or there are reasonable grounds to expect that. During the investigation, authorised persons are also empowered to:

- enter and inspect the premises (premises, land and means of transport) at the registered office of the undertaking and at other locations at which the undertaking itself or another undertaking authorised by the undertaking concerned performs the activity and business for which there is a probability of an infringement;
- examine the business books and other documentation;
- take or obtain in any form copies of or extracts from business books and other documentation;
- seal any business premises and business books and other documentation for the period and to the extent necessary for the inspection; and
- ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and purpose of the inspection.

A penalty amounting to up to 1 per cent of the turnover in the preceding business year on an undertaking and up to €50,000 on a natural person may be imposed in case of an obstruction of an inspection.

The Agency may also conduct the investigation on other premises, on the basis of prior court order, if there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of the inspection are being kept at the premises of an undertaking against which the procedure has not been initiated, or on the residential premises of members of the management or supervisory bodies or of staff or other associates of the undertaking against which the procedure has been initiated.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Slovenian Competition Agency (the Agency) cooperates with the European Commission and other competition offices in EU member states on the basis of Regulation No. 1/2003 and the Competition Act. The Agency is a member of the European Competition Network (ECN), International Competition Network (ICN) and the Competition Committee of the OECD. In 2017, the Agency participated in 28 meetings of the working groups of the ECN and responded to 41 requests for information received through that network.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Agency may issue a decision establishing the existence of an infringement of article 6 or article 9 of the Competition Act or article 101 or article 102 of the Treaty on the Functioning of the European Union (TFEU).

In the case of the procedure alleging the infringement of articles 101 or 102 TFEU, the Agency shall conduct a single procedure, in which the Agency shall also conduct a procedure alleging the infringement of the provisions of article 6 or 9 of the Competition Act. If during the procedure the Agency should determine that the trade between EU member states has not been affected, an order terminating the procedure regarding the infringement of the provisions of articles 101 or 102 TFEU is issued.

Where the European Commission initiates the procedure for the infringement of article 101 or 102 TFEU or has already issued a decision on the same matter, in which the procedure had also been initiated by the Agency, the Agency shall terminate the procedure initiated by the Agency with an order. The Agency may also issue an order of termination in cases where a competition authority of another EU member state has initiated procedure for the infringement of articles 101 or 102 TFEU, or has issued a decision on the same matter.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Slovenian Competition Agency (the Agency) conducts the administrative procedure and minor offence procedure.

In the administrative procedure, the Agency assesses restrictive practices and may issue a decision establishing the existence of an infringement of article 6 of the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act) or article 101 of the Treaty on the Functioning of the European Union (TFEU) and require the undertaking concerned to bring such infringement to an end, may accept commitments with the decision, or may issue an order of termination if no infringement is found or if specific circumstances indicate that the procedure would not be reasonable.

In the minor offence procedure, the Agency assesses liability for a minor offence and imposes the fine.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The Agency bears the burden of proof for the alleged infringement. The undertaking against which the procedure is initiated must demonstrate exculpatory conditions as stipulated in article 6(3) of the Competition Act or article 101(3) TFEU.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Any suitable evidence can be used as evidence in the procedure before the Agency. In certain cases, for example concerted practices, the finding of infringement may be inferred from circumstantial evidence.

Appeal process

18 | What is the appeal process?

Judicial protection against the decisions of the Agency before an administrative court is ensured against all decisions and orders of the Agency if not expressly excluded. The party or other participant to the procedure is obliged to file a lawsuit against the decision of the Agency within 30 days. New evidence or facts that have not already been presented in the procedure before the Agency are not allowed. The court shall test a decision within the limits of the claim and within the limits of

the grounds stated in the lawsuit and shall ex officio pay attention to the certain essential procedural infringements pursuant to the Administrative Disputes Act. Matters shall be considered urgent and a priority. In certain cases, a further extraordinary legal remedy – revision to the Supreme Court – is possible.

Decisions issued in the minor offence procedure are subject to judicial review before the District Court of Ljubljana pursuant to the provisions of the Minor Offences Act. Matters are considered a priority. The court may dismiss the request for judicial protection as unfounded, or abolish or change the decision of the Agency. Further appeal against the court decision is possible.

Court decisions in criminal procedures may be appealed before the competent higher court, and further appealed before the Supreme Court pursuant to the provisions of the Criminal Procedure Act.

SANCTIONS

Criminal sanctions

19 What, if any, criminal sanctions are there for cartel activity?

Pursuant to the Criminal Code, the penalty of not less than six months and not more than five years of imprisonment is foreseen for the illegal restriction of competition as a criminal offence. The court may in certain cases remit the penalty for the perpetrator who announced the criminal offence. Granting of immunity by the Slovenian Competition Agency (the Agency) does not necessarily mean immunity shall also be granted in the criminal procedure.

A fine of at least €50,000 and up to 200 times the amount of damages caused or illegal benefit obtained through the criminal offence may be imposed on a legal entity found liable for the criminal offence. If certain stipulated conditions are met, also the winding-up of a legal person and the prohibition of a specific commercial activity of not less than six months and no more than five years as a safety measure may be ordered pursuant to provisions of the Liability of Legal Persons for Criminal Offences Act.

Civil and administrative sanctions

20 What civil or administrative sanctions are there for cartel activity?

Pursuant to the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act), a fine for a minor offence of up to 10 per cent of the annual turnover of the undertaking in the preceding business year shall be imposed on a legal entity, entrepreneur or individual who performs economic activity in contravention of the prohibition of restrictive agreements in article 6 of the Competition Act and article 101 of the Treaty on the Functioning of the European Union (TFEU). A fine between €5,000 and €10,000, or in the case of offences of a particularly serious nature between €15,000 and €30,000, shall be imposed on the responsible person of a legal entity or of an entrepreneur.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Since there are no special guidelines for the calculation of the fine, the Agency is only obliged to act in accordance with the provisions of the Minor Offences Act, which applies to minor offences in general. This Act stipulates the following aggravating and mitigating circumstances that are relevant for determining the level of the fine:

- the level of responsibility of the perpetrator;
- the motive for the infringement;
- circumstances in which the minor offence was committed;
- previous convictions; and
- the perpetrator's behaviour after the minor offence, especially if the perpetrator compensates for the damage.

For legal persons and entrepreneurs their economic power and previous convictions are considered.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The only official criteria for determining the level of the fine are those laid down by the Minor Offences Act. There is currently no case law indicating how a compliance programme would be considered in the context of mitigating factors in determining a fine.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is no concept of 'director disqualification' in Slovenian competition law; however, directors may be held personally liable for a criminal offence, punishable by imprisonment between six months to five years or a misdemeanour, punishable by a fine in the amount between €5,000 and €10,000, or in the case of offences of a particularly serious nature between €15,000 and €30,000.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Pursuant to the provisions and conditions of the Slovenian Public Procurement Act, a contracting public authority shall exclude an undertaking from the public procurement procedure if the undertaking or a member of the administrative, management or supervisory board or any person having representative, management or supervisory powers is convicted for the criminal offence of illegal restriction of competition under article 225 of the Criminal Code, unless the award of the contract is justified with reasons of significant importance related to the public interest. The decision on debarment lies with the contracting authority. Complex provisions of the Slovenian Public Procurement Act regulate the exact conditions for this measure.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

In Slovenia, penalties imposed by the Agency have the nature of minor offence penalties. A minor offence procedure before the Agency may not be initiated against a person or an entity that has already been finally sentenced for the criminal offence concerning the same conduct. On the other hand, the finality of the penalty in the minor offence procedure does not automatically exclude the initiation of a criminal procedure. The Criminal Code regulates the inclusion of fines for minor offences in criminal sentences.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any person who suffered harm as a consequence of a cartel infringement may claim material damages for actual loss and loss of profit with interest since the occurrence of the damage, according to the full compensation principle. Immaterial damages may be claimed for the defamation of reputation or good name. Multiple damages caused by anticompetitive infringement are not foreseen in Slovenian law.

Where in an action for damages the existence of a claim for damages or the amount of compensation depends on the degree of an overcharge passed on to the claimant as indirect purchaser, the claimant bears the burden of proving the existence and the amount of such passing-on. The claimant has to prove that the defendant has committed an infringement of competition law, that the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant, and that the claimant as an indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. This shall not apply where the defendant proves that the overcharge was not passed on.

Currently there is no case law dealing with the question of 'umbrella damages' in cartel cases. This issue would likely be addressed by the courts in the context of examining the causal link between the cartel behaviour and the damage suffered by the claimant. It can be expected that in addressing this issue, the national courts would follow the case law of the European Court of Justice (ECJ).

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

In 2018, the Slovenian Collective Actions Act entered into force, introducing class actions and class settlement to the Slovenian legal system. According to the express provisions of article 2 of the Act, collective actions may be used for claims based on infringement of article 6 and 9 of the Slovenian Competition Act as well as articles 101 and 102 of the Treaty on the Functioning of the European Union.

Collective actions can be filed by a senior state attorney or by a non-profit legal person of private law whose activities are directly related to the rights that have allegedly been breached. However, a class action must meet certain additional criteria 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 must expressly state that he or she wishes to take part in the class action proceeding (opt-in system), whereas in the case of the latter, all injured individuals are automatically included unless they expressly state that they do not wish to participate (opt-out system). In either case, injured individuals are not formally considered parties to the procedure. They are represented by the person who filed the class action and who has a legal duty to protect their interests. Nevertheless, injured individuals will have the option to participate in the procedure and submit comments and evidence to the court.

The Collective Actions Act entered into force on 21 April 2018; however, class actions can also be filed in cases of mass harm situations that occurred prior to the aforementioned date. So far only two collective actions have been filed in Slovenia and neither of them has a basis in competition law.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme was implemented with an amendment to the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act) in 2009 and the Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels (Official Journal No. 112/09 and 2/14) (the Decree), which entered into force in January 2010. The Slovenian Competition Agency (the Agency) can grant either immunity from fines or a reduction of fines with a minor offence decision.

Only the offender involved in a prohibited agreement who first submits information and evidence may be granted full immunity from a fine, provided all the conditions mentioned below are met:

- the offender fully and completely discloses his or her participation in an alleged cartel;
- the offender is the first to submit information and evidence that, in the Agency's view, will enable an inspection in connection with the alleged cartel or the finding of an infringement of article 6 of the Competition Act or article 101 of the Treaty on the Functioning of the European Union (TFEU) in connection with the alleged cartel;
- the offender cooperates with the Agency throughout the procedure;
- the offender ends his or her involvement in the cartel immediately after the beginning of cooperation with the Agency unless for what would, in the Agency's view, be against the interest of the inspection; and
- the offender did not coerce other undertakings to join the cartel or to remain in it.

An applicant that does not meet all the above-mentioned conditions required to be granted full immunity from a fine may still apply for a reduction of the fine provided the following conditions are met:

- the offender provides evidence of his or her participation in the alleged cartel, which represents significant added value with respect to the evidence the Agency already possesses;
- the offender cooperates with the Agency throughout the procedure; and
- the offender ends his or her involvement in the cartel immediately after the beginning of cooperation with the Agency unless for what would, in the Agency's view, be against the interest of the inspection.

An offender meeting all the conditions needed for fine reduction and who is the first to provide evidence will be granted a fine reduction of 30 to 50 per cent; an offender meeting all the conditions and who is the second to provide evidence will receive a fine reduction of 20 to 30 per cent; and other offenders meeting all the conditions for fine reduction and submitting evidence will be granted a fine reduction of up to 20 per cent.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Subsequent cooperating parties may be charged a reduced fine if the relevant conditions are fulfilled.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

In determining the level of fine reduction the Agency shall take into account:

- the time of the submission of the evidence to the Agency;
- the sequential order of applications; and
- the contribution of the submitted evidence to the finding of an infringement.

A fine, laid down within the range, may not be lowered below the stipulated threshold.

There are no 'immunity plus' or 'amnesty plus' options.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for submitting a leniency application.

An application for a marker is only possible in applications for immunity from a fine. An offender who is not in possession of information that would enable him or her to submit the complete application may apply for a marker in writing with a substantiated request on a form given in the Decree. The Agency may grant a marker if it considers the application to be adequately substantiated and shall also determine the period in which the application has to be completed to be considered in the ranking order granted by the marker.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

An offender who applies for leniency, irrespective of the sequential order, is obliged to cooperate with the Agency from the time of submitting an application and throughout the administrative and minor offences procedures. It shall promptly:

- provide the Agency with all relevant information and evidence relating to the alleged cartel, with all the information that may contribute to the establishment of the facts;
- ensure the cooperation of employees and members of management or supervisory bodies; and
- not destroy, falsify or conceal information or evidence, and not disclose the fact that the application has been submitted or any of its content before the Agency has issued a statement of objections in an administrative procedure without written permission from the Agency.

Also prior to submitting the application, an offender must not destroy, falsify or conceal evidence or directly or indirectly disclose the intention to submit an application to the Agency or its content.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Pursuant to the Decree, an application shall be deemed a business secret and the Agency may only disclose information and evidence from the application to a company under an infringement procedure after a statement of the objection has been issued in an administrative procedure. The same level of protection applies to all leniency applicants.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Pursuant to the Competition Act, an undertaking against which the administrative procedure has been initiated may offer commitments with a view to eliminating the circumstances leading to the likelihood of the existence of the infringement. Commitments may be proposed until the expiry of the time limit set by the Agency for comments on the statement of objections. If, in the view of the Agency, the proposed commitments are capable of eliminating the circumstances leading to the likelihood of the existence of an infringement, the Agency shall make the offered commitments binding by adopting a decision.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

An application for immunity or for a reduction of a fine, submitted by a legal entity, an entrepreneur or an individual who performs economic activity, shall also relate to his or her responsible persons unless otherwise indicated in the application. On the other hand, an application submitted by a responsible person shall not relate to a legal entity, an entrepreneur or an individual who performs economic activity unless indicated otherwise in the application.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An immunity applicant may submit an application to the Agency either in writing (by mail, fax or in person) with three copies (one original and two copies) or by making an oral statement on the record at the Agency premises. Forms for application are provided in the Decree and are also available on the Agency's website. The application must specify whether the application should be considered for immunity only or for a reduction of fine, or both. After receiving the application, the Agency shall inform the applicant whether the application complies with the legal conditions for immunity from or a reduction of a fine and about his or her duty to cooperate. If the offender fulfils all the conditions, the

Agency shall grant immunity from or a reduction of a fine with a minor offences decision.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

Parties in the procedure before the Slovenian Competition Agency (the Agency) have the right to review the documents of the case file throughout the procedure after the issuing of the order on the commencement of the procedure unless the director of the Agency determines this would be against the interests of the investigation and postpones the right to inspection of documents with an order (however, not for longer than to the service of a statement of objections).

Parties may not review or make copies of the internal Agency's documents relating to the case file, including correspondence between the Agency and the European Commission or competition protection authorities of other EU member states, confidential information, including business secrets, information relating to confidential sources, minutes of consultation and voting, and draft decisions.

The Agency may disclose information that constitutes a business secret to the undertaking against which the procedure has been initiated if it deems that disclosure, owing to the right of defence, might objectively prevail over the interests of protecting such information as a business secret. A decision adopted by the Agency may not be based on facts and evidence in respect of which the undertaking against which the procedure has been initiated has not been given the possibility to reply.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent both the corporation and employees under investigation in minor offence administrative proceedings before the Agency, provided that there is no conflict of interest. Conflicts of interest may especially exist in situations where an employee committed an act following an order by a superior responsible person or by the management or supervisory board of an undertaking. An employee is therefore advised to seek independent legal advice as early as possible in all situations where it is possible that his or her defence is not aligned with the defence of the undertaking or where his or her individual responsibility may be excluded.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Although it is not per se prohibited that multiple corporate defendants are represented by the same counsel in the proceedings before the Agency, it is not very likely owing to the possible conflict of interest.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no explicit statutory provision prohibiting payment of legal penalties issued on its employees by the corporation in the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act), but certain tax and justification issues regarding such expenses may arise.

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Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

In accordance with the Slovenian Corporate Income Tax Act, all expenditures that are not in conformity with normal business practice, including penalties imposed by responsible authorities, represent non-recognised expenditure.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The possibility of taking into account penalties imposed in other jurisdictions in the minor offence procedure before the Agency is not foreseen in the Competition Act.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The optimal way to achieve immunity from or a reduction of the fine is by submitting a leniency application as soon as possible. Unless it is considered one of the mitigating circumstances for the assessment of the fine, pursuant to the Minor Offence Act, a compliance programme by itself is not foreseen as a circumstance affecting the level of the fine under Slovenian law.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

In 2020, the Agency issued one cartel decision. In 2021 they initiated one new investigation concerning a potential breach of cartel provisions. The Agency has recently taken a more active role in reviewing public tender procedures by intervening, as an applicant in the public interest, in legal review of several public tender proceedings before the National Review Commission for Reviewing Public Procurement Award Procedures.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Under the current legal framework in Slovenia, the Agency leads dual proceedings. The Agency initiates an administrative proceeding to find that an infringement has been committed. However, to impose a fine, a separate minor offences proceeding, based on the Minor Offences Act and the principles of criminal proceedings, must be conducted by the Agency. There is an ongoing discussion about whether the Agency should be provided with a legal basis to impose fines in administrative proceedings, but it is not possible to predict at this time if and when this change might be implemented.

South Korea

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is the Monopoly Regulation and Fair Trade Act (MRFTA).

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

In general, the Korea Fair Trade Commission (KFTC) enforces the law. The KFTC is an independent administrative branch of the Korean government responsible for administrative investigations, prosecution and adjudication. It has nine commissioners, consisting of a chair, a vice-chair, three standing commissioners and four non-standing commissioners. Within the Secretariat of the KFTC, the Cartel Investigation Bureau is primarily responsible for the administrative investigation and prosecution of cartels. As for criminal prosecution, upon receipt of a criminal referral from the KFTC, only then does the Prosecutors' Office have the authority to investigate and prosecute cartels for criminal punishment.

Meanwhile, article 315 of the Korean Criminal Code and article 95 of the Framework Act on the Construction Industry provide for the offence of bid rigging, which may be prosecuted by the Prosecutors' Office without regard to receiving any criminal referral from the KFTC. Consequently, both administrative sanctions and criminal sanctions may be imposed for the same conduct. Further, the prosecutor may directly commence an investigation and indict even without a criminal referral from the KFTC in cases of objectively obvious and serious collaborative acts (ie, hard-core cartel behaviour, including price fixing, output restriction cartels, market allocation cartels and bid rigging) among unreasonable collaborative acts.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

A full amendment to the MRFTA (Amendment) will become effective on 30 December 2021. The key amendments related to cartel regulation are as follows:

- exchange of information regulated as cartel activity:
  - anticompetitive exchange of information such as price, output and terms and conditions of transactions is added as a type of cartel; and
  - an agreement is presumed to have formed when external conformity in price changes and exchange of information are found;
- if a leniency applicant that received immunity is found to have provided statements at court that are different from those provided to the KFTC during the investigation process, or submitted false information, the leniency may be withdrawn;
- the maximum administrative fine that may be imposed under the current law has been increased twofold (20 per cent of relevant sales); and
- in the event of a claim for compensation of damages resulting from a cartel, the court may order the violator to submit materials necessary to calculate the damages suffered by the claimant.

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 conduct where agreements among undertakings are prohibited under the above provision are as follows:

1 fix, maintain or alter prices;
2 determine the terms and conditions for trade in goods or services or for payment of prices or compensation thereof;
3 restrict the production, shipment, transportation or the trading of goods or services;
4 restrict the territory of trade or customers;
5 hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for the manufacturing of products or the rendering of services;
6 restrict the types or specifications of goods at the time of production or trade thereof;
7 establish a corporation or the like with other undertakings to jointly conduct or manage important parts of businesses;
8 decide the successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by the Enforcement Decree of the MRFTA; or
9 practically restrict competition in a particular business area by means of interfering or restricting the activities or contents of business by other undertakings (including the undertaking that has conducted the activity) other than the acts referred to in (1) to (8) above.

Meanwhile, the Amendment revises (9) to 'engage in other acts of interfering with or restricting the business activities or contents of other undertakings (including undertakings that engaged in the act) or exchanging information prescribed by the Enforcement Decree of the MRFTA that substantially restrain competition in particular business area'. In addition, the information prohibited from being exchanged is

prescribed as the cost of goods or services; output, inventory, and sales volume; and terms and conditions of transactions or payment terms of the goods or services by the amendment to the Enforcement Decree of the MRFTA.

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 agreements.

Moreover, according to article 19(5) of the MRFTA, it may be assumed that there is an agreement among undertakings where there is a significant possibility that such undertakings collaboratively engaged in the applicable act. In this case, if there is proof of direct or indirect contact or information exchange among undertakings, this may serve as circumstantial evidence that enforces the above assumption.

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.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The MRFTA regulates joint ventures or strategic alliances by treating them as cartels if they unreasonably restrain competition (article 19(1)(vii) of the MRFTA). However, joint ventures and strategic alliances are not illegal if they aim to achieve a justifiable business purpose and increase efficiency. Therefore, the business purpose, scope and effect of the joint venture or strategic alliance are comprehensively considered in determining whether they unreasonably restrain competition. For example, through a joint venture at the R&D level, development of new products or technology, which a single company alone cannot achieve, may be done by combining the knowhow or assets of each entity, and pro-competitive effects, such as cost reductions, may be created. On the other hand, joint ventures at the production level are more likely to be regulated than R&D-level joint ventures, as engaging in anticompetitive conduct such as price-fixing through production facility combination or exclusion of competitors is easier in production-level joint ventures.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

The Monopoly Regulation and Fair Trade Act (MRFTA) applies to an 'enterprise', which is defined as entities conducting manufacturing business, service business or other business. Thus, irrespective of the type of business and irrespective of the forms of these entities (such as corporations) and whether they have profit-making purpose or not, entities that continuously and repetitively provide economic benefits based on their own calculations and receive considerations therefor may constitute an 'enterprise' under the MRFTA.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The law applies to conduct that takes place outside Korea if it has an effect on the Korean market. For example, in 2002 and 2003, the Korea Fair Trade Commission (KFTC) imposed administrative fines on the foreign companies that participated in the Graphite Electrodes and Vitamins cartels, respectively. In addition, in December 2008, the KFTC imposed administrative fines on the four companies that participated in the Asian paper cartel following an investigation that was triggered by a leniency application and conducted in cooperation with the Australian Competition and Consumer Commission.

Recently, in November 2016, two Japanese companies that engaged in bid-rigging practices regarding an automotive component (ie, a compressor) were sanctioned by applying the extraterritorial application provision. While the entire agreements were formed in Japan, the KFTC deemed that the Korean market was directly affected because the products subject to the cartel were supplied to Korean companies.

Article 2–2 of the MRFTA, which took effect on 1 April 2005, expressly provides for extraterritorial application of the MRFTA.

The Korean Supreme Court is of the position that cases where 'activities have an effect on the Korean market' under article 2–2 of the MRFTA should be limited to cases where the applicable activity that occurred outside of Korea has a direct, significant and reasonably foreseeable effect on the Korean market. However, if the Korean market is included in the subject of a collaborative agreement to restrain competition between undertakings outside of Korea, then such foreign activity (ie, the agreement to restrain competition) is subject to the application of article 19(1) of the MRFTA since such agreement has an effect on the Korean market unless other special circumstances exist.

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Unlike jurisdictions that explicitly prescribe a waiver provision for export cartels (eg, the United States), Korea does not have a separate waiver provision for export cartels.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are some limited statutory exemptions from the MRFTA that apply to specific activities and that are provided for in the relevant statutes for specific industries, such as export and import, small businesses, marine or air transport, and agriculture.

Government-approved conduct

10 Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

In principle, the same cartel regulations apply to government-regulated conducts as ordinary cases that do not involve government-regulated conducts. However, the application of the MRFTA is excluded where administrative agencies are granted by other laws with the specific power to issue administrative dispositions to undertakings regarding competition factors, such as prices, and undertakings agreed on prices, etc, based on such administrative disposition; and where other laws stipulate that administrative agencies may provide administrative guidance to undertakings with regard to engaging in cartel activities that are

prohibited under the MRFTA and the administrative agencies induced the agreement among undertakings by providing administrative guidance in compliance with the relevant provisions of such laws and, as a result, the undertakings reached an agreement within the scope of such administrative guidance.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

In the Korea Fair Trade Commission (KFTC) proceedings, before an adjudication or decision is made, there are two stages: an investigation and a deliberation. In an investigation, the KFTC typically conducts an on-site inspection of the suspected violators, seizes or requests documents, questions witnesses and requests information from the suspected violators. The KFTC reviews information and documents obtained and, if appropriate, issues an examiner's report against the suspected parties. The parties are then allowed to examine the documents attached to the examiner's report and to respond to it in writing and at an oral hearing. While respondents have four weeks to provide a written response to the examiner's report (three 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 of the date of the initial investigation.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under article 50 of the Monopoly Regulation and Fair Trade Act (MRFTA), the KFTC has broad administrative investigative powers which are essentially based upon the voluntary cooperation of the investigated parties (including suspected violators and witnesses). The KFTC may request the suspected violators and witnesses, etc to submit or produce information, documents or other materials (including computer records and electronic data), oral statements or written answers to questions. The KFTC may appoint expert witnesses and request them to give their opinions. The KFTC may seize any documents or materials so produced.

The KFTC officials may enter the business premises of suspected violators, examine books and records and other materials belonging to them, request the production of such books, records or materials, and request oral statements. The KFTC may seize any documents or materials so produced. No court approval is required for the above investigation procedures.

Anyone who obstructs the KFTC investigations or refuses to comply with any of the KFTC's requests mentioned above is subject to administrative fines or criminal sanctions under the 22 June 2012 amendment to the MRFTA. Prior to the amendment, only civil fines were imposed for any interference with KFTC investigations; however, the amendment provides for criminal sanctions (ie, imprisonment of up to three years or a criminal fine of up to 200 million Korean won, or both) for refusing, obstructing or evading a KFTC investigation through means such as a verbal or physical assault or intentionally delaying or obstructing the entry of KFTC officials onto the business premises. However, the KFTC officials have no power of forcible entry or search and seizure. Also, KFTC officials have no general surveillance powers (including wiretapping).

As for criminal investigations by the Prosecutors' Office, upon receipt of a criminal referral from the KFTC, as in other criminal cases, the Prosecutors' Office has broad powers to investigate, such as arrest or search and seizure. Warrants issued by the court are required for prosecutors to conduct investigations including an arrest and search and seizure.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Korea cooperates with several other countries either through cooperation agreements (eg, with the European Union) or memoranda of understanding (eg, with Brazil, China, Japan and the United States). Although the level of cooperation in the past has been rather limited, there has been growing cooperation recently with these countries in cartel cases (eg, by conducting coordinated dawn raids in the *Auto Parts*, *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or through informal exchanges of information in the investigation of individual cases, often with waivers obtained from cooperating companies). Korea actively participates in the OECD Competition Committee. In addition, Korea has actively participated in the International Competition Network since its creation in 2001. Korea has also attended the annual East Asia Top-level Officials' Meeting on Competition Policy from 2005.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Cartel investigations in the US and the EU may increasingly lead the Korea Fair Trade Commission launching investigations in Korea (eg, through coordinated dawn raids upon exchanges of information, as in the *Auto Parts*, *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or as in the *Graphite Electrodes* and *Vitamins* cartels).

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Korea Fair Trade Commission (KFTC) both investigates and adjudicates on cartel matters. Following an investigation by the officials of the KFTC Secretariat, the full college of commissioners (except in minor matters on which the decision may be made by a chamber of three commissioners) begins a deliberation, which consists of at least an oral hearing. At the end of the deliberation, the decision is made by the full college of the KFTC commissioners.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The KFTC has the burden of proof in the KFTC proceedings. Until recently, article 19(5) of the Monopoly Regulation and Fair Trade Act (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 minds exists.

It may be said that the standard regarding the burden of proof that the KFTC must establish regarding the existence of collaborative acts is 'highly probable'. While it is difficult to clearly define the applicable degree for 'highly probable' under Anglo-American law, it may be viewed as requiring a standard that is higher than the balance of probabilities standard.

In criminal proceedings, the burden of proof falls on the Prosecutors' Office. The prosecutor must establish the case through evidence that has evidentiary value to the degree that there is no reasonable doubt in the judge's mind regarding the facts of the charges. This may be understood as requiring evidentiary value similar to that of 'beyond a reasonable doubt'.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

According to article 19(1) of the MRFTA, an 'unreasonable collaborative act' is established only when an 'anticompetitive agreement' exists. Here, 'an agreement' includes not only an 'explicit agreement', but also an 'implicit agreement', such as a tacit understanding between enterprises. In particular, according to article 19(5) of the MRFTA, even in the absence of direct evidence establishing the existence of agreement between enterprises, when a substantial probability exists to assume the presence of the relevant collaborative acts by the enterprises in light of the relevant circumstances, the existence of an agreement may be legally presumed. The Review Guidelines on Unreasonable Collaborative Acts of the KFTC offer the following items as examples of circumstantial evidence for establishing the legal presumption under article 19(5) of the MRFTA:

- when evidence of direct or indirect communication or exchange of information is present;
- when a joint action is deemed to be the sole mechanism to contribute to the interests of the relevant enterprises and an individual action is found to be adverse to each of the relevant enterprises' interests;
- the conformity of the relevant enterprises' conducts cannot be explained as a consequence of the market status; and
- when the conformity of conducts would be difficult without an agreement in light of the relevant industry structure.

Furthermore, the Amendment (effective 30 December 2021) provides that a legal agreement is presumed to have been formed when there is external conformity in price changes and relevant information has been exchanged (article 40(5)(ii) of the Amendment).

Therefore, in theory, even without direct evidence for the existence of an agreement, an unreasonable collaborative act may be established through circumstantial evidence. However, a review of the history of the KFTC's handling of cases indicates that the majority of 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 a suspected cartel for CD interest rate by the banks, the KFTC found several items of circumstantial evidence. However, owing to the absence of direct evidence proving the existence of an agreement, the KFTC had concluded the aforementioned case by rendering a non-violation decision, despite an investigation spanning four years, on the grounds that it is difficult to substantiate the existence of an unreasonable collaborative act.

Appeal process

18 | What is the appeal process?

The KFTC's decisions may be reconsidered by the full college of commissioners upon application by respondents. The respondents may object to the KFTC's decision within 30 days from receipt of the written decision from the KFTC. The respondents may also appeal the KFTC's decisions to the Seoul High Court. The KFTC's decisions made upon reconsideration may be appealed only to the Seoul High Court by the respondents. The respondents may appeal to the Seoul High Court within 30 days from receipt of the written decision from the KFTC or from the receipt of the decision on reconsideration. The Seoul High Court has exclusive jurisdiction to review the legality of the KFTC's decision, including the amount of any administrative fines imposed, through a panel composed of three judges.

Generally, litigation procedures at the Seoul High Court take about six months to two years. From the Seoul High Court, either the KFTC or the respondents may lodge an appeal to the Supreme Court; such appeal can be made within two weeks from the date of receiving the decision of the Seoul High Court. While a panel composed of four Supreme Court justices decides cases at the Supreme Court, in the event that such panel cannot reach a unanimous decision or there is a need to change a previous Supreme Court decision, the determination is made by a full panel, which comprises more than two-thirds of the 14 Supreme Court justices. The time it takes for the Supreme Court to render a decision varies for each case, and it is difficult to uniformly indicate such a time frame.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Corporate violators are subject to a criminal fine of up to 200 million won. Individuals are subject to imprisonment of up to three years or a criminal fine of up to 200 million won, or both. Under the Monopoly Regulation and Fair Trade Act (MRFTA), the Korea Fair Trade Commission (KFTC) must first make a referral to the Prosecutors' Office for a party to be indicted for illegal acts where criminal sanctions may be imposed. Meanwhile, under the 16 July 2013 amendments to the MRFTA, which became effective on 17 January 2014, the KFTC's obligatory referral obligations have been strengthened. Prior to the amendments, only the prosecutor general could make a request for referral to the KFTC.

According to the amendments to the MRFTA, the chair of the Board of Audit, the administrator of the Public Procurement Service or the administrator of the Ministry of SMEs and Start-ups may make a request to the KFTC to refer a case to the Prosecutor's Office. If such request for referral is made, the KFTC is obliged to make such referral. The amendments to the MRFTA also explicitly recognise an exception to referral in the case of cartel activity leniency applicants.

The KFTC is increasingly filing criminal referrals with the Prosecutors' Office against corporations as well as individuals. Upon investigation and indictment by the Prosecutors' Office, in most cases the courts imposed only criminal fines (rather than imprisonment) on

individuals as well as corporations. To date, this trend appears to be continuing. In a small number of cases, however, the courts imposed imprisonment on individuals with or without a suspension of execution.

The number of criminal referrals made per year since 2007 are as follows:

- 2007: 7;
- 2008: 5;
- 2009: 5;
- 2010: 1;
- 2011: 8;
- 2012: 2;
- 2013: 12;
- 2014: 36;
- 2015: 9;
- 2016: 22;
- 2017: 27;
- 2018: 44;
- 2019: 19; and
- 2020: 5.

Civil and administrative sanctions

20 What civil or administrative sanctions are there for cartel activity?

The KFTC can impose administrative fines against corporate violators that engaged in cartels of up to 10 per cent of the relevant sales (increased to 20 per cent in the Amendment) 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 size of administrative fines that are imposed on cartel cases is continually increasing. Some of the recent examples of cartel cases where a large administrative fine was imposed are:

- the *Liquefied Petroleum Gas* case (2009);
- the *Refineries* case (2011);
- the *Life Insurance* case (2011);
- the *Steel Sheet* case (2012);
- the *Honam Express Railway Construction Bid Rigging* case (2014); and
- the *Scrap Metal* case (2021).

During 1981 to 2001 there were 359 cartel cases that resulted in guilty verdicts or pleas. The average total of fines issued for each of those years was 22,187 million won. The total number of guilty verdicts and fines in subsequent years were:

- 2002: 47 guilty verdicts, total fines 53,109 million won;
- 2003: 23 guilty verdicts, total fines 109,838 million won;
- 2004: 35 guilty verdicts, total fines 29,184 million won;
- 2005: 46 guilty verdicts, total fines 249,329 million won;
- 2006: 45 guilty verdicts, total fines 110,544 million won;
- 2007: 44 guilty verdicts, total fines 307,042 million won;
- 2008: 65 guilty verdicts, total fines 197,479 million won;
- 2009: 61 guilty verdicts, total fines 52,932 million won;
- 2010: 62 guilty verdicts, total fines 585,822 million won;
- 2011: 71 guilty verdicts, total fines 577,902 million won;
- 2012: 41 guilty verdicts, total fines 398,866 million won;
- 2013: 46 guilty verdicts, total fines 364,731 million won;
- 2014: 76 guilty verdicts, total fines 769,428 million won;
- 2015: 88 guilty verdicts, total fines 504,919 million won;
- 2016: 64 guilty verdicts, total fines 756,040 million won;
- 2017: 69 guilty verdicts, total fines 229,439 million won;
- 2018: 157 guilty verdicts, total fines 237,950 million won;
- 2019: 76 guilty verdicts, total fines 73,762 million won; and
- 2020: 83 guilty verdicts, total fines 149,387 million won.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The KFTC's Notification on Detailed Standards Regarding Imposition of Administrative Fines is the guideline on the imposition of administrative fines and, as an administrative regulation, it has binding force internally at the KFTC. Administrative fines for unreasonable collaborative acts are calculated by multiplying the imposition rate by the degree of violation depending on the severity of violations (0.5 per cent to 10 per cent) with the total revenue generated during the period the cartel operated with respect to products or services directly or indirectly affected by the cartel ('relevant sales'). The severity of violations may be classified into very 'severe', 'severe' or 'less severe' violations by considering the details of violation (eg, whether there was restraint of competition and whether monitoring or sanction measures were prepared and undertaken to implement the agreement) and extent of violation (eg, participating enterprise's market shares in the relevant market, relevant sales, scope of unreasonable gain and damage and regional scope of the effect of the violation).

Key factors for an increase in administrative fines include:

- if the statutory violation was repeated and was subject to the KFTC's measures in the past five years, and if the latter, the number of times;
- if the statutory violation period is extensive; and
- if other enterprises that did not participate in the statutory violation were retaliated against.

Key factors for reduction in administrative fines include:

- where there was agreement on collaborative acts, but such agreement was not implemented;
- cooperation in the KFTC investigation; and
- voluntary correction of the statutory violation (here, voluntary correction 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 the case of cartels, high penalty points are assigned to hard-core 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 are 1.8 points or more, the violator would be subject to referral. The referral guidelines stipulate the criteria for calculating penalty points for enterprises as well as individuals.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The KFTC established and operates 'Rules on Operation of Fair Trade Compliance Programs, Offering of Incentives, etc'. According to said Rules, if an organisation receives a certain grade or higher for its compliance programme from an agency designated by the Korea Fair Trade Mediation Agency or agency designated by the KFTC (which does not currently exist), it may be exempt from the duty to officially announce the fact that it is subject to the KFTC's corrective order or such duty may be attenuated.

- Evaluation of 'AAA (Best)': exempt from the duty to publicly announce that the organisation is subject to KFTC's corrective order.
- Evaluation of 'AA (Outstanding) or A (Better than Most)': reduction of the size of posting of public announcement in publications and the number of publications in which such announcement will be published by one level, and a reduction of the period of the announcement at the business's website and on electronic media.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The MRFTA and the Korean Commercial Code do not contain provisions restricting individual employees involved in unreasonable collaborative acts from serving as corporate directors or officers. However, individual employees who participated in a leading manner in unreasonable collaborative acts may be subject to criminal punishment if the KFTC makes a criminal referral to the Prosecutors' Office. In the case of companies under strict supervision for establishment and operation, such as financial institutions and public companies, the individual employees' history of criminal punishment is stated as a ground for disqualification from serving as corporate directors or officers.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

In case of a party engaging in a cartel regarding government or public institution procurement, such party may be restricted from participating in a tender held by the government or public institution for a period of up to two years. The head of the relevant government or public institution has the authority to restrict such participation.

Currently, the Act on Contracts to Which the State is a Party restricts the right of a party to participate in tenders for two years in the case where the party led the cartel and was the successful bidder; for one year in the case where the party led the cartel; and six months in the case where the party participated in a cartel.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The MRFTA provides for both administrative sanctions that may be pursued by the KFTC and criminal sanctions that may be pursued by the Prosecutors' Office. However, article 71 of the MRFTA provides for criminal prosecution only when the KFTC files a criminal referral with the Prosecutors' Office. Under the MRFTA, the KFTC shall file a criminal referral with the Prosecutors' Office if it determines that a violation of the MRFTA is objectively so obvious and serious as to greatly restrain competition, and the prosecutor general may request the KFTC to file a criminal referral with the Prosecutors' Office when he or she believes that a violation of the MRFTA is objectively so obvious and serious as to greatly restrain competition. In addition, article 315 of the Korean Criminal Code and article 95 of the Framework Act on the Construction Industry provide for the offence of bid rigging, which may be prosecuted by the Prosecutors' Office even without regard to receiving any criminal referral from the KFTC. Consequently, both administrative sanctions and criminal sanctions may be pursued in respect of the same conduct.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Article 56 of the Monopoly Regulation and Fair Trade Act (MRFTA) provides for awarding damages to a person who has suffered from a violation of the MRFTA, such as cartel behaviour, unless the defendant companies prove that the violation was neither intentional nor negligent. When the amount of damages is difficult to prove with specific evidence, the court may award an amount of damages on the basis of overall evidence in the proceedings. In relation to the above, the Amendment to the MRFTA provides that a court may order defendant companies that engaged in cartel activity to submit certain materials, to encourage compensation of damages suits by making it easier for the claimant to secure evidence necessary to prove damage and the damage amount (article 111(1) of the Amendment). The defendant companies cannot refuse to submit materials even if they contain trade secrets, as long as the materials are needed to prove damage or to calculate the amount of damages. Further, in the event of a defendant company's failure to comply with the court's order to submit materials, the alleged facts that the claimant intended to prove with such documents will be deemed true (article 111(4) of the Amendment).

Indirect purchasers and purchasers that purchased 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. 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.

A cartelist is stipulated to be liable for up to treble the damages that actually occurred. However, a leniency applicant could be found liable only up to the actual damages that 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.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

No class actions are permitted for a violation of the MRFTA. If several parties were injured due to a cartel, sometimes a lawsuit is commenced by several joint plaintiffs or, under the system of selecting a representative party from those injured from the cartel, a lawsuit is commenced by one plaintiff or a number of plaintiffs among those several parties that were injured. In such a 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 the 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 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.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Initially, in 1996, Korea adopted the leniency programme only for the first company to report a cartel. In 2001, the Monopoly Regulation and Fair Trade Act (MRFTA) was amended to provide for leniency for a company that reported or cooperated in the investigation of a cartel. On 1 April 2005, the Korea Fair Trade Commission (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 the 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 the 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 the 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 the 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 the 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 the administrative fine for leniency applications.

In addition, the 2005 rules provide for 'amnesty plus', granting an automatic reduction in the 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 the 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 to qualify for leniency. Following the amendments, leniency applicants are now required to terminate the cartel activity immediately after their application 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 of the 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, considerable uncertainty arose regarding 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 against any and all of the participants in the same cartel. Similarly, the Prosecutors' Office indicted two executives of the corporate leniency applicants against whom the KFTC did not file a criminal referral. The lower courts dismissed the indictments against the corporate leniency applicants and their executives on the ground that the indictments lacked proper criminal referrals from the KFTC. The uncertainty has recently been resolved by the Supreme Court, which upheld the decisions of the lower courts in September 2010. Meanwhile, as examined above, under the 16 July 2013 amendments to the MRFTA, which became effective on 17 January 2014, an exemption from the obligation to criminally refer a leniency applicant for cartel activities is explicitly recognised.

On 21 July 2011, the KFTC revised the Notice to decrease the minimum reduction rate of 20 per cent to 'up to 20 per cent' for 'amnesty plus', and to enable the KFTC to grant a longer supplemental period of a total of 75 days, especially for international cartel cases.

Based on the 2 January 2015 amendment to the Notification on Implementation of the Leniency Programme for Corrective Measures Etc. Against Confessors, the previous practice of having the secretary general of the KFTC provisionally confirm the marker of the leniency applicant was abolished, and the Notification was amended so that the marker of the leniency applicant would only be confirmed through deliberation and adjudication by the KFTC. In the past (ie, before 2015), under the Notification, when a marker was perfected by a leniency applicant, the secretary general of the KFTC issued a notice of provisional confirmation of the marker to the applicant, but some leniency applicants tended to slow down their cooperation with the KFTC's investigation once they had received such a provisional confirmation. Thus, 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, this amendment was made because it was necessary to determine the credibility of the details in the leniency application and to prevent changes to previous statements by providing the commissioners with an opportunity to directly examine the relevant officers and employees.

Under the 29 March 2016 amendments to the MRFTA, which became effective on the same date, if a party that received a reduction or exemption from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with the investigation engages in a new cartel after such reduction or exemption, such party will not be eligible for any reductions or exemptions from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with an investigation for five years from the initial reduction or exemption from corrective measures or administrative surcharges (the relevant provision became effective from 30 September 2016).

The Amended Notification on Mitigation of Administrative Fines, which came into effect on 30 September 2016, includes the following changes:

- improvement of leniency application procedures;
- specification of amnesty plus standards;
- enhancement of the requirements for a succession of ranks; and
- amendment to the standards for determining repetitive cartels.

Among the changes, the standards for amnesty plus stipulated in detail the leniency ratio by comparing the scale of the collaborative acts that have been additionally voluntarily reported and the scale of the relevant collaborative acts. For example, if the additionally reported cartel is smaller than or the same scale as the relevant cartel, a maximum mitigation of 20 per cent is possible, while if the scale of the additionally reported cartel is at least four times larger than the relevant cartel, the entire amount of the administrative fine is waived. In the case of succession of ranks, when a latter-ranked applicant succeeds the rank of the higher-ranked applicant, it must satisfy the requirements for leniency corresponding to the relevant higher rank to have its new leniency status acknowledged by the KFTC. For example, to obtain the first rank, the relevant applicant has to satisfy the requirement of 'the KFTC lacking sufficient evidence'. In other words, even when a second-ranked applicant could succeed the first-ranked one, if the KFTC had already secured sufficient evidence at the time of the leniency application by the second-ranked applicant, such second-ranked applicant cannot succeed the first-rank position notwithstanding the revocation of the first-rank position since the second-ranked applicant had failed to satisfy the relevant requirement.

Over the past several years, the number of cartel cases in which leniency applications has increased dramatically:

- in 1999: 1 leniency application; total fines 314 million won;
- in 2000: 1 leniency application; total fines 43 million won;
- in 2001: no leniency applications;
- in 2002: 2 leniency applications; total fines 1,288 million won;
- in 2003: 1 leniency application; total fines 3,433 million won;
- in 2004: 2 leniency applications but did not impose any fines;
- in 2005: 7 leniency applications; total fines 173,673 million won;
- in 2006: 7 leniency applications; total fines 54,992 million won;
- in 2007: 10 leniency applications; total fines 221,373 million won;
- in 2008: 21 leniency applications; total fines 150,600 million won;
- in 2009: 17 leniency applications; total fines 42,000 million won;
- in 2010: 18 leniency applications; total fines 557,100 million won;
- in 2011: 32 leniency applications; total fines 552,200 million won;
- in 2012: 13 leniency applications; total fines 275,128 million won;
- in 2013: 23 leniency applications; total fines 352,312 million won;
- in 2014: 44 leniency applications; total fines 769,428 million won;
- in 2015: 48 leniency applications; total fines 406,020 million won;
- in 2016: 27 leniency applications; total fines 753,319 million won;
- in 2017: 41 leniency applications; total fines 221,386 million won;
- in 2018: 41 leniency applications; total fines 205,242 million won;
- in 2019: 34 leniency applications; total fines 67,585 million won; and
- in 2020 (to July): 30 leniency applications; total fines 67,204 million won.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

After the Enforcement Decree of the MRFTA was amended in 2005, if a company is not first or second to come forward to the KFTC and cooperate, such company will not benefit from the leniency programme. However, even if the leniency programme is not applicable, if an undertaking consistently acknowledges that it engaged in the applicable conduct and cooperates with the investigation from the investigation stage until the conclusion of deliberation, the amount of administrative fines imposed on such undertaking may be reduced within the scope

of 20 per cent pursuant to the provisions of the KFTC's Notification on Detailed Standards Regarding Imposition of Administrative Fines.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A company that satisfies all of the requirements below will be accepted as the second leniency applicant and so will be given a reduction in administrative fine by 50 per cent, and will be exempt from the corrective order and from criminal referral:

- applies for leniency before the KFTC commences its investigation or cooperates with the KFTC after it commences its investigation, and be the second company to voluntarily provide evidence necessary to prove the cartel;
- cooperates in good faith, such as providing statements of all the facts related to the cartel and the relevant materials until the committee's deliberation end; and
- discontinues participation in the cartel.

The status of second leniency applicant shall not be granted in the event that there are only two cartel participants and two years have elapsed since the first leniency applicant applied for leniency or cooperated with the investigation.

In addition, an 'amnesty plus' treatment is available. If a company participating in cartel A becomes the first leniency applicant or the first to cooperate with the investigation into cartel B, which it also participated in, it may also be given a reduction in its administrative fine and be exempt from the corrective measures for cartel A. The extent of additional reduction of administration fines differs, according to the size of the cartel (determined by the sales of products or services):

- cartel B is equal to or smaller than cartel A: reduction of administrative fine by less than 20 per cent;
- cartel B is greater than cartel A by less than two times: reduction of administrative fine by 30 per cent;
- cartel B is greater than cartel A by two times but less than four times: reduction of administrative fine by 50 per cent; and
- cartel B is greater than cartel A by four times or more: exempt from an administrative fine.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

With respect to the first question, the application for immunity can be filed until the end of deliberation by the commissioners and there are no time limits in regard to filing prior to or after the time when the KFTC's investigation has commenced. However, the second-ranked leniency applicant must file its application for leniency within two years from the date on which the voluntary report of the first-ranked leniency applicant was filed.

With respect to the second question, there is a marker system under the Notification on Implementation of the Leniency Programme for Corrective Measures Etc. Against Confessors. If an applicant files for leniency with the KFTC, the KFTC official who receives such application will note the date and time and rank or marker on such application and will provide it to the applicant after signing off on such application. If an applicant requires a significant amount of time to obtain evidentiary materials or there are special circumstances present where evidentiary materials cannot be submitted at the time of such application, an application that omits certain portions may be submitted. Under such circumstances, the applicant may initially be granted a 15-day supplemental period, which may be extended for up to 60 additional days if a valid reason is provided to the KFTC. However, as an exception, if it is recognised that such extension is required to collect relevant evidentiary materials and obtain statements in international cartels, such extension may go beyond 60 days. If the applicant satisfies the applicable requirements and is confirmed for leniency by the KFTC, then such application will be deemed to have been filed as of the time when the initial application was made.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Under article 35 of the Enforcement Decree of the MRFTA, a leniency applicant must faithfully cooperate until the conclusion of the KFTC investigation by, among other things, making statements regarding all the relevant facts of the unreasonable collaborative acts and submitting the relevant materials, to receive a reduction or exemption of the corrective order or administrative fine, or both. According to the KFTC's Notification on Imposition of Corrective Measures and Operation of Leniency System for Leniency Applicants of Unreasonable Collaborative Acts, 'until the end of the investigation' refers to the period 'until the end of deliberation by the KFTC', and whether a leniency applicant has faithfully cooperated is comprehensively determined based on whether:

- all the facts regarding the relevant collaborative acts known by the leniency applicant were provided in statements without undue delay;
- all materials regarding the relevant collaborative acts that were held or could be collected by the leniency applicant were promptly submitted;
- prompt responses and cooperation were provided regarding inquiries by the KFTC that were necessary to confirm facts;
- officers and employees (if possible, including previous officers and employees) made utmost efforts to continuously and truthfully cooperate, inter alia, during the KFTC's investigation and the examination process (including personal attendance of the hearing);
- evidence related to the collaborative acts was destroyed, manipulated, mutilated or concealed; and
- the facts regarding the illegal acts or leniency application were provided to a third party prior to the issuance of the examiner's report without the approval of the KFTC.

However, recently, the Korea Supreme Court deemed that leniency applicants did not faithfully cooperate with the KFTC if such leniency applicants destroyed evidence about cartels or leaked the fact of such leniency application 'to third parties, including cartel participants' without the KFTC's approval before the conclusion of deliberation by the KFTC (see Korean Supreme Court, case No. 2016Du46458, rendered on 11 July 2018 and case No. 2016Du45783 rendered on 26 July 2018).

In addition, the Amendment to the MRFTA provides that if a leniency applicant that received immunity is found to have provided statements at court that are different from those provided to the KFTC during the investigation process, or submitted false information, the leniency may be withdrawn (Article 44(3) of the Amendment).

There is no particular difference in the obligation to cooperate between a first-ranked leniency applicant receiving a 100 per cent exemption of the administrative fine and a lower-ranked leniency applicant receiving a 50 per cent reduction of the administrative fine.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The identity of leniency applicants and the information and evidentiary materials are treated as confidential. The investigations, hearings and decisions must be conducted or made in a manner so as not to disclose the information. However, the KFTC may disclose the information 'if necessary for bringing or carrying on a lawsuit relating to the case' in or for which a leniency application was made. In an administrative lawsuit regarding the KFTC's disposition or a civil lawsuit for compensation of damages for a cartel, the relevant court may order the KFTC to submit leniency-related materials upon a motion by the parties. In such a case, the KFTC should comply with the court order and submit the relevant materials. The degree of confidentiality protection afforded to lower-ranked leniency applicants is the same.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Plea bargains or settlements for cartel activities are not permitted in Korea. Also, under the amended MRFTA, the consent decree system under the MRFTA applies only to other MRFTA violations excluding cartel activities.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

A company whose leniency application has been accepted by the KFTC will be exempt from criminal prosecution, except where the violation is objectively so obvious and serious as to greatly restrain competition. Also, a company's current and former employees who sponsor a cartel on behalf of their company would be exempt from criminal prosecution under the same conditions as the company.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Generally, leniency is granted according to the following steps.

The undertaking submits a leniency application form to the KFTC, which includes:

- a summary of the cartel;
- the evidence necessary to prove the cartel exists and an evidence list;
- a statement that the applicant will cooperate in good faith; and
- a statement that the applicant has discontinued participation in the cartel.

Applications may be submitted by visiting the KFTC, by email, by fax or orally. However, submissions by telephone are not permitted. For oral submissions, the applicant's responses to the case examiner's questions are recorded or videotaped.

Immediately after receiving the application, the case examiner marks the application form with the date and time of the application and the applicant's registration ranking, and issues a copy to the applicant. This ranking refers only to the registration of the application.

A 'first revision' interview between the leniency applicant and the KFTC is then held within seven days of the leniency application being received. If the applicant requires additional time to collect evidentiary materials, they may request for the interview to be held within 15 days. At this interview, the applicant submits their initial evidence and material to the case examiner. The applicant may also negotiate for a 'second revision' period and a deadline to submit further material. If the applicant can prove it has a justifiable cause to be granted more time to collect evidence, they may apply for a second revision period of up to 60 days. If the case examiner determines additional time is needed to collect evidence and obtain statements, they may extend this period beyond 60 days.

Generally, a face-to-face meeting with the case examiner and the director-in-charge must be held within 14 days from the date the applicant submits its second revision. The case examiner then submits a separate examiner's report to the committee, determining the applicant's status and ranking as a leniency applicant. The committee then deliberates and decides the applicant's ranking and issues the decision to the applicant.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

Among the materials attached to the examiner's report, the Korea Fair Trade Commission (KFTC) must disclose all materials to a defendant, excluding confidential materials necessary for the protection of trade secrets or privacy, materials related to the leniency application, and confidential materials prescribed under other statutes.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Subject to the Bar rules on conflicts of interest, counsel may represent or give legal advice to those employees under investigation, as well as the corporation.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Owing largely to the leniency programme, in general, representation of multiple corporate defendants would neither be possible nor advisable. This is the case regardless of whether such corporate defendants are affiliated.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation's payment of the legal fees or penalties on behalf of the individual employees who participated in unreasonable collaborative

acts might be subject to criminal punishment under the relevant Korean laws.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Since administrative fines that are imposed owing to cartel activities constitute 'public charges imposed as sanctions for non-performance of duties, or a violation of prohibitions or restrictions under Acts and subordinate statutes' under article 21(iv) of the Corporate Tax Act, they are not included as deductible expenses when calculating the income amount. In the case of civil compensation of damages, since they are not expenses that are generated from ordinary business activities, they are also not included as deductible expenses. In sum, both of the above amounts are not tax-deductible.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Even if a company has had sanctions imposed on it by foreign competition authorities based on the same cartel activity, in principle, this does not influence the KFTC's sanctions imposed for such cartel activity. However, in the *US Forces in Korea Oil Supply* case, the KFTC imposed a corrective order only and did not impose an administrative fine, taking into account the fact that the oil suppliers were sanctioned in the United States. Meanwhile, 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 the case that criminal sanctions had already been imposed on a party abroad. To date, there are no precedent cases in civil damages claims where it was analysed or considered that the compensation of damages related to the applicable case was already made in other jurisdictions.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The best way to obtain leniency and reduce any administrative or criminal fine is to be the first to come forward to the KFTC and cooperate fully, completely and in good faith.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

On 13 May 2014, 'A' applied for leniency and was the first applicant among those that engaged in cartel activity. The Korea Fair Trade Commission (KFTC) denied 'A' status as a first-ranked leniency applicant and rejected the application without conducting further review of whether to grant second rank for cooperating with the investigations, by reasoning that the KFTC had already secured sufficient evidence from the statements and materials submitted by third parties that did not engage in the cartel activity.

'A' filed lawsuit seeking annulment of the KFTC's dismissal of the leniency application. The Seoul High Court held in favour of 'A' and cancelled the KFTC's dismissal of the leniency application by reasoning that: unlike the first-ranked applicant, the second-ranked applicant is not required 'to cooperate with the investigation while the KFTC has not secured information on the cartel or sufficient evidence necessary to prove a cartel', and thus, the KFTC incorrectly refused to review whether 'A' qualified as a second-ranked applicant despite that 'A' was qualified to be a second-ranked applicant although not a first-ranked applicant (Seoul High Court Decision No. 2017*Nu*31431 rendered on 6 July 2017).

The KFTC appealed and the Supreme Court reversed and remanded the Seoul High Court's decision. The reasons provided by the Supreme Court are as follows (Supreme Court Decision No. 2017*Du*54746 rendered on 29 October 2020):

- in light of the intent and purpose of the leniency program, an applicant cannot be deemed to have cooperated with the investigation after the KFTC had already secured information on the cartel and sufficient evidence needed to prove the cartel. Such applies to both first-ranked and second-ranked applicants;
- provided, however, as an exception, when the information provided by the first-ranked applicant causes the KFTC to have gathered sufficient evidence, a second-ranked applicant may also be accepted in addition to a first-ranked applicant; and
- however, once the KFTC has gathered sufficient evidence through the information provided by a third party that did not participate in the cartel, the leniency applicants cannot be granted leniency for the information that they subsequently provided to the KFTC.

The decision above is significant in that it made clear that a leniency applicant cannot be granted leniency, even if it cooperates with the investigation, if the KFTC had already gathered sufficient information and evidence on the cartel activity from information provided by a third party that did not participate in the cartel.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

In the European Union and the United States, among others, the exchange of sensitive information between competitors is deemed to cause considerable anticompetitive effects and is prohibited as a

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concerted practice, or information exchange agreements themselves are subject to regulation. As the Monopoly Regulation and Fair Trade Act (MRFTA) currently does not contain relevant provisions, it has been challenging to regulate the exchange of sensitive information as an unreasonable collaborative act. In this respect, with regard to making the regulation of the anticompetitive exchange of information more effective, the Amendment to the MRFTA provides an agreement to practically restrain competition by exchanging information on price and output among companies as a type of cartel; and presumed that an agreement has been formed when external conformity and exchange of information are found.

In addition, if a cartel is engaged in for the purpose of rationalisation of industry, research and development of technology, overcoming recession, industrial restructuring, rationalisation of trade terms or enhancement of the competitive power of small and medium-sized companies, the requirements determined by an Enforcement Decree of the MRFTA are satisfied, and KFTC approval is given, article 19(1) of the MRFTA does not apply. The MRFTA amendment bill simplifies and clarifies some of the overlapping requirements to receive such approval from the KFTC so that the requirement only entails industrial restructuring to overcome recessions, research and development of technology, rationalisation of trade terms or enhancement of competitive power of small and medium-sized companies.

Switzerland

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The legislation governing cartels in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act). The regulatory framework is complemented by several federal ordinances, general notices, guidelines and communications of the Swiss Competition Commission.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The federal authorities investigating cartel matters are the Commission and its Secretariat, which are based in Berne. They are independent of the federal government. The Commission consists of 11 to 15 members (currently 12) and is headed by its president and the two vice-presidents. The majority of the Commission's members must be independent experts (having no interest in or special relationship with any economic group whatsoever). While investigations are conducted by the Secretariat, which also prepares the Commission's decisions, the deciding body in cartel matters is the Commission.

Based on the Commission's internal rules of procedure of 15 June 2015, which entered into force on 1 November 2015, two separate chambers of the Commission with independent decision-making power were introduced; first, a chamber for partial decisions and second, a chamber for merger control clearance. The chamber for partial decisions has been introduced in particular for the closing of hybrid cartel cases (ie, proceedings in which only some of the parties agree to close the investigation with an amicable settlement). All decisions that are not allocated to one of these two chambers shall be made by the Commission as a whole. The Secretariat is organised into four operational divisions (services) responsible for the construction sector, the service sector, the infrastructure sector and product markets. Besides, the resources and logistics division is dealing with internal administrative matters only. Each division is headed by a vice-director. In addition to these divisions, there exist a number of cross-functional competence centres that support the work of the Secretariat. The Secretariat has around 75 employees (around 65 full-time equivalents), including a significant number of economists.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

There have recently been several changes to the applicable regime. On 9 April 2018, the Commission amended the explanatory notes on the communication on vertical agreements to adapt to the landmark ruling of the European Court of Justice on third-party platform restrictions in the matter of *Coty International v Parfümerie Akzente*. Furthermore, on 28 February 2018, the Secretariat published, for the first time, guidelines on the main features of amicable settlements and an overview of the respective procedure based on article 29 of the Cartel Act (the Amicable Settlement Guidelines). The Amicable Settlement Guidelines also contain a template of the framework conditions for amicable settlement negotiations and a template of an amicable settlement agreement to be concluded with the Secretariat. In August 2020, the Secretariat informed that the Commission allows the setting of paperless markers for leniency applications via online forms. Other than these electronic markers, leniency markers may only be submitted in writing, by email or in person.

There are also some proposals for change to the regime. In particular, on 1 June 2021 the Swiss Parliament adopted the motion Français (18.4282). The objective of this motion is to reintroduce a quantitative test to all agreements affecting competition. If adopted, this motion would essentially reverse the case law of the Swiss Federal Supreme Court according to which agreements affecting competition pursuant to articles 5(3) and (4) of the Cartel Act impede competition in such a significant manner due to their qualitative nature that the quantitative effects of such agreements must not be assessed. It is now for the Swiss Federal Council to propose an amendment to the Cartel Act.

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 the anticompetitive agreement not only covers binding agreements in a strict legal sense but also non-binding agreements, 'gentleman's agreements' or concerted practices such as the exchange of information 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 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 must be assessed whether the agreement significantly restricts competition. In the landmark cases involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, in the matter of the *Elmex toothpaste* cases of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, the Swiss Federal Supreme Court substantially tightened its practice with regard to hard-core restraints. The Swiss Federal Supreme Court decided those vertical and horizontal hard-core restraints 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 Swiss 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 knowhow; and
- a more rational exploitation of resources.

In addition to these benefits, to successfully justify anticompetitive behaviour by claiming it creates economic efficiencies, the legal anticompetitive agreements must not, under any circumstances, enable the parties involved to eliminate effective competition.

The strict approach adopted with the *Elmex toothpaste* cases has been confirmed by the Swiss Federal Supreme Court in its *Altimum* decision (regarding mountaineering equipment) of 18 May 2018 (2C_101/2016). In this decision, the Swiss Federal Supreme Court also made clear that the barriers to justify otherwise unlawful anticompetitive agreements on the basis of economic efficiency are high, in particular for hard-core restraints.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

As any formal or informal agreement that restricts competition by object or effect, joint ventures and strategic alliances, such as marketing alliances and purchasing pools, are, in principle, subject to Swiss cartel regulation. Exceptions may be possible in a merger control context. In this context, anticompetitive and therefore otherwise inadmissible agreements that are directly related and necessary to concentrations (ancillary restraints) may be privileged (concentration privilege). Based on a formal request for legalisation, ancillary restraints can become officially legalised with the clearance of the concentration by the Commission in the respective merger control proceeding, which is of great benefit to the parties involved due to the legal certainty gained. Without such a formal request and legalisation, the parties themselves have to assess whether the ancillary restraints are permissible. This is also the case if a concentration is not notifiable since the turnover thresholds are not satisfied.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

According to article 2(1)-(1bis) of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), any undertaking, public or private, that is engaged in an economic process (ie, that offers or acquires goods or services) is an undertaking within the meaning of the Cartel Act and therefore subject thereto. As to the applicability of the law, a functional approach is taken and neither the organisation nor the legal form of an undertaking is relevant.

Undertakings can be individuals – that is, natural persons – or legal entities such as corporations or associations. Individuals acting as consumers are not caught by the Cartel Act. Individuals acting as officers or employees of an undertaking are not caught by the Cartel Act for administrative sanctions, only the undertaking is. However, certain penal sanctions may apply. Further, undertakings that perform tasks in the public interest and that are vested by law with special rights (such as Swiss Post for specific postal services) are also (partly) exempted.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Article 2(2) of the Cartel Act codifies the international law principle of the effects doctrine. According to the landmark cases involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), respectively, the Federal Supreme Court ruled that the Cartel Act applies to all agreements and concerted practices that may have an effect within Switzerland. Therefore, agreements concluded abroad or conduct that takes place outside Switzerland, but that might have effects in Switzerland may fall under Swiss jurisdiction.

More recently, the Commission has imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the European Economic Area. As Switzerland is not part of the EEA (and was, as a result, affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. This, in general, is in line with the Commission's past practice to interpret effects in Switzerland broadly in a sense that the mere possibility of effects suffices. Both the *BMW* and *Nikon* decisions were upheld by the Swiss Federal Supreme Court and the Swiss Federal Administrative Tribunal, respectively.

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Article 2(2) of the Cartel Act codifies the international law principle of the effects doctrine. In light of this doctrine, conduct that only affects customers or other parties outside Switzerland should, in general, not fall under Swiss jurisdiction. However, in cases where there might be repercussions on the Swiss market as, for instance, in an import or reimport scenario, the Swiss Cartel Act may nevertheless apply. Importantly, the Swiss Federal Supreme court has widened the effects

doctrine with its landmark decisions dated 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), respectively, with regard to Gaba and Gebro in the *Elmex Toothpaste* matter. Not only actual effects, but also potential effects, on the Swiss market are deemed sufficient to establish jurisdiction, giving the authorities considerable leeway when determining whether a specific conduct falls under Swiss jurisdiction.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Cartel Act does not provide for any industry-specific offences or defences or any anti-trust exemptions for government-sanctioned activities. However, pursuant to article 3(1) of the Cartel Act, statutory provisions that do not allow for competition in a certain market for certain goods or services take precedence over the Cartel Act. Such statutory provisions include rules that establish a state market or price regulation, or that provide individual undertakings with special rights to fulfil public duties. However, according to the Swiss Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

The Cartel Act also empowers the Swiss Federal Council and the Commission to issue ordinances or general notices, respectively, on specific anticompetitive agreements that are, in principle, justified on economic 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 response to the Swiss Federal Supreme Court's landmark decisions in the *Elmex toothpaste* matter of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014), and has additionally issued, for the first time, explanatory notes as an interpreting aid on 12 June 2017, as amended on 9 April 2018. The latter particularly also contain explanations with regard to online sales restrictions. This communication incorporates the principles developed by the Commission and the appellate courts based on article 5(4) of the Cartel Act and, in principle, seeks harmonisation with the Block Exemption Regulation 330/2010 and the related Guidelines on Vertical Restraints applicable in the European Union while taking the economic and legal specificities of Switzerland into account.

On 19 December 2005, the Commission adopted the Communication on Agreements of Minor Importance (de minimis), specifically targeting agreements between small and medium-sized enterprises to improve their competitiveness, provided that the agreements do not contain hard-core restraints and only have a limited effect on the market.

On 1 November 2002, the Commission enacted the Motor Vehicle Communication and a brief explanatory note regarding its application. The aims of the Motor Vehicle Communication were essentially to allow the parallel importation of motor vehicles from the European Union and European Economic Area to Switzerland, to suppress the link between retail and after-sales servicing, to facilitate the sale and the parallel importation of spare parts and to give distributors more freedom in relation to multi-branding. On 1 January 2016, the Commission's revised Motor Vehicle Communication entered into force and replaced the communication of 2002.

The Commission has also published a general notice on homology and sponsoring of sports goods and another on the use of cost-calculation schemes (cost-calculation aids). The purpose of the latter, which is the more important of the two in practice, is to distinguish lawful use of cost-calculation aids from illegal horizontal price fixing. To qualify as a lawful cost-calculation aid, the following requirements must be met:

- the aid may only set out the basis for the cost calculation, but may not stipulate any flat costs;
- knowhow may be exchanged to allow the cost calculation, but information on how prices are set must not be disclosed;
- the parties must be free to set prices and conditions and to determine discounts in whatever form; and
- price elements, discounts or consumer prices shall not be 'proposed'.

Communications of the Commission are not binding upon Swiss courts.

Finally, upon specific request by the parties, subject to a decision of the Commission or the appellate courts, the Swiss Federal Council may authorise otherwise unlawful 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Article 2(1)–(1bis) of the Cartel Act makes clear that any undertaking, public or private, engaged in an economic process that offers or acquires goods or services is an 'undertaking' within the meaning of the Cartel Act and that neither the organisation nor the legal form of an undertaking is relevant.

However, pursuant to article 3(1) of the Cartel Act, statutory provisions that do not allow for competition in a certain market for certain goods or services take precedence over the Cartel Act. Such statutory provisions include, in particular, rules that establish a state market or price regulation or that provide individual undertakings with special rights to fulfil public duties. However, according to the Swiss Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Cartel proceedings under the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) are in principle two-staged, consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, the Swiss Competition Commission may open an in-depth investigation even without going through a preliminary investigation.

The Commission's Secretariat can initiate preliminary investigations on its own initiative, at the request of involved undertakings (eg, competitors) or based on a complaint from third parties (eg, consumers). It is at the discretion of the Secretariat to open a preliminary investigation.

If the Secretariat concludes that there are indications of the elimination or a significant restriction of effective competition, it opens an investigation together with one presidium member of the Commission. The Secretariat must open an investigation if requested to do so by the

Commission or by the Swiss Federal Department of Economic Affairs, Education and Research. During preliminary investigations, the parties concerned have no procedural rights (that is to say, no right to access files or records, and no right to be heard). By the same token, third parties cannot bindingly request the Secretariat or the Commission to open a preliminary investigation or an investigation, respectively. The preliminary investigation shall determine whether an in-depth investigation is necessary. The decision to open an investigation does not qualify as a formal decision and hence cannot be appealed. The Commission decides which in-depth investigations are pursued.

The Secretariat must announce the opening of an in-depth investigation by means of an official publication. Such announcement states the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties may join the investigation as a party or as a third party without party status. As a third party without party status, they have limited procedural rights. While, in principle, a request to become involved as a party can be requested anytime, the involvement as a third party without party status must be requested within 30 days of the public announcement.

All parties to the investigation are vested with the usual procedural rights. They may access files and suggest witness statements and have the right to be heard and to participate in hearings. The Secretariat conducts the investigation, but the Commission has the power to intervene and to hold hearings, a right that the Commission has made frequent use of in the recent past.

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Commission, to issue necessary procedural rulings. On the basis of the conducted investigation, the Secretariat brings forward a motion for a draft of a decision, which is comparable to the statement of objections in the European Union. The parties and participating third parties are entitled to comment on such draft decision. If important new facts emerge, another round of hearings and witness statements may take place. Formally, however, the decision itself is not issued by the Secretariat, but by the Commission. Accordingly, the investigating and decision-making bodies are separate, even though at least one of the presidium members of the Commission is involved in some of the investigatory actions.

An investigation can have one of the following outcomes. First, the Commission may decide that there is no evidence of an unlawful agreement and close the investigation without any consequences. Second, the formal decision of the Commission can state that an agreement or conduct is unlawful and order measures to restore effective competition or pronounce direct fines, as the case may be.

There are no statutory time limitations applying to investigations. As a rule of thumb, a preliminary investigation takes, at a minimum, several months and a formal investigation at least one year and sometimes several years.

Investigative powers of the authorities

12 What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Secretariat has broad investigative powers. Such investigative powers are checked by the Commission, in that a member of its presidium must authorise certain investigative instruments of the Secretariat for them to be applied legally. The Secretariat may hear the parties that have allegedly committed the violation as well as third parties concerned (such as competitors or suppliers) and ask for written statements. It can compel testimony from witnesses, although not from the parties alleged to have entered into illegal anticompetitive agreements. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to access and comment on these minutes.

Upon specific request for information, the undertakings under investigation are also obliged to provide the Secretariat with all information required for its investigation and to produce necessary documents (article 40 of the Cartel Act), in due consideration of the right against self-incrimination.

The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions. Moreover, according to article 42(2) of the Cartel Act, members of the Commission's presidium have the power to order inspections or dawn raids and seizures upon request of the Secretariat. The Swiss Federal Act on Criminal Administrative Law applies by analogy to such proceedings.

The Secretariat published a note on selected instruments of investigation in January 2016, in which it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data. The representatives of the Secretariat in charge of the inspection will, among other things, not wait for the arrival of external lawyers before starting to search a premise. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, undertakings being raided may request the sealing of specific or even all documents and electronic data. Moreover, legal privilege applies to any document produced in the course of the core professional activities of independent attorneys admitted to the bar that are allowed to represent parties professionally in Swiss courts. Importantly, legal privilege is not granted to the work product of in-house counsel. It applies irrespective of when such document was created (ie, before or after an investigation was launched) and of where such document is located, be it in the custody of the attorney, the client or any other third party. Legal privilege may be invoked by the attorney, the client and also every third party having a protected document in custody.

The Commission published a note on the decisional process in cartel investigations under the Cartel Act in October 2019. The note aims to increase transparency by, among other things, outlining the practice of the Commission and the Secretariat in relation to their respective competencies, organisation and procedural conduct, in particular with regard to the oral hearings of the parties, and the parties' rights and obligations.

In February 2020, the Secretariat published two notes providing a simple overview of the procedure of both preliminary and in-depth investigations.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Switzerland was the first state to sign a second-generation cooperation agreement in competition matters with the European Union on 17 May 2013. This agreement is not sector-specific and constitutes the legal basis for the cooperation between the European Commission (but not the member states) and the Swiss competition authorities. It facilitates significantly the exchange of information and the transmission of documents between both authorities, subject to specific requirements. The agreement entered into force on 1 December 2014. The Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) also provides for a specific regime with regard to investigations in the air transportation industry (article 42a of the Cartel Act). Such investigations are governed by the agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999, allowing sector-specific cooperation between

the Swiss Competition Commission and the European Commission on a formal legal basis. Moreover, on an informal basis, the Commission and its Secretariat cooperate with various national competition authorities in Europe such as the German Federal Cartel Office as well as with the US antitrust authorities (ie, the US Department of Justice and Federal Trade Commission). In the absence of specific future cooperation agreements, such informal cooperation is not allowed to go beyond the exchange of non-confidential information.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Investigations, prosecutions and sanctions decided by 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 Swiss Federal Supreme Court in its landmark decisions involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, and the fact that such regulatory framework has often made significant inroads into past Swiss competition law practice, its case law will have a significant impact also on future decisions taken by the Swiss authorities.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Commission is the authority that is empowered to take decisions and remedial actions against cartels, and also to impose fines on undertakings that violate Swiss competition law. It has wide decision-making and remedial powers and can, among other things, also issue injunctions to terminate specific conduct or to change and modify a specific business practice. Moreover, a specific chamber of the Commission is empowered to render partial decisions on the closure of proceedings, the approval of amicable settlements including other measures, in particular fines and costs, for some of the parties while the case is decided or the proceeding is continued respectively for the other parties ((sequential) hybrid cartel cases). The Commission's Secretariat is responsible for conducting investigations and preparing cases and, together with one presidium member of the Commission, issuing necessary procedural rulings. In addition, an undertaking impeded by an unlawful restraint of competition from entering or competing in a market may request before the civil courts:

- the elimination of the unlawful agreement or cartel;
- an injunction against the unlawful agreement or cartel;
- damages; and
- restitution of unlawful profits.

Only civil courts have jurisdiction over claims for damages. However, in its decision of August 2019 in the matter *Construction Works in the Canton of Grisons*, a bid-rigging case, the Commission considered compensation agreements with cartel victims (ie, awarding communities) as mitigating factors and reduced the fines for parties that entered into such agreements.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

According to the principle of investigation, which applies generally in administrative proceedings and in particular in connection with cartel proceedings, the competition authorities and the appellate courts have to investigate the facts ex officio. This obligation to investigate extends to justifications on the grounds of economic efficiencies. Nevertheless, the parties to the investigation or proceedings before the appellate courts are obliged to cooperate in assessing the facts and circumstances. Ultimately derived from the criminal law nature of cartel proceedings and the consequent applicable presumption of innocence, it is, however, in any case for the authorities to prove that an undertaking acted, in fact, illegally by taking part in an agreement or concerted practices.

With regard to the level of proof required, as a general rule, only certainty in the sense that no reasonable doubts shall continue to exist with regard to the relevant facts is deemed sufficient. The existence of purely theoretical doubts does not matter. Further, according to the Swiss Federal Supreme Court, exceptions to that rule only exist with regard to complex economic issues, such as market definitions and substitutability questions. With regard to such issues, a prevailing probability shall suffice as the required level of proof, since full proof is, by the nature of these matters, impossible.

In the judgments of the Swiss Federal Administrative Tribunal in the bid-rigging case against building undertakings from the canton of Aargau of June 2018, the tribunal stated that a thorough assessment of the evidence is required without a reduction of the burden of proof or other facilitations, even if accusations from leniency applicants against other undertakings were submitted. The Federal Administrative Tribunal further clarified that accusations made in a voluntary report against other competitors are not sufficient evidence if the non-cooperating undertakings deny these accusations. Instead, the competition authorities must take into account all the specific circumstances of a case (eg, the statements of the undertakings that filed a voluntary report and the statements of the non-cooperating undertakings). If the situation remains unclear, further investigations and taking of evidence are needed, meaning that in practice, additional evidence that corroborates the accusation of another undertaking must be found.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In line with the principle of free appraisal of evidence, the Commission and the appellate courts accept the establishing of an infringement of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) by using circumstantial evidence without direct evidence of an actual agreement. Both direct evidence and circumstantial evidence are, a priori, considered to be of equal value and can be used to fulfil the required level of proof. That is, as a general rule, certainty in the sense that no reasonable doubts shall continue to exist with regard to the relevant facts.

Appeal process

18 | What is the appeal process?

Decisions of the Commission and, to a limited extent, interim procedural decisions can be appealed to the Swiss Federal Administrative Tribunal within 30 days of notification of the decision.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether these third parties are

negatively affected by the decision of the Commission. In principle, only third parties that suffer a clearly perceptible economic disadvantage as a consequence of an 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 (this is rarely invoked in practice).

The appeal before the Swiss Federal Administrative Tribunal is a 'full merits' appeal on both the findings of facts and law. However, in practice, the Swiss Federal Administrative Tribunal grants the Commission a significant margin of technical discretion.

Judgments of the Swiss Federal Administrative Tribunal and, to a limited extent, interim procedural decisions, may be challenged before the Swiss Federal Supreme Court within 30 days of notification of the decision. In proceedings before the Swiss Federal Supreme Court, judicial review is limited to legal claims (ie, the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, in the European Convention of Human Rights or other international treaties). The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

In addition, the parties involved may at any time during and after appeal procedures request the Swiss Federal Council to exceptionally authorise specific behaviour for compelling public interest reasons. To date, such authorisation has never been granted.

Judgments of the civil courts may ultimately be challenged before the Swiss Federal Supreme Court. If the legality of restraint of competition is disputed before a civil court, this question shall be referred to the Commission for an expert report. However, civil courts rarely refer such cases and the Commission's expert opinion is not binding upon the civil courts.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There are no direct criminal sanctions for individuals as natural persons for cartel activities. Swiss law does not provide for imprisonment for cartel conduct. However, individuals acting for an undertaking, but not the undertaking itself, violating a settlement decision, any other enforceable decision or court judgment in cartel matters may be fined up to 100,000 Swiss francs. These sanctions are time-barred after five years following the incriminating act.

Individuals who intentionally fail to comply, or only partly comply, with the obligation to provide information in an ongoing investigation can be fined up to 20,000 Swiss francs. The statute of limitations for these sanctions is two years following the incriminating act.

Individuals who can be fined include executives and board members, as well as all de facto managers and directors.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies from the outset.

From an administrative law point of view, under article 49a of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), direct sanctions (fines) are imposed on undertakings that:

- participate in a hard-core horizontal cartel, according to article 5(3) of the Cartel Act (ie, agreements on prices, quantities or territories between competitors);
- participate in hard-core vertical restraints pursuant to article 5(4) of the Cartel Act (ie, resale price maintenance or absolute territorial protection in distribution matters); or
- abuse a dominant position, pursuant to article 7 of the Cartel Act.

The maximum administrative sanction is a fine of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative). The Ordinance on Sanctions lays down the method of calculation of the fines.

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Swiss Competition Commission or a judgment of the appellate courts can be fined up to 10 per cent of the undertaking's consolidated net turnover in Switzerland during the past three financial years (cumulative). In calculating the fine amount, the presumed profit arising from such unlawful practices shall be taken into due consideration.

Furthermore, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an ongoing investigation, can be fined up to 100,000 Swiss francs.

Since individuals acting as private undertakings fall under the Cartel Act, they can also be fined in cartel cases, as shown in the *Upper Valais Driving Instructor Cartel* case in which the Commission sanctioned also natural persons in its decision of March 2019.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The principle of direct sanctions is set forth in article 49a of the Cartel Act. Sentencing guidelines are laid down in the Ordinance on Sanctions. The Commission has, in addition, issued an explanatory communication. According to the principles in the Ordinance on Sanctions, the penalty must be assessed on the basis of the duration and the severity of the unlawful conduct, the probable profit that the undertaking has achieved as a result of its conduct and the principle of proportionality.

In a first step, the Commission determines the base amount of the fine, which is up to 10 per cent of the consolidated net turnover generated on the relevant markets in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the severity and nature of the infringement.

In a second step, the base amount is increased based on the duration of the infringement.

In a third step, aggravating factors (such as recidivism, a leading role in the illegal conduct, coercion of other cartel members, a particularly high profit as a result of the illegal conduct, or non-cooperation with the authorities) or mitigating factors (such as a passive role in the illegal conduct, effective cooperation with the authorities, or a settlement) influence the final amount of the fine. In its decision in the matter of *Construction Works in the Canton of Grisons* of August 2019, a bid-rigging case, the Commission reduced sanctions substantially for those undertakings that agreed with cartel victims on compensation for

damages. Full immunity or a discount can also be obtained based on leniency cooperation.

Eventually, the Commission shall ensure that the penalty imposed is proportionate and that the maximum fine amount of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative) is not exceeded. In particular, the sanction must also be in proportion to the financial capacity of the concerned undertaking and as a matter of principle must not lead to the bankruptcy of the concerned undertaking.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

There is no statutory provision under Swiss law according to which the existence of a compliance programme would affect the level of a fine. It can be taken into consideration by the Commission when deciding on the level of fines. However, the Commission has been reluctant to do so in its recent practice. In the absence of relevant case law, it is therefore disputed whether and to what extent compliance programmes may reduce sanctions under Swiss competition law.

In the landmark case involving GABA International SA, the manufacturer of Elmex toothpaste, of 28 June 2016 (2C_180/2014), the Swiss Federal Supreme Court reasoned that in this case, the compliance programme that had been in place at the time of the illegal conduct had no relevance with regard to the determination of the sanction. The Swiss Federal Supreme Court argued in that regard that from a competition law perspective, compliance programs aimed at preventing 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 Swiss Federal Supreme Court concluded that the compliance programme could not be taken into account as a mitigating factor reducing the fine. This reasoning could be interpreted in such a way that depending on the merits of other cases, compliance programmes could indeed have a mitigating effect regarding sanctions. It remains to be seen, however, whether such argumentation will in fact be heard by the authorities. The requirements for a compliance programme to be taken into account as a sanction-mitigating factor will in any event be high, as has also been pointed out by the Swiss Federal Administrative Tribunal in its decision regarding Nikon in 2016. The mere existence of a compliance programme should not be enough in that regard.

A parliamentary motion by Rolf 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, a parliamentary initiative by Dominique de Buman (16.473) that, among other things, addressed the same matter was withdrawn in 2017.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

No. There is no legal basis for such disqualification under Swiss competition law.

Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

The Cartel Act contains no specific regulation on the exclusion from public procurement procedures in cases of illegal cartel conduct. However, the Swiss Public Procurement Act provides that the contracting authority may exclude undertakings from an ongoing procurement procedure or delete them from a list of qualified undertakings in cases of illegal cartel conduct. In addition, undertakings may be banned from participating in procurement procedures for a period of several years in cases of illegal cartel conduct. However, no automatic exclusion applies at the federal or cantonal level.

Parallel proceedings

25 | Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

According to the Cartel Act, violation of an amicable settlement, a legally enforceable decision of the Commission or a judgment of the appellate courts, as well as the failure to provide information or produce documents, or the partial compliance with the obligation to provide information during an ongoing investigation, are subject to administrative or criminal fines, or both. Criminal prosecutions against individuals rely on similar criteria to those applied in imposing administrative sanctions. However, the roles of individuals in the violation of a decision or judgment, or the failure to comply with their obligations to provide information, as well as subjective criteria (degree of intent) are more important. Civil sanctions may be accompanied by claims for damages and reparations or restitution of unlawful profits from third parties affected by the illegal cartel activity.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 | Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Third parties affected by cartel conduct may sue the cartel members for damages in civil courts. Their claim is limited to the damage actually incurred – no punitive damages are available in Switzerland – and the passing-on defence is not excluded in Switzerland. However, a claimant may request the remittance of illicitly earned profits. Court and legal costs, as determined by the court, must usually be borne by the losing party in the proceedings.

Under Swiss law, the main difficulties are providing specific and sufficient proof of the damage incurred and establishing the required causal nexus between the anticompetitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims. In most instances, the claimant bears the burden of proof.

In its decision in the matter of *Road Construction* of August 2019, a bid-rigging case, the Swiss Competition Commission reduced sanctions substantially for those undertakings that agreed with cartel victims on compensation for damages. It remains to be seen, however, whether this will provide a sufficiently strong incentive for cartelists to offer compensation for damages during an administrative proceeding before

the Commission or whether they hold back and potentially face civil proceedings.

Umbrella purchaser claims have so far not played a relevant role in Swiss case law. Also, they have barely been discussed in legal literature. 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 the case of umbrella purchaser claims.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not available under Swiss law. Consumers and consumer organisations may participate in investigations before the Commission but, in general, have no legal standing before civil courts. Whether and to what extent trade associations have legal standing is a matter of dispute.

Recent cases have shed some light on certain aspects of concepts for the collective enforcement of legal claims under Swiss law and shown that legal claims used in other legal systems (ie, class actions or model declaratory proceedings) are generally not provided for in the Swiss legal system.

In the aftermath of 'Dieselgate' – the Volkswagen emissions scandal – the Swiss Foundation for Consumer Protection (SKS) filed multiple lawsuits with the Zurich Commercial Court against Volkswagen and its general importer for Switzerland. Finally, SKS acquired claims from approximately 6,000 consumers and non-consumers and accumulated these claims in a single lawsuit. However, the Commercial Court decided not to consider the merits of this case in the absence of the applicant's capacity to bring proceedings. In a recent judgment, the Swiss Federal Supreme Court confirmed the lower court's view that the legal action of SKS was not covered by the foundation's purpose.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Leniency is an important aspect of cartel enforcement in Switzerland. According to the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), an undertaking that cooperates with the Swiss Competition Commission in view of the discovery and the elimination of a restraint of competition may benefit from full or partial immunity. Only the first applicant may enjoy full immunity and rather high thresholds apply.

The leniency programme particularly applies to (horizontal and vertical) 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 in-depth investigation; or
- submit evidence enabling the Commission to prove a hard-core restraint, provided that no other undertaking must already be considered the 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 Commission's Secretariat published a revised notice on leniency, which included a form for leniency applications. The notice was slightly revised in August 2015 and again in January 2019. In August 2020, the Swiss competition authorities introduced the possibility of setting paperless markers for leniency applications via an online form (electronic markers).

The Cartel Act does not expressly regulate the possibility for the Commission to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example, if facts are discovered that justify such a withdrawal or amendment of a final decision. There is no cartel-specific case law in that regard. However, the bar for immunity revocation has to be set very high.

In addition, no fine will be imposed if undertakings notify a possible 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 within a period of five months following the notification and the undertakings continue to implement the notified restriction.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Pursuant to the Ordinance on Sanctions and the notice on leniency, full immunity is limited to the 'first in'. Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50 per cent of the fine amount is available at any time in the proceeding to undertakings that do not qualify for full immunity.

Further, the fine amount can be reduced by 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 an indispensable requirement for receiving a fine reduction. The decisive factor for determining the reduction percentage is the importance of the undertaking's contribution to the success of the proceedings (the position in the queue is not per se relevant).

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Being the second or third or subsequent cooperating party will not allow for full, but only partial, immunity of up to 50 per cent of the fine amount. However, as the decisive factor for determining the leniency bonus is the contribution to the success of the proceedings, being second alone does not guarantee a better bonus than the one for the subsequent cooperating parties.

In addition, there is a 'leniency plus' option with a fine reduction of up to 80 per cent if an undertaking provides information to the Commission about other hard-core restraints that were unknown to the Commission at the time of their submission.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no statutory deadlines for submitting leniency applications or for perfecting a leniency marker. However, pursuant to the Cartel Act, full immunity is limited to the 'first in' but also possible for cooperation that enables the Commission to prove a Cartel Act infringement and therefore when a preliminary or in-depth investigation has already been opened and a dawn raid conducted. Therefore, it is important to decide immediately upon knowledge of an opened investigation and conducted dawn raid whether to cooperate with the competition authorities and, if such cooperation is desired, to submit a leniency marker or application to the Commission without delay (in writing, such as by email, orally by protocol declaration, or online by electronic marker – another form of paperless communication with the Commission that was introduced in August 2020). Importantly, it is not possible to submit a leniency marker via telephone or, since January 2019, by fax.

According to past investigations with several leniency applicants, the decision about which undertaking may qualify for full immunity may be made in a matter of days or even hours.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The voluntary submission of all information or evidence in the applying undertaking's possession concerning the unlawful practice and continuous cooperation with the Commission throughout the proceeding without restrictions or delay, as well as discontinuing its involvement in the infringement no later than the moment at which it provides information or submits evidence concerning the unlawful practice or upon receipt of the first injunction of the Commission are indispensable requirements for receiving full immunity or a partial reduction of the fine.

In its recent practice, the Secretariat has repeatedly insisted that a leniency applicant must at least admit its involvement in an unlawful agreement subject to potential sanctions. It made clear that it is not sufficient to simply produce factual elements. In the Secretariat's view, a leniency applicant would in principle have to admit that the unlawful agreement had effects on the markets. However, the recent decisions of the Swiss Federal Administrative Tribunal in the *Metal Fittings for Windows* case clearly state the right of the leniency applicants to argue against the Commission's legal interpretation of the facts. Only two of these three judgments have not yet become final and been handed down to the Swiss Federal Administrative Tribunal again by the Swiss Federal Supreme Court.

Where an undertaking does not meet these conditions, but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the possibility to reduce the fine.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The right of access to witness statements, hearing minutes and other documents relevant to the investigation may be limited to protect cooperating parties. The level of confidentiality protection is the same for all leniency applicants. Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis.

The Commission and the Secretariat are aware of a leniency applicant's particular need for confidentiality and, in the recent past, have established several measures to protect the leniency applicants' interests in that regard. However, these measures have not been tested in court so far. The catalogue of protective instruments includes the possibility to submit oral leniency statements, paperless proceedings and restricted access to the files. Access rights of other parties subject to an investigation were, in the Secretariat's practice, limited to accessing the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or hearing minutes were not allowed. In addition, access to the files was only granted shortly before the Secretariat provided the Commission and the parties with the draft decision (ie, shortly before the end of an investigation and the Commission's decision on the merits). The Secretariat has also implemented a number of specific internal measures to protect the leniency applicants' interests. Internal access to the file is restricted, and only the case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file. The above practice has been set out by the Secretariat in the notice on leniency.

With judgments of August 2016, the Swiss Federal Administrative Tribunal has authorised the Commission to grant access to certain data of a closed cartel investigation regarding a bid-rigging cartel in the construction sector to municipalities seeking civil damage claims. In doing so, the tribunal limited the access to files in various respects. First, data may only be accessed to the extent necessary, and data retention for later use is not permitted. Second, access is limited to data that 'directly affects' the requesting party. Third, access may only be granted and data may only be used to serve the purpose disclosed in the access request and a legally binding restriction of use must be imposed on the requesting party to that effect. Fourth, access to the files must not include data of undertakings that finally had not been addressees of the decision.

The tribunal, however, did not have to decide on information requests of private undertakings where the conditions applied by the court could be all the more relevant. Also, the tribunal did not have to formally decide on the issue of access to leniency application data, since the Commission excluded all leniency information before providing it to the municipalities. However, the tribunal did at least not question this practice of the Commission to exclude leniency information completely

from access by third parties. Whether these third parties are public or private entities should have no bearing.

In the case of opening an investigation, the Secretariat gives notice by way of official publication. The notice states the purpose of and the parties to the investigation. There is no express obligation to keep the identity of the leniency applicants confidential. In practice, the Secretariat keeps the leniency applicant's identity confidential as long as possible. However, even if the final decision does not reveal the name of the leniency applicant, it is not excluded that a party familiar with the facts of the case may deduce its identity from the context. In addition, the competition authorities' publications must not reveal any business secrets.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Amicable settlements are an important feature of the Swiss cartel enforcement regime. During preliminary investigations, the Secretariat may propose measures to eliminate or prevent restrictions of competition. In the framework of an investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose to the undertakings involved an amicable settlement concerning ways to eliminate future restrictions. Hence, amicable settlements solely deal with an undertaking's conduct in the future, meaning that a party can voluntarily undertake to terminate respectively not to commit certain illegal conduct any more. However, the fine amounts to be imposed for illegal conduct in the past cannot be agreed on – Swiss competition law does contemplate plea bargaining. This also means that, in principle, an undertaking is allowed to appeal against a decision of the Commission and the imposed fine even if it has entered into an amicable settlement. It would be inadmissible to request a formal waiver of a party's right of appeal. Nonetheless, in practice, the Secretariat requests a party to a settlement agreement to confirm in writing that no grounds to appeal the final decision exist if the Commission will finally approve such agreement and does not exceed the framework of a possible fine set out therein; such requested memorandum of understanding should also be deemed to be void.

Amicable settlements shall be formulated in writing and approved by the Commission, typically in its decision on the merits. The Commission shall either approve the amicable settlement as proposed by the Secretariat, or refuse to do so and send it back to the Secretariat and suggest amendments. According to the Commission, it cannot amend the terms of a settlement on its own. However, it did so in one case, namely by setting a time limit to the amicable settlement.

Amicable settlements are binding upon the parties and the Commission and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties. Amicable settlements do not hinder the Commission from imposing fines on the parties if they have committed illegal 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.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

There is no effect on the employees of the defendant. They are not addressees of administrative sanctions and, hence, the granting of immunity or partial leniency concerning a corporate defendant has, in principle, no effect on current and former employees. Employees might, however, be subject to criminal penalties if they committed a corresponding offence in connection with the undertaking's conduct leading to the administrative sanction (for instance, fraud or forgery of a document). Further, individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an on-going investigation can be fined up to 20,000 Swiss francs, and individuals acting for an undertaking violating a settlement decision, or other enforceable decisions or court judgments in cartel matters, may be fined up to 100,000 Swiss francs.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Secretariat will acknowledge receipt of the leniency application (ie, the leniency marker, if any, or the leniency statement). It will specify the exact date and time of receipt and, in case of a leniency marker, the time frame within which the undertaking shall perfect such leniency marker with a full corporate statement. Subsequently, and with the consent of one presidium member of the Commission, the Secretariat will communicate to the applicant whether it deems that the conditions for full immunity from fines are met, any additional information that the disclosing undertaking should submit and, in cases of anonymous disclosure, the time frame within which the undertaking shall reveal its identity.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

While, during the preliminary investigation procedure, there is no right of access to file, the defendant has such right after the opening of an in-depth investigation. The files include submissions from parties and the comments made thereon by the authorities, any documents serving as evidence as well as copies of rulings already issued. The authority may under certain conditions (eg, owing to essential public or private interests) refuse access to a file. In particular, access to a file may be limited with respect to business secrets as well as information regarding the leniency applications of other parties.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Under Swiss law, counsel may represent the employees under investigation as well as the undertaking provided that it discloses the fact to both parties and that there is no conflict of interest. Given that two different kinds of sanctions apply to individuals and undertakings, as a general rule, it is advisable to seek independent legal advice and

representation. This seems all the more relevant since according to recent (and heavily criticised) practice of the Secretariat, with the exception of actual (formal or de facto) board members of an undertaking, current and past employees are treated as third parties (witnesses or informants), but not as parties representing the concerned undertaking.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Under the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), the Commission may require groups of more than five parties in a cartel proceeding to appoint a common representative, provided that these parties have identical interests and if the investigation would be unduly complicated otherwise. In practice, the Secretariat mainly applies this rule in cases involving trade associations and provided that the members of such trade associations agree to one representative. Besides, under Swiss law, counsel may represent multiple corporate defendants, provided that it discloses the fact to all undertakings and that there is no conflict of interest. Since affiliated companies are treated as one undertaking in the sense of the Cartel Act (the possibility to exercise decisive influence is the relevant test criterion), representation of such a group of companies by the same counsel is the rule (ie, possible without restrictions).

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Corporations can pay the legal costs of their employees. However, the employees remain personally liable for any imposed criminal sanctions.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

With a judgment of September 2016, the Swiss Federal Supreme Court clarified that fines and other sanctions of a criminal nature are not tax-deductible for legal entities, as they are not deemed to be business-related expenses that would be tax-deductible under Swiss law. According to the Swiss Federal Supreme Court, tax-deductibility is only possible insofar as fines aim at disgorging illegally obtained profits (ie, fines that do not have a criminal or punitive purpose but aim at correcting an unlawful situation). It is thus essential for Swiss (corporate) income tax purposes to distinguish sanctions with a penal nature from such aiming at disgorging illegally obtained profits. The Swiss Federal Supreme Court handed down the judgment to the lower instance to assess this question in light of the facts of the case. The judgment was rendered in a case of violation of EU competition law. The same outcome may be expected in case of violations of the Cartel Act.

In this context, it is noteworthy that in a draft bill submitted to the Swiss parliament, an explicit legal basis provides that financial administrative sanctions of criminal nature, such as direct fines under the Cartel Act, as well as the related cost of proceedings, shall not be deductible, whereas profit disgorgement sanctions with non-penal purpose shall be tax-deductible. The matter has passed the Swiss parliament. The date of entry into force of this federal law, however, has not yet been determined.

Private damages awards that take place in the ordinary course of business qualify in principle as business expenses and are deductible from profit taxes.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is in the Commission's discretion to take into account sanctions imposed in other jurisdictions. The Commission states in its explanatory communication on the Ordinance of Sanctions that for the sake of reasonability of sanctions, it may consider administrative sanctions imposed outside Switzerland. However, there is no statutory obligation in this respect and, so far, the Commission has not considered foreign sanctions as a mitigating factor in its case law. In private damage claims, it could be argued that damages paid for the same conduct in another jurisdiction could be taken into consideration to determine the effective damage of the party.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Generally, the best way to influence the level of fines is to fully cooperate with the competition authorities as early as possible and to disclose all relevant facts if the undertaking according to its self-assessment has committed a hard-core infringement. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition may enjoy full or partial immunity of up to 50 per cent. Moreover, an amicable settlement with the authority may also result in an additional reduction of the potential fine of up to 20 per cent.

Further, it is more important than ever for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law for their agreements and practices. It is often advisable for undertakings active in Swiss markets to implement an effective 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.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Following a short slump caused by the covid-19 pandemic, the Commission has become more active again since late summer 2020. The following cases are a selection of the most relevant cases in the present context.

In June 2020, the Commission opened a new investigation with regard to possible bid rigging in the construction sector based on information received from the Canton of Grisons that several companies in the rather remote Moesa region in the south of the Canton of Grisons have entered into bid-rigging arrangements. The new investigation is just the latest chapter in a series of investigations in this canton concerning bid rigging. The Commission carried out dawn raids. In June

2021, the investigation was extended to three additional undertakings. The extension of the proceedings was also accompanied by dawn raids.

In September 2020, the Commission opened an investigation against several wholesale and retail companies and their debt collection and services agency. The investigation focuses on alleged anticompetitive measures against various suppliers of daily consumer goods. In particular, the investigation will examine whether coordinated measures have been taken to encourage suppliers to use the debt collection platform, in particular through the threat of collective delisting of certain daily consumer goods. The opening of this investigation was accompanied by dawn raids at the premises of certain addressees of the investigation.

On 24 November 2020, the Commission informed that it sanctioned several IT suppliers that participated in bid rigging concerning the Swiss National Bank as purchaser. According to the Commission, it was the first bid-rigging case in the context of IT procurement. The fines were significantly reduced due to the cooperation of the concerned undertakings and amicable settlements.

On 1 April 2021, the Commission opened a preliminary investigation against three distributors of covid-19 self-tests. According to the Secretariat of the Commission, they had indications that several distributors of covid-19 self-tests had put pressure on one of their competitors to adjust its prices. The Commission discontinued the proceeding on 1 July 2021 because the attempt to influence prices was unsuccessful.

On 30 April 2021, the Commission opened an investigation against several waste carriers concerning potential bid rigging in the waste collection and disposal area in the Canton of Valais. The Commission carried out dawn raids.

On 8 July 2021, the Commission sanctioned Ford Credit Switzerland GmbH for the inadmissible coordination of leasing conditions with competitors. In 2019, the Commission had already reached amicable settlements with several financing companies in the car leasing sector. It could not reach a settlement with Ford Credit and issued a separate sanctioning decision (sequential hybrid procedure).

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Consultation on revising the Cartel Act

In February 2020, the Swiss Federal Council instructed the Federal Department of Economics, Education and Research to prepare a consultation draft for a partial revision of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act). An important element of the suggested technical revision of the law is the modernisation of the Swiss merger control regime. Studies show that this is expected to have positive effects on competition in Switzerland. The aim is to switch from the current qualified dominance test to the Significant Impediment to Effective Competition test. In accordance with the decision of the Swiss Parliament of 5 March 2018, two requests of Motion Fournier 16.4094 'Improvement of the situation of SMEs in competition law proceedings' shall also be included in the envisaged partial revision. On the one hand, regulatory time limits shall be introduced for the Commission and the appellate courts to speed up the respective administrative procedures. On the other hand, compensation for parties at all stages of the administrative competition law procedure shall be granted (ie, also for the proceeding before the Commission).

Motion by Olivier Français – The Elmex toothpaste matter

The motion by Olivier Français 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' (18.4282) – called on the Swiss Federal Council to amend article 5 of the Cartel Act in response to the landmark decisions involving GABA International SA, the manufacturer of Elmex toothpaste, and Gebro Pharma GmbH, its Austrian licensee, of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively. The motion was accepted by the Swiss parliament on 1 June 2021. It is now for the Swiss Federal Council to present the amended Cartel Act.

Introduction of the concept of relative market power in Switzerland

In March 2021, the Swiss parliament adopted the counter-proposal which the Swiss Federal Council rendered to the 'Fair price initiative'. In addition to the prohibition of private geo-blocking, the counter-proposal introduces the concept of relative market power in the Swiss Cartel Act and thus behavioural obligations for companies whose unilateral behaviour has so far not been subject to any competition law scrutiny. The amendment to the Cartel Act will enter into force at the beginning of 2022.

Motion by Pirmin Bischof – Online hotel booking systems

A motion by Pirmin Bischof of 30 September 2016, 'Prohibition of adhesion contracts of online booking platforms against the hotel industry' (16.3902), calls on the Federal Council to submit the necessary legislative amendments 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 as to 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 of Economic Affairs, Education and Research is currently elaborating a consultation draft in this matter.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

After rounds of revisions and failed attempts of enactment over a span of several years, a proposed amendment to the Competition Law (the Amendment Proposal) has been approved by the Grand National Assembly of Turkey (the Turkish parliament). On 16 June 2020, the amendments passed through the parliament and entered into force on 24 June 2020 (the Amendment Law), which was published in Official Gazette on 23 June 2020, No. 31165. According to the recital of the Amendment Proposal, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Turkey is the Competition Authority (the Authority). The Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Six divisions with sector-specific work distribution handle enforcement of the Competition Law through approximately 180 case handlers. An economic analysis and research department, a decisions unit, an information management unit, an external relations unit, a management services unit, the cartel and on-site inspections support unit and a strategy development unit assist the six technical divisions and the presidency. As the competent body of the Authority, the Board is responsible for, among other things, investigating and condemning cartel activity. The Board consists of seven independent members. If a cartel activity amounts to a criminally prosecutable act, such as bid rigging in public tenders, it may be separately adjudicated and prosecuted by Turkish penal courts and public prosecutors.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

One of the most important amendments in the Amendment Law is the introduction of a de minimis principle, bringing Turkish competition law closer to that of EU law. Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (the De Minimis Communiqué), which sets out the principles of the de minimis rule, came into force upon its publication on 16 March 2021. This amendment enables the Board to decide against launching full-fledged investigations into agreements, concerted practices and decisions of associations of undertakings that do not exceed the market share and turnover thresholds provided under the De Minimis Communiqué. This principle does not apply to hard-core violations such as price fixing, territory or customer sharing, or restriction of supply. With this new mechanism, the Authority appears to be steering its direction, and public resources, towards investigating significant violations.

The introduction of the de minimis principle appears to be a more appropriate (and legally less controversial) measure for the Authority to prioritise cases, which has previously used article 9(3) of the Competition Law to terminate a pre-investigation on procedural efficiency grounds, such as when an infringement only affects a small market (eg, the *Izmir Container Transporters* decision, (20–01/3–2, 2 January 2020). Article 9(3), however, is an interim measure the Board may use to explain to companies how to terminate an infringement until its final decision is made. It still remains to be seen whether the introduction of the de minimis exception will end the excessive use of article 9(3) altogether, given that hard-core restrictions in small markets will still not benefit from the de minimis provision. The De Minimis Communiqué serves to grant the Board the opportunity to focus on more significant competition law matters, as well as bringing the Turkish competition law come closer to the standards in EU competition law on which it is modelled.

The Amendment Law brought about other significant changes, such as the introduction of settlement and commitment mechanisms.

The commitment mechanism will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of articles 4 and 6 of the Competition Law, prohibiting restrictive agreements and abuses of dominance. Depending on the sufficiency and the timing of commitments, the Board can decide not to launch a full-fledged investigation following the preliminary investigation or to close an ongoing investigation without completing the entire investigation procedure. On 16 March 2021, the Authority issued Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position. The Communiqué brings a definitive list of the excluded

types of infringements. Accordingly, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or the restriction of supply. The Board may reopen an investigation in the following cases: substantial change in any aspect of the basis of the decision; non-compliance with the commitments; and realisation that the decision was decided on deficient, incorrect or fallacious information provided by parties.

Second, the Amendment Law also introduces the settlement procedure. This would enable the Board, ex officio or upon parties' request, to initiate the settlement procedure. Parties that admit an infringement can apply for the settlement procedure until the official service of investigation report. The Board will set a deadline for the submission of a settlement letter and, if settled, the investigation concerned will be closed with a final decision, including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25 per cent.

There is also the amended Guidelines on Vertical Agreements, which was published on 30 March 2018, which includes provisions concerning internet sales and most favoured customer clauses.

Currently, an expected and significant development in Turkish competition law is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines). The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. The draft regulation was sent to the Turkish parliament on 17 January 2014, but no enactment date has been announced as yet. However, its introduction demonstrates the Authority's intention to bring secondary legislation in line with EU competition law during the harmonisation process.

Finally, the following key legislative texts were announced or enacted between 2013 and the time of writing:

- Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (Communiqué No. 2021/3);
- Communiqué on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (Communiqué No. 2021/2);
- 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. 2017/2);
- 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. 2021/1);
- Block Exemption Communiqué on Specialisation Agreements (Communiqué No. 2013/3), entered into force on 26 July 2013;
- Guidelines on Examination of Digital Data during On-site Inspections enacted on 8 October 2020;
- 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;
- 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. Similar to the TFEU, the Amendment Law introduced the de minimis principle, whereby the Board will be able to decide not to launch full-fledged investigations into agreements, concerted practices and decisions of association of undertakings that do not exceed the market share and turnover thresholds provided under the De Minimis Communiqué.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment of whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal-to-deal agreements. A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. Certain other types of competitor agreements, such as vertical agreements and purchasing cartels, are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;

- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the EU. The most recent of these block exemptions – Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicle Sector – sets out revised rules for the motor vehicle sector in Turkey, overhauling Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector. Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

The Turkish antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Under Turkish Competition Law, the competitive assessment of joint ventures falls between merger control and cartel regulation. Depending on the full-function character of a joint venture, it can be subject to either merger control or a general antitrust assessment.

If a joint venture is found to be a full-function joint venture, it will be subject to the merger control regime under article 7 of the Competition Law, if the applicable turnover thresholds are met. However, if the joint venture is considered to be non-full-function, it would be subject to an article 4 test to see if it has an anticompetitive purpose or effect, and therefore would be subject to cartel regulation.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) applies to 'undertakings' and 'associations of undertakings'. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. The Competition Law therefore applies to individuals, corporations and other entities alike acting as an undertaking.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Turkey is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Competition Board (the Board) has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (eg, *The suppliers of rail freight forwarding services for block trains and cargo train services*, 16 December 2015,15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; *Imported Coal*, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156). It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey that lack a presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a convincing argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that 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?

Export cartels do not fall within the scope of the Competition Authority's (the Authority's) jurisdiction, as per article 2 of the Competition Law. In *Poultry Meat Producers* (25 November 2009, 09–57/1393–362), the Authority launched an investigation into allegations that included, among other things, an export cartel. The Board decided that export cartels could not be sanctioned unless they affected the host country's markets. Although some other decisions (*Paper Recycling*, 8 July 2013, 13–42/538–238) suggest that the 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 Authority's jurisdiction if and to the extent that it does not produce an impact on Turkish markets.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. There are sector-specific block exemption rules, but these do not define any industry-specific offences or defences that do not exist in the Competition Law but detail slightly different rules for the block exemption regulations. One such regulation exists in the motor vehicle sector (Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector) (Communiqué No. 2017/3)). Accordingly, in cases that concern the motor vehicle sector's block exemption, both the defending undertaking and the Authority would consider the thresholds and rules specified within Communiqué No 2017/3.

To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Owing to the 'presumption of concerted practice', oligopoly markets for the supply of homogeneous products (eg, cement, bread yeast and ready-mixed concrete) have constantly been under investigation for concerted practices. Nevertheless, whether this track record (more than 32 investigations in the cement and ready-mixed concrete markets in 21 years of enforcement history) leads to an industry-specific offence is debatable.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There are no defences or exemptions for state-approved or regulated actions.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector

are notable examples. The Competition Law does not provide any specific exceptions to government-sanctioned activities or regulated conduct.

However, there are examples where the Board has taken an undertaking's defence that it was acting in a state-approved or regulated manner into account (eg, *Paper Recycling*, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*, 2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Board (the Board) is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board conducts a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority (the 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 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, which, as per the recent amendments, is extendable for a further 15 days. The defending parties will have another 30-day period to reply to the additional opinion (third written defence), which is also extendable for a further 30 days. When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held.

The appeal must be brought within 60 calendar days of the reasoned decision being officially served. It usually takes around three to eight months from the announcement of the final decision for the Board to serve a reasoned decision on an appeal.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 34,809 Turkish lira (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. 2021/1)). 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 Law on Protection of Competition No. 4054 of 13 December 1994 (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 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 gives vast authority to the Authority regarding 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 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 Authority, including, but not limited, to deleted items. Moreover, the Authority recently published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which sets forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems during on-site inspections.

In addition to the above, the Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in the companies' physical records and those in electronic storage and IT systems, which the Authority already does in practice. This is also confirmed in the Amendment Proposal's preamble, as it indicates that the amendment serves 'further' clarification on the powers of the Authority that are

particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (that is, that which is written on the deed of authorisation).

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council (Decision No. 1/95) authorises the Competition Authority (the Authority) to notify and request the European Commission's Directorate-General for Competition to apply relevant measures if the Competition Board (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 Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia–Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Authority also has close ties with the OECD, United Nations Conference on Trade and Development, World Trade Organization, the International Competition Network and the World Bank.

The research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition 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 Authority and the Turkish Public Procurement Authority 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 Authority's actions.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The interplay between jurisdictions does not, in practice, materially affect the Board's handling of cartel investigations, including cross-border cases. The principle of comity does not have an explicit provision in Turkish competition law. Cartel conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on Turkish markets.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Board (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 have increasingly made their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Board and build their own rulings on that decision.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Turkey is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Law on Protection of Competition No. 4054 of 13 December 1994 (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 Competition Authority officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The Board considers communication evidence and economic data that indicate coordination between competitors as circumstantial evidence. Communication evidence, for instance, can prove that the possible parties to an agreement communicated with or met each other, yet cannot demonstrate the actual content of such communication. If there is no direct evidence demonstrating the existence or content of a violation, the Board might establish an infringement through circumstantial evidence by itself or along with direct evidence, especially in concerted practice cases.

Appeal process

18 | What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive reviews.

As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff, the court, by providing its justifications, may decide on a stay of execution if executing the decision is likely to cause serious and irreparable damage 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.

A significant development in competition law enforcement was the change in the competent body for appeals against the Board's decisions. 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 on both procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. 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 such cases, the decision of the regional court will not be considered a final decision and the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the High State Court's decision. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

An appeal process is typically initiated by the infringing party in cases where the Board finds a violation, or by complainants if there is no finding of a violation. The Competition Authority does have the right to challenge a court decision by initiating a judicial review process if a decision of the Board is overturned by the deciding court.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

The sanctions that can be imposed under the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

In the case of a proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Competition Board (the Board) to take mitigating and aggravating factors into account (eg, the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, and the financial power of the undertakings or the compliance with their commitments) in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the 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 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.

Civil actions

The number of civil actions is still low, but is increasing. The majority of private lawsuits in Turkish antitrust enforcement are based on allegations of refusal to supply and price manipulation. Civil damage claims are usually settled among the involved parties prior to a court rendering judgment.

Similar to US antitrust enforcement, the most distinctive feature of Turkish competition law is that it provides for civil lawsuits for treble damages, and so supplements administrative enforcement with private lawsuits. Articles 57 et seq of the Competition Law entitle any legal or real person injured in their business or property by reason of anything forbidden in the antitrust laws, to sue the violators for three times their damages, plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts do not usually engage in an analysis as to whether there is a condemnable anticompetitive agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question. As courts usually wait for the Board's decision, the court's decision can be obtained in a shorter period as compared to regular full judiciary processes in follow-on actions.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc, in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines) sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines.

The Regulation on Fines states that fines are calculated by determining their base level. In the case of cartels, each undertaking's fine is set at between 2 per cent and 4 per cent of its turnover in the financial year preceding the date of the fining decision; if this is not calculable, the turnover for the financial year nearest the date of the decision is used. Then aggravating and mitigating factors are factored in. Such factors are set forth in the Regulation on Fines.

Article 5/3 states that the amount of the fine may be increased by 50 per cent if a violation lasted between one and five years, and by 100 per cent if it lasted for more than five years, and article 6 allows for the base fine to be increased by 50 per cent to 100 per cent for each repetition of the violation and also further increased one-fold if the cartel is maintained after the notification of the investigation decision.

Aggravating factors are defined under article 6 in a non-exhaustive manner and accordingly the base fine may also be increased by:

- 50 per cent to 100 per cent if an undertaking's commitments made regarding the elimination of competition problems raised within the scope of article 4 of the Competition Law have not been met;
- up to 50 per cent if an undertaking does not provide assistance with an investigation; and
- up to 25 per cent in cases such as coercing other undertakings into the violation.

The provisioned increase for not providing assistance with the investigation differs from the administrative monetary fine set forth in article 16 of the Competition Law for undertakings that obstruct the investigation process by way of providing misleading information or documents or not providing any information or documents at all, or preventing or obstructing an on-site inspection. In such cases, the Board would impose a separate administrative monetary fine, for each instance of obstruction, which is separate from the final administrative monetary fine that is imposed at the end of the investigation process.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner (ie, the Board has flexibility in deciding what constitutes mitigating factors in each specific case). In this regard, the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking, or association of undertakings:
  - provided assistance to the investigation beyond the fulfilment of their legal obligations;
  - provided evidence of public authorities encouraging, or other undertakings coercing, other undertakings to take part in the violation;
  - made voluntary payments of damages to those harmed; or
  - voluntarily terminated other violations; or
- the violating practices formed a very small part of the undertakings' business, in relation to its annual gross revenue.

The Regulation on Fines also applies to managers or employees who held ringleader roles within the violation (eg, those participating in cartel meetings made decisions that would involve the company in cartel activity), and also provides for certain reductions in their favour when there are mitigating factors to the violation or the undertaking has provided assistance during the course of the investigation.

The Regulation on Fines is binding on the Competition Authority.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Article 7 of the Regulation on Fines follows that the Board may reduce the base fine at a rate of 25 to 60 per cent if the undertakings or association of undertakings concerned prove certain facts such as the provision of assistance to the examination beyond the fulfilment of legal obligations, the existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of violations and occupation of a very small share by practices subject to the violation within annual gross revenues.

Mitigating factors are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner, in such a way that the base fine may be reduced by 25 per cent to 60 per cent if:

- the concerned undertaking, or association of undertakings:
  - provided assistance to the investigation beyond the fulfilment of their legal obligations;
  - provided evidence of public authorities encouraging, or other undertakings coercing, other undertakings to take part in the violation;
  - made voluntary payments of damages to those harmed; or
  - voluntarily terminated other violations; or
- the violating practices formed a very small part of the undertakings' business, in relation to its annual gross revenue.

Regarding mitigating factors, there have been several cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas*, 13-49/710-297). In *Industrial Gas*, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Competition Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's *Mey İçki* decision (16 February 2017, 17-07/84-34) might be signalling a change in its perception of compliance programmes. The Board applied a 25 per cent reduction on the grounds that Mey İçki (a producer and distributor of spirits) ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board before the Board issued its final decision. Similarly, in its *Consumer Electronics* decision (7 November 2016, 16-37/628-279), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts, as the undertaking amended its contracts before the final decision of the Board.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The sanctions specified in terms of undertakings themselves may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as an infringing entity's employees or board or executive committee member if such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific for individuals. On that note, bid-rigging activity may be criminally prosecutable under sections 235 et seq of the Turkish Criminal Code. Illegal price manipulation (ie, manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract or by the relevant ministry that the contracting authority is subordinate to or is associated with. It is a duty, not an option, for administrative authorities to apply blacklisting in cases of bid rigging in government tenders. Blacklisting is only applicable to bid rigging. It is not available in cases of other forms of cartel infringement.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for treble damages in lawsuits. Article 57 et seq of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish Code of Obligations regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, a debtor shall pay on the amount of their shares. However, in the event that the debtor makes a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations. Civil damage claims have usually been settled by the parties involved prior to the court rendering its judgment.

Indirect purchaser claims have not yet been tested before the courts. However, there is no regulation that prevents potential umbrella purchaser claims as well, as article 58 of the Competition Law, which focuses on the existence of a damage, states that:

> *Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.*

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. While article 73 of Law No. 6502 on the Protection of Consumers allows class actions by consumer organisations, these actions are limited to violations of Law No. 6502, and do not extend to cover antitrust infringements. Similarly, article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under article 57 et seq of the Competition Law.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 6100. Associations and other legal entities may initiate a group action to 'protect the interest of their members', 'to determine their members' rights' and 'to remove the illegal situation or prevent any future breach'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (the 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 Competition Board (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 requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for 'second-in' and subsequent leniency applicants. Also, the Competition Authority (the Authority) may consider the parties' active cooperation after the immunity application as a mitigating factor, as per the provisions of Regulation on Fines.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 per cent and 50 per cent. Employees or managers of the second applicant that actively cooperate with the 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 Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

Amnesty plus is regulated under article 7 of the Regulation on Fines. According to article 7, the fines imposed on an undertaking that cannot benefit from immunity provided by the Regulation on Leniency will be decreased by 25 per cent if it provides the information and documents specified in article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A cartel member may apply for leniency until the investigation report is officially served. Although the Regulation on Leniency does not provide detailed principles on the 'marker system', the Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties. A document (showing the date and time of the application and request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

An applicant must submit:

- information on the products affected by the cartel;
- information on the duration of the cartel;
- the names of the cartelists;
- the dates, locations and participants of the cartel meetings; and
- other information or documents about the cartel activity.

The required information may be submitted verbally. Markers are also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the 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 Competition Board (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, as the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

In 2015, the Board slightly eased the tensions and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the Board's reasoned decision of an investigation of fresh yeast producers was released (14-42/783-346). The decision was the first of its kind, where the Board granted full immunity based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was granted to a submission made after the initiation of a preliminary investigation and dawn raids were executed. It served as a landmark case, in that it was the first example of the Board granting immunity after dawn raids. The Board justified this unprecedented action by claiming that substantive evidence and added value was brought in through the leniency application. In parallel, in the *Mechanical Engineering* decision (14 December 2017, 17-41/640-279), the Board accepted one undertaking's leniency application during the course of the preliminary investigation. The leniency applicant received full immunity from fines. Recently, in its decision regarding undertakings active in the Ro-Ro transportation sector (18 April 2019, 19-16/229-101), the Board decided that the administrative fine for an undertaking that applied for leniency during the investigation should be halved if the information it provides significantly contributed to the investigation. The Board further noted that relevant contributions included providing evidence that the violation's starting point was earlier than was detected during the on-site inspection, and evidence illustrating that price information was exchanged by the violating undertakings and further details on how the price exchange was conducted. The case is therefore expected to result in an increase in the number of leniency applications in Turkey in the near future.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the principles set forth under the Regulation on Leniency, the applicant (an undertaking or the employees or managers of an undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is also applicable to subsequent cooperating parties. While the Board can also evaluate the information or documents ex officio, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request, in writing, confidentiality from the Board and justify the confidential nature of the information or documents that they are requesting be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Board has decided on the case.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Amendment Law introduced two new mechanisms that are inspired by the EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of articles 4 and 6 of the Law on Protection of Competition No. 4054 of 13 December 1994, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a full-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or the restriction of supply. The Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anticompetitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance (the Settlement Regulation), which entered into force on 15 July 2021, determines the other procedures and fundamentals of the settlement process. As regards the applicability of the settlement mechanism, Law 4054 imposes no restrictions in terms of the nature of the violation.

According to the Settlement Regulation, if the Authority ex officio invites the investigation parties to settlement negotiations, the parties should declare whether they accept the invitation to initiate settlement negotiations with the Authority within 15 days. Article 4(4) of the Settlement Regulation provides that the Board has the discretion to grant a settlement reduction of between 10 and 25 per cent, indicating that the actual reduction of the fine due to settlement would not be less than 10 per cent. Article 6(5) of the Settlement Regulation stipulates that the Authority would inform the settling party regarding the content of the allegations; the nature and scope of the alleged violation; the main evidence that constitutes a basis for the allegations; the potential reduction rate to be applied in case of settlement; and the range of potential administrative monetary fine that might be imposed on the settling party. Following the settlement negotiations, the Board would adopt an interim decision, which would, inter alia, include the nature and scope of the alleged violation, the maximum rate for the administrative monetary fine in accordance with the Regulation on Fines and the reduction rate to be applied at the end of the settlement procedure. Subsequently, if the settling party agrees on the matters set forth therein, it will submit a settlement letter which shall include inter alia an express declaration of admission as to the existence and scope of the violation. Article 9(1) of the Settlement Regulation provides that the Board shall adopt its final decision to end the investigation within 15 days following the submission of the settlement letter. The Board's final decision shall include the finding of the violation and the administrative monetary fine to be imposed against the settling undertaking.

Additionally, the Board may reopen an investigation in the following cases:

- there is a substantial change in any aspect of the basis of the decision;
- the relevant undertakings' non-compliance with the commitments; and
- there is a realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The current employees of a 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

of 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

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Because active cooperation is required from all applicant cartel members to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The right of access to the file has two legal bases in the Turkish competition law regime: Law No. 4982 and Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3). Article 5/1 of Communiqué No. 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties within the due period during the investigations. The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement. This right can only be used once, so long as no new evidence has been obtained within the scope of the investigation. On the other hand, Law No. 4982 does not have such a restriction in terms of timing or scope. Access to the case file enables the applicant to gain access to information and documents in the case file that do not qualify as either internal documents of the Competition Authority or trade secrets of other firms or trade associations. Law No. 4982 provides for similar limitations.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both an undertaking under investigation and its employees. That said, employees are hardly ever investigated separately, and there are no criminal sanctions against employees for antitrust infringements.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

If there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

There is a reduction mechanism for the administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No. The Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules.

Overlapping liability for damages in other jurisdictions is not taken into account.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Aside from the recently introduced leniency programme, article 9 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law), which generally entitles the Competition Board (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, together with 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 the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

- the level of fault and amount of possible damage in the relevant market;
- the market power of the undertakings within the relevant market;
- the duration and recurrence of the infringement;

- the cooperation or driving role of the undertakings in the infringement; and
- the financial power of the undertakings; and compliance with commitments.

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13–49/711–300; *Industrial Gas*, 13–49/710–297). In the Board's *Industrial Gas* decision, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Competition Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's *Mey İçki* decision (16 February 2017, 17-07/84-34) might be signalling a change in the Board's perception of compliance programmes. The Board decided to apply a 25 per cent reduction on the grounds that Mey İçki ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board even before the final decision of the Board. Similarly, in *Consumer Electronics* (7 November 2016, 16–37/628–279), the Board applied a 60 per cent reduction to an undertaking because of its compliance efforts, since the undertaking amended its contracts before the final decision of the Board.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

During the course of the year in review, there has not been any significant cartel decision where the Competition Board (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 Competition Authority (the Authority) for 2020, the Board decided on 319 cases and 65 of them are related to competition law violations. Forty-three out of 65 are related to article 4 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) and 33 of 43 cases related to horizontal agreements. Overall, the Authority recorded increased cartel enforcement under horizontal agreements assessments.

In terms of cartel enforcement activity, the Board recently issued a short decision that concludes the imposition of an administrative monetary fine against Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş. and Roche Müstahzarları San. A.Ş. for their cartel arrangement (21 January 2021, 21-04/52-21).

Moreover, the *Gaziantep auto-expert opinion* decision is one of the most significant decisions of 2020 with regard to price-fixing arrangements (9 July 2020, 20-33/439-196). The decision concerns an investigation initiated against auto-expert opinion providers operating in the Gaziantep province of Turkey. The Board found concrete evidence of a price-fixing arrangement and therefore imposed a monetary fine on the relevant undertakings, except for one that received a reduction due to its application to benefit from the Active Cooperation Guideline.

In another decision, the Board concluded that gas stations located in the Burdur province violated article 4 of the Competition Law by way of fixing prices (9 January 2020, 20-03/28-12). The Board found that the cartel arrangement was essentially formed via WhatsApp groups and messages created between certain employees of the relevant gas stations. Despite an explicit finding of a cartel violation, the Board took into consideration the lowest base fine rate available under the Regulation on Fines applicable for violations other than cartel violations, as the profit margins of the investigated undertakings were significantly low and imposition of a high fine would restrict sustainability of their business.

On the other hand, the Board found that certain ready-mixed concrete producers operating in the Yozgat province infringed article 4 by way of establishing two legal entities (namely, Güven Beton and Sorgun Emek Beton) to coordinate sales, collectively determine prices and share customers. Accordingly, the Board imposed administrative fines of 1.2 per cent of the annual gross income of the investigated parties (19 March 2020, 20-15/215-107).

In the investigation concerning the traffic signalisation market, the Board concluded that nine of the 10 investigated parties violated article 4 of the Competition Law by way of bid rigging (12 March 2020, 20-14/191-97). Among other practices, the Board essentially found that undertakings prepared offers and entered into bids based on a mutually reached consensus. As a result, all but one of the investigated undertakings were given an administrative monetary fine of either 2 or 3 per cent of their annual gross income. During the investigation process, one of the investigated undertakings – Mosaş Akıllı Ulaşım Sistemleri A.Ş. (Mosaş) – was fined separately for hindering the on-site inspection conducted by the Authority (21 June 2018, 18-20/356-176) and refusing to grant access to the Authority for 17 days (5 July 2018, 18-22/378-185).

The investigations that have been initiated by the Authority so far clearly show that it does not focus on specific sectors when it comes to the investigation of cartel behaviour, but rather aims to tackle all conduct and practices that might restrict competition among competing undertakings. It is expected that this trend will continue in future.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

On 16 June 2020, the long-awaited and expected proposed amendments to the Competition Law passed through parliament. They entered into force on 24 June 2020. According to the recital of the Amendment

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Proposal, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to European Union law. There are no further reviews or changes expected at this stage.

Ukraine

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The main domestic legislation regulating issues of anticompetitive concerted actions (cartels) is as follows:

- the Constitution of Ukraine;
- the Economic Code of Ukraine;
- Code of Ukraine of Administrative Offences;
- Law of Ukraine No. 3659-XII on the Antimonopoly Committee of Ukraine;
- Law of Ukraine No. 2210-III on Protection of Economic Competition;
- Law of Ukraine No. 236/96-BP on Protection Against Unfair Competition;
- Law of Ukraine No. 1197-VII on Public Procurements; and
- Law of Ukraine No. 1555-VII on State Aid to Undertakings.

A noteworthy detail is that Ukrainian competition law does not use the term 'cartels' but rather the notion of 'anticompetitive concerted actions'. Moreover, the Code of Ukraine of Administrative Offences and the Economic Code of Ukraine uses the term 'illegal contracts' for 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 of Ukraine 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 competence.

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. 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 following its 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 the ability to execute control over the activity of certain participants in the economic sphere and to respond quickly to violation of legislation on protection of economic competition, which allows it to prevent a negative impact on competition or to lessen its impact on relevant markets.

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 to assess breaches of the procedure or material law that may be admitted by the competition authority.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Recent amendments were proposed in the draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving the Activities of the Antimonopoly Committee of Ukraine' adopted by the Ukrainian parliament on 13 July 2021 on first reading. The Draft Law is aimed to reform legislation on protection of economic competition, and, in this regard, improve the AMCU's activities, with the main aims of increasing the efficiency of development and protection of economic competition, improving state policy in the field of economic competition and strengthening the institutional capacity of the AMCU.

In particular, it is proposed to improve the mechanisms of control over the concentration of economic entities; determine the procedure for conducting inspections of business entities; introduce institutions of settlement in affairs; and introduce joint liability of defendants for the purpose of fine payment. Among the innovations is granting the right to conduct inspections by AMCU bodies if there are signs of violation of the legislation on the protection of economic competition before starting the case officially.

At the same time, the competition authority is about to receive additional tools for inspections: the ability to conduct physical searches and confiscation of documents and ensure the exchange of information with other law enforcement agencies. It is also planned to introduce the obligation of the subjects of state registration (notaries) at the request of the AMCU bodies, to provide documentation or registration cases in connection with investigations of the AMCU. Additional possibilities will arise for out-of-court settlement of cases of anticompetitive concerted actions and abuse of a monopoly (dominant) position in the market. After receiving the preliminary conclusions of the AMCU, the business entity will be able to 'negotiate' with the controlling body by concluding an appropriate agreement. In this case, the amount of fine issued will be reduced by 15 per cent.

The abovementioned draft is now subject to debates as to further amendments and preparation for the second reading in the Parliament.

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 a non-exhaustive list of factors that 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; dividing 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, with a view to the 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 if the analysis of the situation on the commodity market provides evidence that there are no objective reasons for taking such acts (omissions). The AMCU analyses the nature of actions of suspected entities on a case-by-case basis for determination of their liability.

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 for the criteria of admissibility applied to horizontal concerted actions (cartels).

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The law applies to any business entity that violates economic competition. Nevertheless, if to speak about joint ventures and strategic alliances, it should be noted that they may be considered as not being competitors as they have specific contractual relations and purposes of creation that may fall within exemptions granted by the AMCU.

The law provides for actions that in certain circumstances are permitted by the AMCU. According to Articles 7-10 of the Law on Competition, in certain cases coordinated actions of small or medium-sized enterprises, coordinated actions regarding the supply and use of goods, or regarding intellectual property rights may be exempted. Also exempted may be 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.

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 actions overcomes negative consequences of competition restriction and on this ground to obtain permission of the Cabinet of Ministers of Ukraine based on Cabinet of Ministers of Ukraine Regulation No. 219 as of 28 February 2002 on the Cabinet of Ministers of Ukraine approval of the Order on granting permission for concerted actions, concentration of undertakings.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

The legislation on protection of economic competition regulates the relations of governmental authorities, municipal authorities, bodies of administrative and economic management and control and business undertakings, undertakings with other undertakings, with consumers, and 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 (AMCU) may impose fines both on associations and economic entities: legal persons; natural persons; and 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 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. However, under article 10 of the Competition Law, concerted actions as regards optimisation of export or import of goods may be permitted by the AMCU.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

All anticompetitive concerted actions are a priori forbidden. But the law grants a plethora of exceptions from the general requirements. Exemption from liability in certain circumstances may occur if the offender voluntarily informs the AMCU authorities about the illegal deal. The system of exceptions to the general requirements of the prohibition on anticompetitive concerted actions also includes agreements on transfer of intellectual property rights and exemptions for small and medium-sized enterprises. In addition, concerted actions in relation to the supply and use of one's own products do not fall under the prohibition irrespective of the specific industry.

Also exempted may be 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.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

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 actions overcomes negative consequences of competition restriction and on this ground to obtain permission of the Cabinet of Ministers of Ukraine based on Cabinet of Ministers of Ukraine Regulation No. 219 as of 28 February 2002 on the Cabinet of Ministers of Ukraine approval of the Order on granting permission for concerted actions, concentration of undertakings. This Order determines the procedure for granting by the Cabinet of Ministers of Ukraine a permit for concerted actions and concentration of economic entities that have been banned by the Antimonopoly Committee.

The Law of Ukraine 'On State Aid' says that state aid is inadmissible for competition, unless otherwise provided by this law. It also governs the determination of state aid to economic entities – support in any form of economic entities at the expense of state resources or local resources, which distorts or threatens to distort economic competition, creating advantages for the production of certain types of goods or production of certain types of business activity.

State aid providers imply authorities, local governments, administrative and economic management and control bodies, as well as legal entities acting on their behalf, authorised to dispose of state or local resources and initiate or provide state aid.

The law specifies when state aid is or may be declared eligible. Among such cases are, for example, when the aid is of a social nature, the final beneficiaries of which are consumers, provided that such aid is provided without discrimination as to the origin of the goods, and provided to compensate for damage caused by emergencies of human-made or natural nature.

State aid may be declared eligible in cases when it promotes the socio-economic development of regions where living standards are low or unemployment is high; implements national development programmes or solving social and economic problems of a national nature; promotes certain types of economic activity or certain economic spheres, or business entities in certain economic zones; or provides support for culture, creative industries, tourism and preservation of cultural heritage, if the impact of such state aid on competition is insignificant.

The Cabinet of Ministers of Ukraine determines the criteria for assessing the eligibility of certain categories of state aid.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The procedure for investigating violations in the form of anticompetitive concerted actions is determined by the relevant provisions of the Competition Law and the Rules of Consideration of Cases on violation of legislation on protection of economic competition, approved by Order of the Antimonopoly Committee of Ukraine (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; and
- on the initiative of the AMCU itself.

In considering the application on violation of antimonopoly legislation a fact check following 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 of 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 and 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 a defendant whose actions constitute signs of abuse from performing certain actions; or oblige them to perform certain actions when an urgent commitment to these actions is necessary under the legitimate rights and interests of others.

Adoption by the AMCU of its decision

Upon consideration of cases of violation of legislation on protection of economic competition and unfair competition the AMCU adopts its decision.

Execution of the decision

The decision provided by the AMCU is subject to execution by way of sending or delivery with a receipt or notifying otherwise.

Decisions or orders of the AMCU shall be considered as handed to the defendant in 10 days after the disclosure of the information on the adopted decision.

Investigative powers of the authorities

12 What investigative powers do the authorities have? Is court approval required to invoke these powers?

In accordance with article 7 of the Law of Ukraine on the Antimonopoly Committee of Ukraine, the AMCU has the following authority in the field of control over observance of the legislation on economic competition protection:

- to consider applications and cases of violation of the legislation on economic competition protection, and to carry out investigations on these applications and cases;
- to make orders and decisions envisaged by the legislation on economic competition protection in respect of applications and cases, check and revise case decisions and make its conclusions as to the classification of actions under the legislation on economic competition protection;
- to check undertakings in accordance with the legislation as to their compliance with the requirements of the legislation on economic competition protection;
- to request from undertakings, associations, their officials and employees and other individuals and legal entities any information, including restricted data, during the consideration of applications and cases of violation of the legislation on economic competition protection;
- to appoint an examiner and expert from among persons who have knowledge necessary for giving an expert opinion;
- to examine the office premises and transport of undertakings and legal entities, and 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 the application of measures provided by legislation 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 and 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

13 Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Antimonopoly Committee of Ukraine's (AMCU) 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 the cases that go beyond the jurisdiction of domestic competition law.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Currently, the AMCU's practice has not reported any examples of such interplay with foreign jurisdictions concerning termination of anticompetitive concerted actions.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Upon receipt of parties' commentaries and objections, the Antimonopoly Committee of Ukraine (AMCU) must prepare a draft decision on the basis of its preliminary findings. Normally, a decision on cartels is made by the collegiate authorities that form part of the AMCU structure. The parties may submit commentaries on a preliminary decision. The authority adopts a final decision after considering commentaries, proper discussion and deliberation.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the AMCU, which shall prove critical facts of the case, unless otherwise prescribed by law. Any factual data may be regarded as relevant evidence when they find an infringement or lack thereof. These data may be obtained from different sources: 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. The parties involved in a case may also submit evidence and prove its authenticity.

Evidence of anticompetitive concerted actions may be divided into two groups:

- direct evidence that directly exposes a link between cartel participants and proves the anticompetitive nature of the concerted actions; this is a documentary confirmation of the anticompetitive concerted actions; and
- secondary evidence that implies cartel practice but does not directly expose the conditions under which the concerted actions were carried out (eg, records of phone calls between competitors' representatives, correspondence, joint participation in events, other proofs of contact-making targeted at conduct coordination, and compelled withdrawal from a market by competitors).

In its turn, case law covers courts' approaches in defining the level of proof to be maintained in justifying the AMCU's conclusions regarding anticompetitive concerted actions. It is difficult for the AMCU to have direct evidence of a cartel; therefore, it analyses the economic behaviour of its members and the factors influencing it. As there is usually no direct evidence for concerted actions, case law also allows the courts to analyse cumulatively signs and circumstances that in each case may point to cartel behaviour provided that there was no reasonable explanation of such behaviour in the ordinary course.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Concerted actions may be committed by both individuals and companies. For certain actions to be found illegal, the anticompetitive effect must be determined. The Competition Law provides a comprehensive list of factors on which the AMCU should focus, for example:

- setting prices or other conditions with respect to the purchase or sale of products;
- limitation of production, product markets, technical and technological development, investments or establishment of control over them;
- distribution of markets or sources of supply based on territorial principle, in accordance with the assortment of products, the volume of their sale or purchase, circle of sellers, buyers or consumers or otherwise;
- distortion of the results of bids, auctions, contests or tenders;
- removal from the market or restriction of access to the market (exit from the market) for other undertakings, buyers or sellers;
- applying different conditions to equivalent agreements with other undertakings, which results in the creation of a disadvantage for these undertakings in terms of competition;
- concluding agreements provided that other undertakings assume supplementary obligations, which according to their content or in terms of trade customs and other fair customs in entrepreneurial activities do not relate to the subject of these agreements; and
- significant restriction of the competitive ability of other undertakings on the market without objective reasons therefor.

If there are facts 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 and coordinated them, and that these actions harmed competition by preventing, restricting or eliminating it. It is necessary to prove the reason for harming competition, the harm to competition and the relationship between cause and effect. It is worth noting that the criteria for attributing collective actions to concerted actions and the delineation of agreements and concerted actions are quite vague in the Competition Law.

It is difficult for the AMCU to have direct evidence of a cartel; therefore it analyses the economic behaviour of its members and the factors influencing it. As there is usually no direct evidence for concerted actions, case law also allows the courts to analyse cumulatively signs

and circumstances that in each case may point to cartel behaviour provided that there was no reasonable explanation of such behaviour in the ordinary course.

Appeal process

18 | What is the appeal process?

AMCU decisions may be reviewed either by the committee or its administrative board, on its own initiative or upon application of the parties involved in a dispute. In the latter case, the AMCU initiates a review based on the appropriate application. The period for consideration of the application on review 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: the essential facts of the case that the AMCU was not or could not be aware of; or when the decision was made on the basis of unreliable information; or when the AMCU authorised the concerted actions on the basis of circumstances that have ceased to exist.

Pending the review, the AMCU may suspend enforcement of the decision. It shall respectively inform the parties involved in the case in writing.

Upon the result of the review, the AMCU authority may uphold the decision, modify the decision, reverse the decision or make a new decision.

The decisions made by the AMCU authority may be modified, reversed or rendered invalid if the AMCU fails to fully assess the facts that are relevant to the case; fails to 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 fails to duly comply with or apply substantial or procedural legal provisions.

The plaintiff, defendant or third party may appeal a decision of the AMCU authority in full or in part to an economic court within two months from the date of receipt of the decision. Moreover, parties to the case may challenge the AMCU authorities' actions in the administrative court.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Currently, there is no criminal liability under Ukrainian legislation for anticompetitive concerted actions (cartels), as it was repealed in 2011 for purposes of humanisation of criminal legislation. Nevertheless, the issue of defining criminal responsibility for anticompetitive concerted actions has been much debated, and taking recent developments in the improvement of competition legislation and the Antimonopoly Committee of Ukraine (AMCU) authorities, it is possible to see the incorporation of relevant provisions of criminal nature into Ukrainian legislation.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Currently, the Competition Law provides for sanctions to be imposed on the participants of anticompetitive concerted actions as follows: a fine for anticompetitive concerted actions of up to 10 per cent of income (revenue) of an undertaking for the previous financial year; double compensation for damage caused by committing the infringement; or obligations upon termination of the consequences of infringing legislation on the protection of economic competition.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

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 abovementioned document submits anticompetitive concerted actions to the severest punishments. In the process of fine determination, the AMCU is guided by these 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 15 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. In the case of an illegal merger with hard consequences, the basic fine may be up to 10 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 the 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 by up to 50 per cent in aggregate if there is evidence of mitigating factors, which may be as follows:

- the defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;
- the 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;
- the 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

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Currently, legislation on protection of economic competition does not envisage such an option.

The basic amount of the fine shall be reduced by up to 50 per cent in aggregate if evidence of mitigating factors is as follows:

- the defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;

- the 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;
- the 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

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Currently, 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 if it has a compliance programme. There is no criminal responsibility of individuals involved in cartel activity. Officials of undertakings may be subject to administrative responsibility under the Code of Administrative Offences of Ukraine, but this administrative responsibility does not envisage prohibiting them from serving as corporate directors or officers.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is envisaged in article 17 of the Public Procurement Act of Ukraine. Its application is mandatory by the respective customer of procurement as a sanction for anticompetitive concerted actions during procurements which led to distortion of public procurement procedure results. The list of undertakings that are subject to debarment is available on the AMCU's website. A tender committee automatically makes a decision on debarment on the basis of this list.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

To date 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 this does not refer to cartel regulation.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

According to paragraph 1 of article 55 of the Competition Law, persons who have suffered harm as a result of violations of the legislation on protection of economic competition may apply to the economic court for compensation for damage. The procedure for application with the 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 sustainable consideration by the economic courts of Ukraine.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions under their usual meaning are not possible in Ukraine. The Economic Procedural Code of Ukraine provides an opportunity to file a complaint by several plaintiffs; however, each plaintiff acts in a lawsuit as an independent party.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Leniency programmes are allowed in Ukraine. Full release from liability is granted only to the participant in collusion that first appealed to the Antimonopoly Committee of Ukraine (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 must provide information essential for rendering a decision on the case. Throughout the investigation, this party should cooperate as much as possible with the antimonopoly agency.

It is also worth noting that the party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions, provided for control of such actions or has not provided all the evidence and information about the commitment of anticompetitive concerted actions that it was party to and could freely obtain.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The official immunity programme does not provide leniency to individuals who appealed to the competition authorities following the application of immunity. However, it should be noted that in accordance with paragraphs 17 and 18 of the Recommendation Clarifications of the Antimonopoly Committee, the fine for violation of legislation on economic competition may be reduced by to 50 per cent where evidence of the existence of mitigating circumstances is presented.

Among such circumstances, the following should be noted:

- termination of actions that contain elements of a violation before the relevant decision of the AMCU;
- remedying the conditions that contributed to commitment of the offence to the relevant decision; and
- cooperation throughout the proceedings with the committee authorities that contributed to clarifying the circumstances of the case.

It should also be noted that, depending on the circumstances of the case, other mitigating circumstances may be taken into account indicating that the defendant has committed actions aimed at mitigating the negative effects of a violation of competition in the interests of consumers on the commodity markets of Ukraine.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

At present, the immunity programme can only be granted to the first party in anticompetitive concerted actions that contacted the office of the AMCU. Other participants in anticompetitive concerted actions should 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 conditions of cooperation are laid down in paragraphs 17 and 18 of the Recommendation Clarifications of the Antimonopoly Committee No. 39-pp.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The basic requirement of legislation regarding the application for immunity is the necessity of submission of the application on release from liability before the date of presentation of the preliminary findings of the case.

Yes, there is a practice of marker letters in Ukraine. The participant may apply for a marker letter that confirms the primacy of its application to the committee on release from liability.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The applicant is entitled to immunity (full release of liability), if at the same time it satisfies the following conditions:

- voluntarily reporting on its participation in the anticompetitive concerted actions before other participants of anticompetitive concerted actions;
- providing information essential to the decision in the case. The amount and content must 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.

A party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions or provided for control of such actions.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Limited access is a special information regime that is to be established in the interest of the competition investigation for protection of a party applying for such regime upon a substantiated request. In this case the applicant must provide the AMCU with a corresponding non-confidential version of its information.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Currently, there is no dispute settlement mechanism enshrined in the law allowing the AMCU and parties to the investigation to enter into deals on admission of guilt or otherwise.

However, amendments were proposed in the draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving the Activities of the Antimonopoly Committee of Ukraine', adopted by the Ukrainian parliament on 13 July 2021 on first reading.

After receiving the preliminary conclusions of the AMCU, the business entity will be able to 'negotiate' with the controlling body by concluding an appropriate agreement. In this case, the amount of fine issued will be reduced by 15 per cent.

The abovementioned draft is now subject to debates as to further amendments and preparation for the second reading in the parliament.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Currently, Ukrainian legislation does not provide for employee responsibility for anticompetitive concerted actions. Under the amendments made to the Criminal Code of Ukraine in 2014, companies may be held liable, as may companies' officers. However, economic crimes resulting in substantial damages or threat of public danger have not yet been listed as giving rise to the criminal liability of employees. In its turn, the AMCU imposes fines directly on undertakings.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A cartel participant applying for immunity must first report its participation in the cartel to the AMCU. In addition, the immunity applicant must provide the AMCU with data of critical relevance for the case's outcome. The applicant for immunity must cooperate with the AMCU to the maximum possible extent throughout the investigation.

Moreover, a cartel participant cannot be exempted from responsibility and obtain immunity if it initiated anticompetitive concerted 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 obtain freely.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

A defendant may get access to case materials after the evidence has been collected and analysed and the Antimonopoly Committee of Ukraine (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 the parties' agreement, after the non-confidential version is prepared, or by the court's decision.

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Ukrainian antitrust law does not provide for employee liability. The AMCU imposes fines directly on undertakings.

Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Ukrainian antitrust law does not provide for employee liability; therefore, currently there is no need to represent (multiple) corporate defendants. If counsel is to represent multiple undertakings as defendants, then there is a need to check for the presence of conflict of interest between the clients.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

This is possible but Ukrainian competition law does not provide for employee liability. The AMCU imposes fines directly on undertakings.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

The fine shall be paid from the undertaking's income that is subject to taxation. The fine as such is tax-deductible.

International double jeopardy

42 Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The AMCU gives consideration to circumstances under which decisions in analogous cases were made in other jurisdictions. The AMCU acts in full conformity with Ukrainian legislation.

Getting the fine down

43 What is the optimal way in which to get the fine down?

The total amount of a fine is determined in two steps. First, the AMCU determines the 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 by up to 50 per cent in aggregate if evidence of mitigating factors is as follows:

- the defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;
- the 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;
- the 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

44 What were the key cases, judgments and other developments of the past year?

In August 2021, The Northern Economic Court of Appeal cancelled the decision of the court of first instance on recognition as invalid and cancelled the Antimonopoly Committee of Ukraine (AMCU) decision of October 2020 to fine Interpipe Ukraine and three other companies about

US$2.6 million and to bar them from participating in public procurements for three years for alleged anticompetitive concerted actions. Interpipe, as Ukraine's largest pipe and railway wheel producer, previously won a court case against the AMCU regarding tenders for railway wheels.

Under the AMCU decision, it found the four companies guilty of distorting the results of 2018 tenders conducted by Ukrainian Railways.

Currently, the case is submitted to the Supreme Court.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Recent amendments were proposed in the draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Improving the Activities of the Antimonopoly Committee of Ukraine' adopted by the Ukrainian parliament on 13 July 2021 on first reading. The Draft Law is aimed to reform legislation on protection of economic competition, and, in this regard, improve the AMCU's activities, with the main aims to increase the efficiency of development and protection of economic competition, improving state policy in the field of economic competition, and strengthening the institutional capacity of the AMCU.

In particular, it is proposed to improve the mechanisms of control over the concentration of economic entities; determine the procedure for conducting inspections of business entities; introduce institutions of settlement in affairs; and introduce joint liability of defendants for purpose of fines payment. Among the innovations is granting the right to conduct inspections by AMCU bodies if there are signs of violation of the legislation on the protection of economic competition before starting the case officially.

At the same time, the competition authority is about to receive additional tools for inspections: the ability to conduct physical searches and confiscation of documents and ensure the exchange of information with other law enforcement agencies. It is also planned to introduce the obligation of the subjects of state registration (notaries) at the request of the AMCU bodies, to provide documentation or registration cases in connection with investigations of the AMCU. Additional possibilities will arise for out-of-court settlement of cases of anticompetitive concerted actions and abuse of a monopoly (dominant) position in the market. After receiving the preliminary conclusions of the AMCU, the business entity will be able to 'negotiate' with the controlling body by concluding an appropriate agreement. In this case, the amount of fine issued will be reduced by 15 per cent.

The above-mentioned draft is now subject to debates as to further amendments and preparation for the second reading in the parliament.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartel conduct can lead to both civil and criminal enforcement in the United Kingdom. The civil offence is set out in Chapter I of the Competition Act 1998 (CA 1998) and article 101 of the Treaty on the Functioning of the European Union (TFEU) and prohibits certain conduct by undertakings. Following the UK's withdrawal from the EU, the Competition and Markets Authority (CMA) can no longer enforce article 101 TFEU.

The criminal offence, which applies to individuals, not undertakings, is set out in section 188 of the Enterprise Act 2002.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The CMA investigates and enforces breaches of Chapter I of CA 1998. There are also certain sectoral regulators such as Ofgem (gas and electricity), the Financial Conduct Authority and the Payment Systems Regulator that have equivalent powers to the CMA to apply and enforce Chapter I of CA 1998 for conduct that takes place in their respective sectors. The Competition Appeal Tribunal hears appeals against cartel decisions taken by the CMA or sectoral regulators.

In England, Wales and Northern Ireland, the CMA and the Serious Fraud Office (SFO) prosecute the criminal offence under section 190(2) of the Enterprise Act 2002. The CMA can refer criminal cartel cases to the SFO, but will only do so if a case involves serious or complex fraud. To date, criminal prosecutions have only been pursued by the CMA. The criminal cartel offence is tried either before a jury in a Crown Court or before a magistrate.

In Scotland, the CMA and the Crown Office and Procurator Fiscal Service (COPFS) cooperate to enforce the criminal offence, with the COPFS bringing prosecutions.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Brexit

The United Kingdom formally left the European Union on 31 January 2020 and the transition period in which EU law continued to apply ended on 31 December 2020.

Before its departure, the United Kingdom issued a series of statutory instruments that brought an end to the direct jurisdiction of the EU institutions in the United Kingdom at the end of the transition period. As a result, the European Commission no longer enforces breaches of EU competition law in the United Kingdom unless it formally commenced its investigation (issued a statement of objections) before 31 December 2020 and gave notice that it would continue its jurisdiction in those investigations. Likewise, the CMA was only able to investigate breaches of article 101 of the TFEU until 31 December 2020 unless the relevant conduct occurred before that date. Investigations into conduct that took place from 1 January 2021 are restricted to breaches of Chapter I of the Competition Act 1998.

Another change is that section 60 of the CA 1998, which requires UK competition law to be interpreted consistently with EU law, has been repealed. This will be replaced with a new section 60A of the CA 1998 from the end of the transition period, which requires UK competition authorities and courts or tribunals to ensure that UK competition law is interpreted consistently with EU law at 31 December 2020, but allows the departure from EU case law and principles that predate the end of the transition period where it is considered appropriate in light of certain specified circumstances. Section 60A of the CA 1998 applies to all UK competition authority investigations. In October 2020, the draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 was updated to provide that both the UK Supreme Court and the Court of Appeal will be able to overturn established EU case law after the end of the transition period.

The EU Damages Directive

The EU Damages Directive was implemented in the United Kingdom on 9 March 2017 through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (Regulations). These provisions continue to apply post-Brexit. Schedule 1 of the Regulations introduces certain changes, which include:

- the granting of protection over leniency materials, settlement submissions and competition authorities' investigation materials (schedule 1, sections 28 and 29 of the Regulations);
- confirmation of the rebuttable presumption that cartels cause harm (schedule 1, section 13 of the Regulations); and
- benefits to immunity applicants in subsequent damages claims through exemption from the general rule that cartelists will be jointly and severally liable for harm caused by the cartel (schedule 1, section 15 of the Regulations) for conduct that has taken place wholly on or after 9 March 2017.

CMA guidance

Following a consultation process in August to September 2020, the CMA released an updated guidance note – CMA8 (Investigation Procedures Guidance) – on the CMA's investigation procedures in Competition Act 1998 cases regarding:

- investigation procedure: the Investigation Procedures Guidance provides further detail on commitments and the CMA's streamlined access to file approach;
- director disqualification orders: for example, the guidance clarifies that directors' written representations that relate to an investigation under the Company Directors Disqualification Act 1986 will only be disclosed to addressees of a statement of objections in exceptional circumstances;
- penalties: the draft penalty statement will now be sent at the same time as the statement of objections; and
- leniency: the CMA will not mention publicly whether any undertaking involved in a suspected cartel has applied for leniency at the opening of its investigation.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices, which:

- may affect trade within the United Kingdom; and
- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (the Chapter I prohibition).

The Chapter I prohibition is based on article 101 of the TFEU.

Chapter I provides a non-exhaustive list of prohibited conduct. This includes agreements to fix prices; limit or control production, markets, technical development or investment; and share markets or sources of supply. The Office of Fair Trading's applications for leniency and no-action in cartel cases guidance (which has been adopted by the CMA) states that, by definition, cartel activities have as their object the prevention, restriction or distortion of competition and, therefore, there is no need to assess the effects of the cartel activity. The guidance also makes clear that cartel activity includes direct or indirect communication of specific, not publicly available, information regarding future pricing intentions between two or more competitors in a market.

An agreement may be exempt from the Chapter I prohibition if an undertaking can prove that the agreement improves production or distribution, promotes technical or economic progress and offers consumers a fair share of the resulting benefit (section 9 of the CA 1998). However, this is highly unlikely to be the case in relation to cartel activity.

The criminal cartel offence is a separate offence to the Chapter I prohibition that applies to individuals and not undertakings, and is set out in section 188 of the EA 2002. Section 188 of the EA 2002 relates only to horizontal agreements and provides that an individual is guilty of an offence if he or she agrees (with one or more other persons) to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings that involve direct and indirect price fixing, limitation of supply or production, market sharing and bid-rigging. This offence will be committed regardless of whether the agreement was implemented.

When considering whether to bring a prosecution under section 188 of the EA 2002, the CMA will follow the Code for Crown Prosecutors, which requires the CMA to consider whether a case has sufficient evidence for a realistic prospect of success. The CMA must then consider whether a prosecution is required in the public interest, taking into account factors such as the seriousness of the offence and whether prosecution is a proportionate response.

In April 2014, the scope of the criminal cartel offence was broadened with the removal of the requirement that an individual must have acted dishonestly in agreeing to engage in cartel activity. Since April 2014, the CMA is only required to demonstrate that an individual intended to enter into, or operate, an agreement.

Section 188A of the EA 2002 states that an individual does not commit an offence in various circumstances including:

- if customers are provided with relevant information about the arrangements before they enter into an agreement for the supply of the affected product or service;
- in bid-rigging cases, if the person requesting bids is given relevant information about the arrangements at or before the time a bid is made; and
- if relevant information is published in a specified manner before the arrangements are implemented.

Section 188B of the EA 2002 provides three defences to the criminal cartel offence:

- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from customers at all times before they entered into agreements for the supply to them of the product or service;
- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from the CMA; or
- before the making of the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers to obtain advice about them before making or implementing them.

Joint ventures and strategic alliances

5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Section 22 of the EA 2002 provides that if a joint venture or strategic alliance constitutes a relevant merger situation under section 23 of the EA 2002, it must be notified to the CMA. The parties to a joint venture or a strategic alliance will need to determine whether they are in a relevant merger situation, and if so, notify the CMA on a voluntary basis. The CMA's Mergers: Guidance on the CMA's jurisdiction and procedure states that until a merger (or in this case, a joint venture) is completed, the parties will still be subject to the Chapter I prohibition, and should ensure that they continue to operate as separate undertakings while the CMA considers approval of the arrangement.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

Chapter I of the Competition Act 1998 (CA 1998) applies to undertakings that are broadly defined as any natural or legal person engaged in economic activity, regardless of its legal form or how it is financed. The Competition and Markets Authority (CMA) guidance as to the appropriate amount of a penalty confirms that this includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings, non-profit-making organisations and in certain circumstances, public entities that offer goods or services on a given market.

The criminal cartel offence under the Enterprise Act 2002 (EA 2002) only applies to individuals.

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Section 2(3) of the CA 1998 states that the prohibition in Chapter I of the CA 1998 (the Chapter I prohibition) governs agreements that are implemented or are intended to be implemented, in the United Kingdom. If an agreement is entered into outside of the United Kingdom, but implemented, or intended to be implemented in the United Kingdom, the Chapter I prohibition will apply. The qualified effects doctrine set out by the European Court of Justice in *Intel v Commission* [2017] Case C-413/14P provides that article 101 of the Treaty on the Functioning of the European Union will apply not only to agreements implemented in the European Union but also to agreements that have immediate, substantial and foreseeable economic effects within the internal market. This principle, arising from retained EU case law, remains applicable in the UK post-Brexit.

Section 190(3) of the EA 2002 also states that the criminal offence will apply to agreements entered into outside the United Kingdom if the agreement, or part of the agreement, is implemented, or intended to be implemented, in the United Kingdom.

Export cartels

8 | Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Under section 2(1)(a) of the CA 1998, Chapter I prohibition only applies to agreements if they may affect trade within the United Kingdom. Section 190(3) of the EA 2002 requires that agreements must also be implemented, or intended to be implemented, in the United Kingdom.

Industry-specific provisions

9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Agreements that are subject to exemptions under the Financial Services and Markets Act 2000 (schedule 2 of the CA 1998), the Broadcasting Act 1990 or the Communications Act 2003 (schedule 2 of the CA 1998) are excluded from the scope of the Chapter I prohibition. Agreements relating to the production or trade in an agricultural product are also excluded from the Chapter I prohibition (schedule 3 of the CA 1998).

There are no industry-specific defences or exemptions for the criminal cartel offence.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is no general defence or exemption, but if there are exceptional and compelling public policy reasons (schedule 1, section 7(1) of the CA 1998), a conflict with laws or international obligations (schedule 1, section 6(1) of the CA 1998), the Secretary of State can exclude a particular agreement from the scope of Chapter I. In May 2020, the Secretary of State issued five statutory instruments that grant exemptions to the Chapter I prohibition in response to the covid-19 pandemic. These exemptions were granted to address issues such as excess demand for groceries supplies, logistics services and healthcare, and excess supply in dairy farming and production and ferry services. There were limits to these exemptions. For example, the dairy exemption allows farmers and producers to share information on surpluses, stock and capacity (among other things) but does not permit them to share information on prices and costs. These exemptions have since been revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (SI 2021/773), which has brought the exemptions to an end.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act Guidance.

Sources of the CMA's investigations

The CMA's Competition Act 1998 (CA 1998) guidance explains that the CMA obtains information from several sources that may result in it opening an investigation. These include:

- businesses that have been involved in a cartel (and want to take advantage of leniency);
- individuals with information about a cartel who apply for leniency;
- complaints from individuals or businesses;
- the CMA's own research; and
- evidence gathered through other CMA work (eg, mergers or market investigations).

Initial assessment phase

To open a formal investigation, section 25 of the CA 1998 requires that the CMA has reasonable grounds for suspecting that competition law has been breached. Generally, before the CMA forwards a case to its Enforcement Directorate, it is likely to request further information from parties on a voluntary basis. However, this is less likely in a suspected cartel case owing to concerns that this may prejudice the investigation.

Opening a formal investigation

If a complaint is likely to progress to a formal investigation, the case is allocated a designated case team responsible for the daily running of the case and a senior responsible officer who authorises the opening of a formal investigation and, where the senior responsible officer considers there is sufficient evidence, authorises a statement of objections.

After the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter setting out brief details of the conduct that the CMA is investigating, the relevant legislation, the case-specific timetable, and contact details for the case team. The CMA will also generally publish a notice of investigation on its website at this point. However, in cartel investigations, the CMA is unlikely to include details of the investigation at this stage to avoid any impact on its ongoing investigation.

Investigative powers

The CMA has a range of powers under the CA 1998 to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach, criminal offences also apply where an individual interferes with the CMA's investigatory powers.

Investigation outcomes

CMA investigations can be resolved in several ways.

If the CMA considers that the case gives rise to competition concerns, instead of continuing its investigation, the CMA may accept commitments from businesses on future conduct. The CMA must be satisfied that the commitments offered to address its competition concerns.

The CMA can issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law. After allowing the businesses under investigation an opportunity to make written and oral representations on the statement of objections, if the CMA still considers that there has been an infringement, the CMA can issue an infringement decision and impose fines or directions, or both, to end any ongoing anticompetitive conduct.

A case decision group will be appointed by the Case and Policy Committee if the CMA decides to issue a statement of objections. The General Counsel and Chief Economic Adviser will ensure that there has been a thorough review of the legal and economic analysis (and the supporting evidence) and will inform the case decision group of any significant legal risks or risks on the economic analysis. The case decision group will then decide whether, based on the facts and available evidence, the CMA can establish that the legal test under the Chapter I prohibition has been met. If a draft penalty statement has been issued, the case decision group will also decide whether a financial penalty should be imposed and the appropriate amount of that penalty.

The CMA can decide to close an investigation on grounds of administrative priorities. The CMA can also publish a reasoned no-grounds-for-action decision if it has not found sufficient evidence of an infringement of competition law.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CMA has a range of powers under the Competition Act 1998 (CA 1998) to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach, criminal offences also apply where an individual interferes with the CMA's investigatory powers.

These powers include the following.

Written information requests

Under section 26(1) of the CA 1998, the CMA has the power to require any person to produce a specified document or to provide specified information, which the CMA considers relates to any matter relevant to the investigation. The CMA will send formal information requests in writing (a section 26 notice). This will indicate the subject matter and purpose of the CMA's investigation, specify or describe the documents or information, or both, that the CMA requires, and set out the offences or sanctions, or both, that may apply if the recipient does not comply.

The CMA may ask for documents such as internal business reports, copies of emails and other internal data. The definition of a document under section 59(1) of the CA 1998 also allows the CMA to ask for information that is not in written form (eg, market-share estimates based on knowledge or experience).

Power to require individuals to answer questions

Under section 26A(1) of the CA 1998, the CMA can require any individual who has a connection with a business that is a party to the investigation to answer questions on any matter relevant to the investigation after giving formal written notice. Section 26A(6)(a) of the CA 1998 provides that an individual is considered to have a connection with a business if he or she is or was:

- concerned in the management or control of the undertaking; or
- employed by, or otherwise working for, the undertaking.

This may be a current connection or a former connection, for example where the individual used to work for the undertaking under investigation (section 26A(6)(a) of the CA 1998).

The CMA's Competition Act Guidance states that it will give formal notice to anyone it wishes to interview, informing them that it intends to ask questions under formal powers. Where an individual has a current connection with the relevant undertaking at the time the formal notice is given, the CMA must also give a copy of the notice to that undertaking. The Guidance states that it will be generally inappropriate for a legal adviser who only represents the undertaking to attend this interview.

Power to enter premises (dawn raids with or without a warrant)

In some cases, the CMA will visit premises to obtain information. The CMA has separate powers under CA 1998 that allow it to enter premises with or without a warrant. The power that the CMA uses will depend on whether it intends to inspect business premises (eg, offices) or domestic premises (eg, employees' homes). The CMA can enter a business premise without a warrant but cannot enter domestic premises without one.

Power to enter premises without a warrant

Under section 27(1) of the CA 1998, any CMA officer who is authorised in writing by the CMA to do so has the power to enter business premises without a warrant. Section 27(2) of the CA 1998 requires that the investigating officer give the occupier of the premises written notice indicating the subject matter and purpose of the CMA's investigation, setting out the offences or sanctions, or both, that may apply if the recipient does not comply.

In certain circumstances, as set out in section 27(3) of the CA 1998, the CMA need not give advance notice of entry. For example, the CMA need not give advance notice if it has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that the CMA is investigating or a business whose conduct the CMA is investigating, or if a CMA-authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to do so.

When an inspection without a warrant is being conducted, section 27(5) of the CA 1998 permits CMA officers to require any person to:

- produce any document that may be relevant to the CMA's investigation: CMA officers can take copies of, or extracts from, any document produced;
- explain any document produced; and
- tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

Power to enter premises with a warrant

The CMA can apply to the court for a warrant to enter and search business premises (section 28(1) of the CA 1998) or domestic premises (section 28A(1) of the CA 1998).

The CMA generally seeks warrants if it has concerns that information relevant to the investigation may be destroyed or otherwise interfered with if requested through a written request (sections 28(1)(b) and 28A(1)(b) of the CA 1998).

Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary but only if they are prevented from entering the premises (sections 28(2) and 28A(2) of the CA 1998). The CMA's Competition Act Guidance states that CMA officers cannot use force against any person.

The warrant also authorises CMA officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies or extracts from them (sections 28(2)(b) and 28A(2)(b) of the CA 1998). The CMA's Competition Act Guidance states that at the end of the inspection, the CMA officer will provide, where practicable, a list of documents and extracts that have been taken.

Criminal Cartel Offence

Under section 190(2) of the Enterprise Act 2002 (EA 2002), proceedings relating to the criminal cartel offence may only be instituted by the Director of the Serious Fraud Office (SFO) (section 190(2)(a) of the EA 2002) or by, or with, the consent of the CMA (section 190(2)(b) of the EA 2002).

The CMA and SFO both have investigation powers relating to the criminal cartel offence. The CMA's powers are set out in sections 193 and 194 of the EA 2002, whereas the SFO's powers are set out in section 2 of the Criminal Justice Act 1987 (CJA 1987). The recent 2020 memorandum of understanding between the CMA and SFO sets out the presumption that if the SFO accepts a criminal cartel investigation, the powers under CJA 1987 will be used rather than those under EA 2002. In joint investigations, the SFO and CMA will consider which powers to use on a case-by-case basis.

Under section 193(1) of the EA 2002 and section 2(2) of the CJA 1987, the CMA and Director of the SFO respectively may require a person under investigation, and any other person whom they have reason to believe has relevant information to answer questions or provide information relevant to the investigation. Notice of this will be sent to the person under investigation in writing.

Under section 193(2) of the EA 2002 and section 2(3) of the CJA 1987, the CMA and the Director of the SFO respectively may require the person under investigation, or any other person, to produce specified documents that relate to the investigation. The CMA and Director of the SFO are permitted to take copies of documents, or require the person producing them to explain them (section 193(3)(a) of the EA 2002 and section 2(3)(a) of the CJA 1987). Under section 193(4) of the EA 2002 and section 2(3)(b) of the CJA 1987, if documents are not produced, the CMA or Director of the SFO can require the person who was ordered to produce them to state, to the best of their knowledge and belief, where the documents are.

Under section 194(1) of the EA 2002 and section 2(4) of the CJA 1987, the CMA and the Director of the SFO respectively have the power to request the grant of a warrant. This warrant is exercisable by any officer of the CMA (section 194(2) of the EA 2002) or any constable (section 2(5) of the CJA 1987) and enables them to enter premises using reasonable force, and to take possession of, or take steps to preserve, documents. Section 2(6) of the CJA 1987 states that a constable exercising a warrant under section 2(5) of the CJA will be accompanied by a member of the SFO or a person whom the Director has authorised.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Competition and Markets Authority (CMA) was a member of the European Competition Network (ECN), through which it cooperated with other member states' national competition authorities (NCAs). However, the cooperation ceased when the transition period ended on 31 December 2020.

The CMA is permitted, under section 243(1) of the EA 2002, to disclose information to overseas authorities for certain purposes that include supporting overseas authorities with their cartel investigation (section 243(2) of the EA 2002). The CMA has stated that as part of its expanded role post-Brexit, it plans to enhance its relationships with other NCAs both closer to home and further afield. In September 2020, the CMA became a signatory to the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities that aims to improve inter-agency cooperation between five countries: Australia, Canada, New Zealand, the United Kingdom and the United States.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Section 2(3) of the CA 1998 states that the prohibition in Chapter I of the CA 1998 (the Chapter I prohibition) governs agreements that are implemented, or are intended to be implemented, in the United Kingdom. If an agreement is entered into outside of the United Kingdom, but implemented, or intended to be implemented, in the United Kingdom, the Chapter I prohibition will apply. The qualified effects doctrine set out by the European Court of Justice in *Intel v Commission* [2017] Case C413/14P provides that article 101 of the Treaty on the Functioning of the European Union will apply not only to agreements implemented in the European Union but also to agreements that have immediate, substantial and foreseeable economic effects within the internal market. This principle, arising from retained EU case law, remains applicable in the UK post-Brexit.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act Guidance.

In relation to the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 2002). The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's Cartel Offence Prosecution Guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

Regarding the prohibition in Chapter I of the Competition Act 1998 (CA 1998), in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (2002) CAT 1*, the Competition Appeal Tribunal (CAT) confirmed that the Office of Fair Trading (OFT) had the burden of proof in civil cartel cases. The standard of proof is the civil standard, so the Competition and Markets Authority (CMA) must prove its case on the balance of probabilities. In *Napp*, the CAT held that the OFT Director must satisfy the CAT that, based on strong and compelling evidence, taking account of the seriousness of what is alleged, the infringement is duly proved. This approach was confirmed in *JJB Sports plc and Allsports Ltd v OFT* [2004] CAT 17. However, the CAT held that 'strong and compelling' evidence should not be interpreted as meaning that something akin to the criminal standard applies to cartel proceedings.

Concerning the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 2002). The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to

plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's Cartel Offence Prosecution Guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In *Napp*, the CAT confirmed that the OFT was able to rely on inferences and presumptions about a certain set of facts (absent the existence of any contradictory facts) to discharge the burden of proof. In *JJB Sports plc and Allsports Ltd*, the CAT further confirmed that wholly circumstantial evidence could be sufficient to meet the required standard in certain circumstances.

Appeal process

18 | What is the appeal process?

The CAT hears appeals against decisions of the CMA and sectoral regulators. Appeals in the CAT are on the merits and heard before a tribunal consisting of three members: either the president or a chairman and two ordinary members. The chairmen are generally judges of the High Court of England and Wales (and the equivalent courts in Scotland and Northern Ireland), and other senior lawyers. The two ordinary members will likely be senior lawyers or economists, or those with expertise in business, accountancy or related fields.

To appeal a CMA or sectoral regulator's decision, an appellant must file a notice of appeal that must satisfy certain format requirements. The CAT registrar will send an acknowledgement of receipt to the appellant and a copy of the notice to the respondent. The registrar will then schedule a case management conference to discuss such items as timing, procedural issues, and whether and when the parties should file a disclosure report.

The notice of appeal must be filed by the appellant with the registrar within two months of being notified of the regulator's decision, under Rule 9 of the Competition Appeal Tribunal Rules 2015. These two months are counted from the day after the undertaking is notified of the regulator's decision. Rules 15(1) and 15(6) provide that a respondent must file the defence and its annexes within six weeks after the date it receives the notice of appeal. The CAT will only grant extensions to any of these deadlines in exceptional circumstances (see *Vodafone v Ofcom* [2008] CAT 4). Hearing dates will be fixed at a case management conference.

Appellants and the CMA also have a right to appeal CAT judgments either on a point of law or, in penalty cases, the amount of any penalty, with the permission of the CAT or the Court of Appeal.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Criminal sanctions for individuals are set out under section 190 of the Enterprise Act (EA 2002) and include custodial sentences (including a term of up to five years) and fines.

The Competition and Markets Authority (CMA) has pursued only a handful of criminal convictions, with the most recent prosecution in 2017. All successful CMA criminal prosecutions detailed below related to conduct before April 2014, when the CMA was required to demonstrate that an individual acted dishonestly in agreeing to engage in cartel activity. The CMA is now only required to demonstrate that an individual intended to enter into or operate an agreement, making the requirements of section 188 of the EA 2002 easier for the CMA to satisfy.

There have been several successful criminal prosecutions. An individual was sentenced to two years imprisonment (suspended), made the subject of a six-month curfew order, and disqualified from acting as a company director in relation to the supply of precast concrete drainage products (2017). In relation to the supply of galvanised steel tanks (2015), three individuals were charged, with one pleading guilty (receiving a suspended sentence of six months and 120 hours of community service) and two others being acquitted following a jury trial. In relation to the marine hose cartel (2008) three defendants were sentenced to terms of between two-and-a-half and three years in prison, disqualified from acting as directors for between five and seven years and, in some cases, ordered to pay costs.

The CMA has also pursued unsuccessful prosecutions. In 2010, four individuals involved in the airline passenger fuel surcharge cartel were charged under section 188 of the EA 2002, but proceedings were withdrawn one month into the criminal trial.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

Civil sanctions for cartel activity include fines of up to a maximum of 10 per cent of the worldwide turnover of the undertaking. Following the CMA's 2019 concrete drainage products investigation, it issued total fines of £36 million to three undertakings, one of which received a £25.4 million fine. In July 2021 the CMA imposed fines totally £260m for competition law breaches (including market sharing excessive and unfair pricing) in relation to the supply of hydrocortisone tablets. The CMA may also impose directions or a declaration that the agreements in question are void. Also, the CMA can apply to the High Court for a Competition Disqualification Order that can result in a director being disqualified for up to 15 years.

If an undertaking fails to comply with a CMA investigation order, the CMA can issue directions to ensure an undertaking's compliance with the relevant order.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The CMA sets out its approach to penalties in its Penalty Guidance, which details its six-step approach to calculating financial penalties, namely:

- calculation of the starting point (of up to 30 per cent of the turnover in the relevant product market and the relevant geographic market in the last financial year preceding the date when the infringement ended) having regard to the seriousness of the infringement and for general deterrence;
- the starting point may be increased or, in certain circumstances, decreased to reflect the duration of the infringement. Typically, the starting point will be multiplied by the number of years (or part years) of an infringement;
- the penalty may then be adjusted based on aggravating or mitigating factors. Aggravating factors include continuing the infringing behaviour after the commencement of the CMA's investigation, whereas a mitigating factor may be an undertaking partaking in the infringement under severe duress or pressure;
- the penalty may next be adjusted for specific deterrence and proportionality (eg, the amount may be increased to discourage the undertaking from engaging in future breaches of competition law);

- the penalty will then be adjusted downwards if it exceeds the maximum penalty of 10 per cent of the worldwide turnover of the undertaking, and to avoid double jeopardy; and
- there may be discounts for leniency, settlement or the CMA's approval of a voluntary redress scheme or both.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The CMA can issue discounts of up to 10 per cent (in the mitigating factors stage set out above) if an undertaking can demonstrate that it has taken adequate steps appropriate to the size of its business concerned to achieve a clear and unambiguous commitment to competition law compliance. In its penalty guidance, the CMA states that it will not issue discounts unless the undertaking can demonstrate that it has reviewed its compliance activities, and changed them to reflect the failings that led to the specific breach of competition law. Any compliance programme will also need to address competition law risk identification, risk assessment, risk mitigation and review activities. This might require an undertaking to make a public statement on its commitment to compliance, and submit enhanced reporting on its compliance activities to the CMA.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

If a company has infringed Chapter I of the Competition Act 1998 (CA 1998), its directors can be disqualified for up to 15 years if they knew of, or ought to have known about, the arrangements. The CMA, and sectoral regulators, can either seek a competition disqualification order from the High Court (or Court of Session in Scotland or Northern Ireland High Court) or accept a competition disqualification undertaking from the director that has the same effect as a competition disqualification order. To date, the CMA has disqualified 19 directors primarily by way of competition disqualification undertakings.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedure is not automatic; however, sections 57(8)(d) and 57(12) of the Public Contracts Regulations 2015 set out that a contracting authority has the discretion to exclude economic operators from procurement procedure for three years from the date of the relevant event if it has sufficiently plausible indications to conclude that the economic operator has entered into agreements aimed at distorting competition.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Sanctions for criminal and civil activity can both be pursued for the same conduct; however, only undertakings can be pursued for breach of the prohibition in Chapter I of the CA 1998, and only individuals can be pursued under section 188 of the EA 2002.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of the prohibition under Chapter I of the Competition Act 1998 (CA 1998) or article 101 of the Treaty on the Functioning of the European Union (TFEU), prior to the UK's departure from the EU has the standing to bring a claim in the High Court or the Competition Appeal Tribunal (CAT) (section 47A of the CA 1998), whether a direct or indirect purchaser. Claims can be brought on a follow-on basis after an infringement decision under Chapter I of the CA 1998 (or article 101 of the TFEU prior to the UK's departure from the EU in respect of damage occurring prior to 31 December 2020) has been issued, or on a standalone basis where no infringement decision has been issued.

Follow-on actions are based on the tort of breach of statutory duty, and damages are awarded on the tortious basis of the amount of the loss, plus interest. Defendants can use the passing-on defence, which allows damages suffered by the purchaser of a cartelised product to be reduced if the defendant can prove that the purchaser passed on the overcharge to his or her customers. For claims where the loss or damage suffered was wholly on or after 9 March 2017, under section 36 Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was suffered before, there are circumstances in which exemplary damages may be awarded.

Costs generally follow the event, with the unsuccessful party paying the costs of the successful party (Part 44.2 of the Civil Procedure Rules). However, the CAT has a broader discretion in awarding costs and will consider a range of factors. Generally, a successful party is only likely to recover around two-thirds of its costs. The English courts have a wide discretion to order simple interest and have also awarded compound interest.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The High Court

In the High Court, there is no equivalent in England and Wales of the US-style (opt-out) class-action procedure, nor is there a similar certification process. While it is possible to bring representative actions in the High Court, this is difficult to do. In *Emerald Supplies Limited v British Airways* plc [2009] EWHC 741 (Ch), the claimants attempted to bring a quasi-class action in the High Court. They alleged that they had paid inflated air-freight prices as a result of a price-fixing cartel to which British Airways and other airlines were a party and claimed damages for themselves and other importers of cut flowers who they purported to represent. The claim was rejected at first instance, on the basis that the class of direct and indirect purchasers was too ill-defined, and the direct and indirect purchasers would not all benefit from the relief sought by the claimant because of the need for direct purchasers to pass on the overcharge to indirect purchasers for the latter to benefit from damages awarded. This decision was upheld by the Court of Appeal.

The Competition Appeal Tribunal

The Consumer Rights Act 2015 (CRA 2015) introduced collective actions in the CAT for both follow-on and standalone claims on an opt-in or an opt-out basis.

There is a certification process in the CAT. Under section 47B of the CA 1998 (as amended by the CRA 2015), any collective proceedings will only be continued if the CAT makes a collective proceedings order. It is possible to bring either opt-in or opt-out collective proceedings; that is, brought on behalf of each class member without specific consent unless a class member elects to opt out by notifying the representative that his or her claim should not be included in the proceedings.

The CAT will make this order if the person bringing the proceedings is someone it could authorise to act as the representative and it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, claims must raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings. The collective proceedings must:

- authorise the person who brought the proceedings to act as the representative;
- describe the class of persons whose claims are eligible for inclusion; and
- specify whether the proceedings are on an opt-in or an opt-out basis.

The test that the CAT applies was subject to an appeal to the Supreme Court (*Mastercard and others v Merricks* [2020] UKSC 51) and, as a result of that judgment, the threshold for ordering a CPO has been considerably lowered. The CAT refused to issue a CPO on the basis that there was no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated. The Supreme Court found that the CAT had made various errors of law. In particular, the Court found that if the forensic difficulties had been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings. In addition, the incompleteness of data and the difficulties of interpreting what survives are frequent problems with which courts wrestle. However, this was not a good reason for a court to refuse a trial. In addition, the CAT was wrong to require Mr Merricks' proposed method of distributing damages to take account of the loss suffered by each class member. A central purpose of the power to award damages in collective proceedings is to avoid the need for individual assessment of loss.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition and Markets Authority (CMA) offers three types of leniency, based on the time at which an undertaking applies.

To be offered Type A or B leniency, an applicant must:

- accept that it participated in cartel activity in breach of the law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

To be offered Type C leniency, an applicant must satisfy all the above conditions, except for the coercion requirement. Further details on type A, B and C leniency are set out below.

Type A

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Type B and Type C leniency are available for parties that cooperate after an immunity application has been made.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Parties that cooperate with the CMA after a leniency application has already been made may be eligible for Type C leniency. Type C applicants will be eligible for discretionary reductions in corporate penalties of between 25 to 50 per cent, discretionary criminal immunity to specific individuals and protection from director disqualification proceedings. The Leniency Guidance provides that once an applicant becomes eligible only for Type C leniency, their position in relation to other Type C applicants will not be decisive as to the level of discount they are awarded. However, it is likely that the further ahead in the queue an applicant is, the easier it will be to provide greater value to the CMA and receive a greater discount.

The CMA also offers leniency plus if an undertaking is cooperating with the CMA in relation to its cartel activity in one market, and chooses to cooperate with the CMA in relation to cartel activity in a second market, it can receive a larger reduction in financial penalties for its cartel activities in the first market.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no set deadlines for initiating or completing a leniency application; however, the CMA will not accept leniency applications from undertakings once it has issued a statement of objections in relation to the reported cartel activity. Also, if applicants would like to receive Type A leniency, they will need to approach the CMA before the CMA launches a Chapter I of the Competition Act 1998 (CA 1998) investigation, and before other members of the cartel approach the CMA.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The Leniency Guidance set out that applicants must first confirm their acceptance that their activity amounts to an infringement of Chapter I of the Competition Act 1998 and article 101 of the Treaty on the Functioning of the European Union.

Once applicants have confirmed this, the Leniency Guidance emphasises that applicants must maintain continuous and complete cooperation with the CMA throughout the CMA's investigation and any subsequent proceedings brought by the CMA. If an applicant fails to cooperate with the CMA continuously, they could lose the protections offered to them. The CMA expects applicants to genuinely assist them in effectively investigating and taking enforcement action against the cartel conduct. This requires that applicants take such steps as providing the CMA with documents and other evidence when they submit leniency applications.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CMA will not generally disclose that an undertaking has made a leniency application until it issues its statement of objections.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The CMA has the discretion to offer an undertaking an opportunity to enter into a settlement process on the condition that the undertaking admits that it breached the Chapter I of the Competition Act 1998 prohibition, ceases the infringing behaviour immediately from the date that it enters into settlement discussions with the CMA (where it has not already done so), and confirms it will pay a penalty set at a maximum amount. The undertaking must also confirm that, among other things, it accepts that there will be an infringement decision made against it and that the streamlined administrative procedure will govern the remainder of the CMA's investigation. An undertaking will still be able to appeal the CMA's infringement decision, but if it does so it will lose its settlement discount.

The amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

The CMA may, at its discretion, choose to accept commitments from an undertaking on its future conduct instead of proceeding with an investigation. These could be structural or behavioural, or a combination of both, but an undertaking's compliance with them must not be too difficult for the CMA to monitor. If commitments address all of the CMA's concerns, the CMA cannot proceed with the investigation. If the commitments only partially address the CMA's concerns, it can continue its investigation into the elements that have not been addressed.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The Competition and Markets Authority (CMA) offers three types of leniency, based on the time at which an undertaking applies.

Type A

An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

The grant of any form of leniency or reductions in penalties to Type B applicants is always discretionary but current and former employees who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Type C

The grant of any form of leniency or reductions in penalties to Type C applicants is always discretionary, but specific individuals who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Dealing with the enforcement agency

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Before making a leniency application, an applicant or its legal adviser can phone the CMA's leniency enquiry line on a confidential basis to ascertain whether the CMA has an ongoing investigation or whether Type A immunity is, in principle, available. The legal adviser will need to provide certain details such as the relevant sector and dates to allow the CMA to check the availability of Type A immunity.

Once the CMA officer has made the relevant internal enquiries, they will revert on the availability of Type A immunity. If Type A immunity is available, and the applicant wishes to proceed with its applications, the legal adviser will need to provide the applicant's identity to the CMA. At this point, the CMA will give the applicant a preliminary marker, while the applicant prepares its full leniency package. If Type A immunity is not available, the applicant should discuss with the CMA whether Type B leniency is available.

DEFENDING A CASE

Disclosure

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The Competition and Markets Authority (CMA) offers addressees of the statement of objections and any draft penalty statement a reasonable opportunity to inspect the CMA's file. The CMA will generally provide addressees with copies of the documents referred to in the statement of objections and any draft penalty statement, and a schedule of documents that sets out all other documents in the CMA's file.

The CMA has made changes to its disclosure process, as reflected in its updated Investigation Procedures Guidance, including a new streamlined access-to-file approach whereby parties are provided with the key documents referred to in the statement of objections and a schedule of other, non-key documents on the file. Addressees can request to inspect the additional documents set out in this schedule, and the CMA will deal with these requests on a case-by-case basis. Where the CMA agrees to disclose these documents, it will likely use a confidentiality ring or data room to facilitate disclosure.

The CMA generally provides addressees with the same time to review the file as to submit its written representations in response to the statement of objections and any draft penalty statement (which will be up to a maximum of 12 weeks).

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

There are no restrictions on counsel representing employees under investigation in addition to the corporation that employs them unless there is a conflict of interest. However, in the Investigations Procedure Guidance, the CMA states that its starting position is that it will be generally inappropriate for an undertaking's legal adviser to attend interviews that it conducts under its powers under section 26 of the Competition Act 1998.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

While there are no restrictions on lawyers representing multiple corporate defendants, there is a risk that conflicts of interest may arise and corporate defendants will usually each have their own, independent representatives.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

There are no blanket restrictions prohibiting a company from paying a civil penalty, or any associated legal costs imposed on an employee.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines or penalties imposed by the CMA are not tax-deductible on the basis that they are incurred as a result of an undertaking's breach of the law (see *CIR v Alexander von Glehn Ltd* [1920]).

A private damages settlement payment may be tax-deductible if an allegation is neither admitted nor proved. Tax deductions for private damages are not permitted where a payment is punitive but may be permitted where a payment is restitutionary.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

If a penalty or fine has been imposed by the European Commission, or by a court or other body in another EU member state in respect of an agreement or conduct, the CMA's Penalty Guidance states that the CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The CMA can issue discounts of up to 10 per cent if an undertaking can demonstrate that it has taken adequate steps appropriate to the size of its business concerned to achieve a clear and unambiguous commitment to competition law compliance. In its penalty guidance, the CMA states that it will not issue discounts unless the undertaking can demonstrate that it has reviewed its compliance activities and changed

them to reflect the failings that led to the specific breach of competition law. Any compliance programme will also need to address competition law risk identification, risk assessment, risk mitigation and review activities. This might require an undertaking to make a public statement on its commitment to compliance, and submit enhanced reporting on its compliance activities to the CMA.

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Regarding settlements, the amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

UPDATE AND TRENDS

Recent cases

44 What were the key cases, judgments and other developments of the past year?

Hydrocortisone

In July 2021, the Competition and Markets Authority (CMA) imposed fines totalling £260 million for competition law breaches against a number of companies (including for market sharing and excessive and unfair pricing) in relation to the supply of hydrocortisone tablets. A number of the addressees of the CMA's decision have appealed to the Competition Appeal Tribunal.

Nortriptyline

The CMA made its first application to the High Court for a competition disqualification order in the *Competition and Markets Authority v Michael Christopher Martin*, in which it was successful. Mr Martin was not directly involved in meetings with the other undertakings but was aware of the cartel agreement and took no steps to stop the conduct. The High Court described this as a middle bracket serious case and disqualified Martin for seven years.

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Fludrocortisone acetate tablets

In July 2020, the CMA issued a decision imposing fines on suppliers of fludrocortisone acetate tablets for breaching the prohibition in Chapter I of the Competition Act 1998. All three companies admitted breaching competition law and were fined £2.3 million in total. In June 2020, the CMA successfully secured a binding disqualification undertaking from one of the directors involved in the cartel.

Online resale price maintenance in the music industry

In 2020, the CMA issued four separate decisions regarding online retail price maintenance within the music industry (regarding guitars, synthesisers, electronic drums, digital pianos and keyboards). The CMA found that in the four separate cases, the companies had entered into or participated in a concerted practice whereby they instructed resellers not to sell their products below a minimum price point. The fines issued by the CMA totalled more than £10 million.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Brexit

The United Kingdom formally left the European Union on 31 January 2020 and the transition period in which EU law came to an end on 31 December 2020.

The EU Damages Directive

The EU Damages Directive was implemented in the United Kingdom on 9 March 2017 through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

CMA guidance

Following a consultation process in August to September 2020, the CMA released updated guidance note Guidance on the CMA's investigation procedures in Competition Act 1998 cases.

Consultation on Reform of Competition and Consumer Policy

In July 2021, the Department of Business, Energy and Industrial Strategy launched a consultation on the Reform of Competition and Consumer Policy. The consultation includes questions as to whether:

- the jurisdictional requirements of the Chapter I (and Chapter II) prohibitions be amended to make clear that they apply to all anticompetitive agreements that are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial and foreseeable effects in the United Kingdom;
- to provide the holders of full immunity in the public enforcement process with additional immunity from liability for damages caused by the cartel;
- to adopt proposals for requirements for businesses to preserve evidence and to include powers to 'seize and sift' when inspecting private premises; and
- the CMA should be permitted to adopt short-form decisions where all parties have chosen to settle and whether the CMA could be entitled to rely on binding admissions in any infringement decision addressed to that party without the need for further corroboration of those facts.

United States

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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, but instead relies on the FTC Act to challenge conduct that would also violate the Sherman Act. Also, the FTC may bring cases under the FTC Act challenging coordinated conduct that is beyond the scope of the Sherman Act, such as invitations to collude. On the state level, state antitrust and unfair competition laws substantially prohibit the same conduct as their federal counterparts and, depending on the state, may provide for criminal and civil enforcement.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

There are three principal enforcers of the federal antitrust laws. The US Department of Justice (DOJ), Antitrust Division has the power to investigate and to civilly and criminally prosecute cartel activity in the federal courts. The FTC enforces the FTC Act but only has civil enforcement powers in FTC administrative proceedings or federal court. Private plaintiffs may also sue in a federal court for treble monetary damages and injunctive relief under the Sherman Act. State antitrust laws are enforced criminally and civilly by state attorneys general in state courts and civilly by private plaintiffs. State attorneys general may also enforce federal antitrust statutes.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Not applicable.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Federal court decisions provide the framework for analysing cartel activity under the Sherman Act. Hard-core agreements among competitors to fix prices (or any component of pricing), restrict output, rig bids or allocate customers or geographic territories are considered to be per se illegal (ie, the law provides for an irrebuttable presumption that such conduct had an anticompetitive effect on the market). Per se cartel offences may be prosecuted criminally.

There are four elements of a criminal cartel offence:

- an agreement;
- between two or more competitors;
- that restrains trade; and
- that affects either domestic (interstate) commerce or import commerce.

In the absence of an agreement, unilateral conduct does not violate section 1 of the Sherman Act (although it may violate section 2 and other laws).

An 'agreement' under the Sherman Act need not be a formal written document. Agreements may be formed informally, through emails, instant messages, orally or even with a 'telling nod or wink'. The DOJ's practice is to establish the existence of an agreement in criminal cases through direct evidence, reflecting the higher standard of proof that applies in the criminal context. The law, especially as it pertains to civil enforcement, is more lenient. To establish an agreement in civil cases where the evidence is circumstantial, the US Supreme Court has held that the evidence must tend 'to exclude the possibility of independent action' and establish that the defendants 'had a conscious commitment to a common scheme' (*Monsanto v Spray-Rite Service Corp*, 465 US 752, 768 (1984)). Proof that defendants engaged in parallel conduct is insufficient, standing alone, to evince a 'conscious commitment' (*In re Chocolate Confectionary Antitrust Litigation*, 801 F3d 383, 397-98 (3d Cir 2015)). Plaintiffs must also allege certain 'plus factors' to give rise to an inference of an agreement. Plus factors are 'proxies for direct evidence' because they tend to ensure that courts punish concerted actions as opposed to 'unilateral, independent' competitor conduct (*In re Flat Glass Antitrust Litigation*, 385 F3d 350, 360 (3d Cir 2004)). There is no definitive set of plus factors, although some decisions do contain lists of such factors (*Flat Glass* at 360). The most important plus factor is traditional, non-economic (non-expert) evidence of a conspiracy (*Flat Glass* at 361).

Information exchanges among competitors are not prosecuted criminally but may be challenged in civil court if the anticompetitive effect of the exchange outweighs its procompetitive benefits. That said, evidence that competitors exchanged competitively sensitive information may constitute circumstantial evidence of an underlying cartel. For this reason, competitors should exercise caution during business discussions not to discuss competitively sensitive topics such as pricing, production levels, capacity, margins and the status and details of customer negotiations or bids. The scope of information that is competitively significant varies by industry and companies should seek legal guidance about the scope of information that could give rise to antitrust liability if shared with a competitor.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures and other competitor collaborations may be subject to scrutiny under the antitrust laws just like any agreement among otherwise independent firms. To avoid per se treatment, courts have held that the economic resources of the parties must be integrated so that, effectively, the joint venture amounts to a single entity. It is not enough simply to characterise an agreement among competitors as a joint venture; courts have held joint venture agreements to be per se unlawful where the agreement was nothing more than a price-fixing device. By contrast, a joint venture agreement is not per se unlawful under section 1 if it 'holds the promise of increasing a firm's efficiency and enabling it to compete more effectively' (*CopperweldCorp v Independence Tube Corp*, 467 US 752, 768 (1984)). Importantly, not every joint venture agreement raises competitive issues (eg, if the participants are not competitors), and a legitimate collaboration can violate the antitrust laws.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

Both individuals and corporations (as well as partnerships and other business entities) are subject to the antitrust laws. Criminal enforcement actions may be brought against corporations and individuals. Civil enforcement actions (both government and private) typically are brought against corporations but may also be brought against individuals. Likewise, non-profit entities are subject to the antitrust laws.

Extraterritoriality

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The extraterritorial reach of the US antitrust laws is governed by the Foreign Trade Antitrust Improvements Act (FTAIA) (15 USC section 6a). The FTAIA establishes a two-pronged test for determining whether a defendant's foreign conduct falls within the scope of US antitrust laws. First, the threshold inquiry is whether the defendant's foreign conduct involves US 'import trade or import commerce'. If so, the conduct falls within the scope of US antitrust laws. The courts have strictly interpreted import commerce to capture only 'transactions in which a good or service is being sent directly into the United States, with no intermediate stops' (*Minn-Chem, Inc v Agrium, Inc*, 683 F3d 845, 854 (7th Cir 2012)). The Ninth Circuit has likewise interpreted import commerce to capture only 'transactions that are directly between the plaintiff purchasers and the defendant cartel members' (*US v Hsiung*, 778 F3d 738, 755 (9th Cir 2015)).

Alternatively, if the conduct does not involve 'import trade or import commerce', the defendant's foreign conduct falls outside the scope of US antitrust law unless it satisfies both prongs of the FTAIA's 'domestic effects' exception (ie, the foreign conduct has a 'direct, substantial, and reasonably foreseeable effect' on US domestic or import commerce, or on the export commerce of a US-based exporter, and that effect 'gives rise to' the plaintiff's claims (*F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 162 (2004); 15 USC section 6(a)).

The courts are split on the degree of 'directness' required to satisfy the domestic effects test. The Ninth Circuit has held that an effect is 'direct' only if it 'follows as an immediate consequence of [defendants'] activity' (*US v LSL Biotechnologies*, 379 F3d 672, 680 (9th Cir 2004)). Thus '[a]n effect cannot be "direct" where it depends … on uncertain intervening developments' (ibid at 681). The Second and Seventh Circuits and the Department of Justice have interpreted directness more broadly, applying a 'proximate cause' standard. See *Minn-Chem, Int v Agrium Inc*, 683 F3d 845, 859-61 (7th Cir 2012) (en banc); *Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816, 817-20 (7th Cir 2015); and *Lotes Co v Hon Hai Precision Indus Co*, 753 F3d 395, 410 (2d Cir 2014). While these standards are different, these differences may be of little practical distinction in most cases.

The courts have yet to define standards that would satisfy the 'substantiality prong' of the FTAIA. At least one court has remarked, however, that Congress intended to permit antitrust claims only where the alleged 'anticompetitive conduct has … a quantifiable effect on the US economy' (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F Supp 2d 953, 964 (NDCA 2011)). Finally, courts have held that plaintiffs must demonstrate that the requisite 'direct effect' on US commerce was 'foreseeable' to an objectively reasonable person making practical reasonable judgments (*Animal Science Products, Inc v China Minmetals Corp*, 654 F3d 462, 471 (3d Cir 2011)).

Civil plaintiffs must further establish, as an additional element of their Sherman Act the claim, that this 'direct, substantial and reasonably foreseeable' effect on US domestic commerce 'gave rise to' their claims (*Motorola Mobility v AU Optronics Corp*, 775 F3d 816, 818 (7th Cir 2015)). Moreover, because each sale to the plaintiff represents a 'separate accrual' of a claim, the 'give rise to' prong of the FTAIA must be satisfied for each transaction for which plaintiffs seek damages. In assessing whether a claim regarding a particular transaction satisfies the 'give rise to' prong of the FTAIA, courts have generally used a proximate cause standard.

Export cartels

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Under its current interpretation, the FTAIA limits the scope of Sherman Act claims to anticompetitive conduct that affects either import commerce or has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. Export cartels are thus beyond the scope of the Sherman Act.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are numerous statutory and judicially created exemptions and immunities from the antitrust laws. Congress has, to varying degrees, expressly exempted certain industry practices and activities from antitrust liability, usually in heavily regulated sectors such as the transport, healthcare, telecommunications, energy, insurance and financial industries. The McCarran-Ferguson Act (15 USC section 1011 et seq) is one example of such legislation, exempting state law-regulated insurance business that does not involve any agreement to 'boycott, coerce, or intimidate'. The courts have also created various industry-specific exemptions, including the well-known 'baseball exemption'.

Other exemptions and immunities apply more broadly but generally share the characteristic that they seek to avoid disruption of an existing regulatory scheme. The 'filed-rate doctrine' or '*Keogh* doctrine', for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161-65 (1922)). Similarly, the 'political question doctrine' removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Government-approved conduct

10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

A series of court decisions beginning with *Parker v Brown*, 317 US 341 (1943) have exempted state governments from antitrust liability for conduct that, if engaged in by a private actor, would certainly be considered anticompetitive. This 'state action doctrine', or '*Parker* doctrine', may also extend to private actors in certain limited circumstances, when their conduct is taken in furtherance of an express regulatory scheme under state policy and is subject to state supervision.

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Internationally, the 'foreign sovereign compulsion doctrine' may provide a defendant with antitrust immunity if it can establish that it was compelled to violate US antitrust law because it was impossible to comply with both US antitrust law and the law of a foreign jurisdiction simultaneously.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The existence of a cartel typically comes to light when a participant applies for leniency and provides evidence of criminal activity. Many leniency applications are now triggered as a result of corporate compliance programmes. Other common sources of information for the enforcement agencies include existing investigations or litigation in related industries, whistle-blowers, tips from customers or competitors, or even publicly available evidence of suspicious market behaviour. Evidence of cartel behaviour has also been uncovered during merger control investigations conducted under the Hart-Scott-Rodino Act.

In a criminal investigation, the Department of Justice (DOJ) presents evidence to a grand jury, whose purpose is to determine whether there exists sufficient evidence to indict the targeted company or individuals. An indictment is simply a finding of sufficient evidence to proceed to trial, not a finding of guilt. The bar the grand jury must meet to return an indictment is low and defence counsel is excluded from the grand jury process. The DOJ, therefore, generally will obtain any indictment it seeks from a grand jury. Defendants facing criminal antitrust charges have the right to a trial by jury, where the DOJ must prove guilt beyond a reasonable doubt.

The grand jury has broad investigatory powers that are separate from those of the DOJ. A grand jury may subpoena the production of documents and the testimony of witnesses. Witnesses may be served with a grand jury subpoena anywhere in the US (Fed R Crim P 17(e)). While witnesses have the right under the Fifth Amendment to the US Constitution to refuse to testify if their testimony would potentially incriminate them, the DOJ may compel testimony by granting the witnesses immunity, thereby removing the risk of self-incrimination.

Before the indictment, the DOJ will identify certain targets of the investigation, including corporations and individuals whom it considers to be potential defendants based on the existence of substantial evidence linking the target to the crime. Individual targets typically obtain individual outside counsel once they become aware of their status. Targets have the right to meet the DOJ to try to avoid indictment through a proffer of cooperation and testimony or by offering counterevidence of their own. Targets also have the right to testify on their own behalf before the grand jury, although in practice this is uncommon, given the exclusion of defence lawyers from the grand jury.

Civil investigations do not involve a grand jury. Instead of subpoenas, the federal or state enforcement agency will generally issue civil investigative demands (CIDs) to obtain documents or sworn written or oral testimony from targets of the investigation, as well as from third parties. The evidence resulting from CIDs may form the basis of a civil lawsuit in federal court (by the DOJ or Federal Trade Commission (FTC)) or an FTC administrative proceeding before an administrative law judge.

Cartel investigations, either civil or criminal, follow no set timeline and may linger for several years before proceeding to any enforcement action or termination.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The antitrust enforcement agencies have far-reaching, although not unlimited, investigative powers. The DOJ has at its disposal the broad investigative powers of the grand jury. Through a grand jury subpoena, testimony and documents may be obtained from witnesses throughout the United States. Also, upon a finding of probable cause by a federal judge, the DOJ may obtain warrants permitting it, through the Federal Bureau of Investigation, to search for and seize physical evidence located on private premises, including documents and electronic devices, or to place wiretaps allowing it to audit and record private phone calls between suspected cartel participants. Because much of the necessary evidence is in the possession of the cartel participants, the DOJ often grants immunity to key individual witnesses in exchange for cooperation and testimony.

In the case of witnesses located outside the United States, the agency may initiate a border watch. If an individual on a border-watch list voluntarily enters the United States, immigration and border control authorities may detain the individual and will automatically notify the DOJ. There is no requirement of a warrant or showing of probable cause to place an individual on a border-watch list, which is not public and not formally disclosed to defence counsel. If the individual enters the United States and is not detained, the DOJ's 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 are often unaware of their rights, making resisting the pressure exerted by the authorities in these situations difficult. There also exists the risk that physical evidence, such as documents and electronic devices, may become vulnerable to search or seizure at the US border, where border control authorities enjoy extensive investigative powers. Foreign companies under investigation by the DOJ, therefore, should carefully consider the circumstances under which executives may travel to the United States.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

US antitrust agencies routinely cooperate with their counterparts in the European Commission and elsewhere around the world. In its most visible form, this cooperation includes the coordinated raids of global cartel participants, but cooperation behind the scenes is increasingly

common. For example, under bilateral mutual legal assistance treaties (MLATs), US agencies share information with foreign counterparts. The United States has MLATs with approximately 80 jurisdictions that create a channel for the taking of testimony, the provision of documents or other physical evidence, and executing searches and seizures. Under these MLATs, investigators may exchange evidence, where possible under law, and theories of the case.

In addition to MLATs, the United States has entered into bilateral antitrust cooperation agreements (ACAs) and memoranda of understanding (MOUs), which are less formal than MLATs and do not generally bind the agencies to provide information or evidence but facilitate cooperation between the agencies. The United States has entered into ACAs with, among others, Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The Department of Justice (DOJ) and the Federal Trade Commission have bilateral MOUs with corresponding agencies in China, India and Russia, which serve a similar function to the ACAs.

The United States and the individual agencies participate in several organisations or international cooperative efforts whose aim is to increase and facilitate cooperation among antitrust authorities and to promote greater procedural and substantive convergence among the global antitrust regimes, including the International Competition Network, the Competition Committee of the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Because the DOJ's subpoena powers extend only as far as the US border, relationships with foreign enforcers are critical to its ability to collect evidence located overseas. Particularly in recent years, the DOJ has increased its scrutiny of foreign cartels, and frequently relies on information shared among international agencies in preparing to prosecute foreign defendants. This is particularly true for (but is not limited to) the jurisdictions with which the United States has entered into MLATS, ACAs or MOUs.

Where provided for by treaty, the DOJ may seek extradition of individuals from foreign jurisdictions. Extradition had been largely theoretical in antitrust cases because most treaties contain a dual criminality requirement, but the risk of extradition has increased over time as more jurisdictions around the world have criminalised cartel conduct. In 2014, the DOJ successfully extradited an Italian national from Germany on a charge of participating in a conspiracy to rig bids, fix prices and allocate market shares for sales of marine hose sold in the United States and elsewhere.

The DOJ may also place an individual target of a grand jury investigation on Interpol's red notice list. Where extradition is not possible, and those individuals decline to voluntarily surrender to US jurisdiction, listing on a red notice will expose the individual to detention and extradition at the borders of the 190 participating countries. Obtaining a red notice requires the issuance of a valid national arrest warrant, but not proof that the individual is guilty of any crime. There is no time limit on a red notice, so, in effect, listing on a red notice may indefinitely confine individuals to their home countries. Some commentators have criticised the DOJ's use of red notices as a violation of due-process rights because it amounts to the imposition of a sanction without a trial.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by courts of law. Criminal cases that proceed to trial are heard in federal court, where the defendant may demand trial by jury. Civil cases may also be heard in federal court, or, where the Federal Trade Commission is the enforcing agency, in administrative proceedings before an administrative law judge. Cases brought by state regulators under both federal law and state law may be heard in federal court, but purely state prosecutions are heard in state courts alone.

In practice, the vast majority of cartel prosecutions are resolved before trial by way of a plea agreement. In the civil context, nearly all litigations are resolved by way of a dispositive motion or by way of settlement.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

Criminal violations of the US antitrust laws must be proven beyond a reasonable doubt. Civil liability is established using the lower standard of preponderance of the evidence. The initial burden to prove guilt or liability always rests with the government or the plaintiff. Defendants have the burden to prove any affirmative defences only after this initial burden is satisfied.

Circumstantial evidence

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In the criminal context, the Department of Justice's practice is to establish the existence of an agreement through direct evidence. Federal law, however, does permit civil plaintiffs to use circumstantial evidence to establish the existence of an agreement.

Appeal process

18 | What is the appeal process?

Defendants have the right to appeal a guilty verdict in a criminal trial. Both plaintiffs and defendants have the right to appeal adverse rulings in civil cases. The government may not appeal an acquittal of a criminal defendant because of the constitutional prohibition of double jeopardy.

In the federal court system, a trial takes place at the district-court level. Appeals from the trial decision are taken to the federal circuit Court of Appeals for the geographic region in which the trial court sits. Appellate courts give great deference to trial courts' findings of fact, overturning them only when they are erroneous. Questions of law, by contrast, are reviewed de novo, meaning the appellate court considers the law as if for the first time. The right to appeal is generally lost unless timely asserted, and the windows in which appeals must be noticed are extremely short. For civil litigants, the deadline to appeal is usually 30 days from entry of the judgment or order appealed from; for criminal defendants, the deadline is 14 days from the date of entry of judgment, or from the filing of the government's notice of appeal, whichever is later (Fed R App P 4(a)(1)(A), 4(b)(1)(A)). From the circuit court, appeals are taken to the US Supreme Court. Supreme Court review is discretionary, and only a very small proportion of cases seeking review every year are ultimately heard.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

Both corporations and individual defendants face severe sanctions for cartel activity under the US antitrust laws, including high financial penalties and, for individuals, imprisonment. For corporations, the Sherman Act imposes a maximum fine of US$100 million per offence. For individuals, the maximum is US$1 million, plus up to 10 years imprisonment. There is no minimum fine for either corporations or individuals, nor is there a minimum prison term.

The US$100 million cap has been surpassed in practice, however. The Alternative Sentencing Act (18 USC section 3571) may permit penalties to exceed the statutory maximum. A defendant may be fined up to twice its gross pecuniary gain from the criminal conduct, or twice the victim's gross pecuniary loss. At least one federal district court has held that if a fine above the US$100 million cap is sought, the government must prove the pecuniary gain or loss beyond a reasonable doubt (*US v AU Optronics Corp*, No. C 09-00110 SI, 2011 WL 2837418, at *4 (NDCA 18 July 2011)). In that case, the judge imposed a fine of US$500 million. Total annual criminal penalties exceeded US$1 billion for four years in a row, from 2012 to 2015, and topped US$3.6 billion in 2015 alone. These levels then dropped sharply in 2016 to US$399 million, largely because of the conclusion of several major investigations during the prior year.

Prison sentences for individuals do not in practice approach the statutory maximum of 10 years. Few individuals take the risk of a criminal trial, preferring to accept a reduced sentence in exchange for a guilty plea and a cooperation commitment. Prison sentences averaged 22 months between 2010 and 2016.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The Department of Justice (DOJ) may seek equitable injunctive remedies for cartel activity via civil actions (15 USC section 4) but has no power to seek civil fines. The DOJ may, however, seek civil damages in cases in which the US government is a victim of the conduct under section 4A of the Clayton Act. The DOJ's actions rarely proceed to trial and are commonly resolved by consent decrees usually requiring the defendant to cease the problematic conduct or impose other internal changes in response to the government's concerns. The Federal Trade Commission is similarly limited to equitable remedies like injunctive relief.

Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Federal Sentencing Guidelines (the Guidelines) apply to both individual and corporate violators of the antitrust laws. The Guidelines are not binding on federal judges (*US v Booker*, 543 US 220, 226-27 (2005)), although 'respectful consideration' to the Guidelines must still be given (*Pepper v US*, 562 US 476, 490 (2011)). The full text of the Guidelines is available online from the US Sentencing Commission's website.

In recommending the appropriate prison sentence for an individual defendant, the Guidelines assign a 'base offence level' to a crime. For antitrust violations, the base offence level is 12, which results in a starting range of 10 to 16 months' imprisonment. The Guidelines further recommend increases to the base offence level when the specific antitrust offence is bid rigging, or when the affected volume of commerce exceeds certain thresholds starting at US$1 million. The judge may then consider aggravating or mitigating factors in adjusting the time up or down, such as whether the individual abused a position of trust, or participated in the obstruction of justice (Guidelines, sections 3B1 and 3C1). Concerning individual criminal fines, the Guidelines suggest beginning amounts corresponding to 1 to 5 per cent of the affected volume of commerce but no less than US$20,000. The judge may then consider aggravating or mitigating factors in setting the fine, considering the extent of the defendant's participation in the cartel and the role he or she played, and whether and to what extent the defendant personally profited from the scheme, including through bonuses, promotions, or other career enhancements. Individuals who cannot pay the fine are sentenced to community service, which the Guidelines recommend should be 'equally as burdensome as a fine' (Guidelines, section 2R1.1, application note 2).

For convicted corporations, the Guidelines recommend a 'base fine' equal to 20 per cent of the affected volume of commerce. This 'base fine' is then multiplied according to a 'culpability score', which is calculated based on factors including the firm's previous criminal history, whether the firm tolerated the activity, whether it has or will implement antitrust compliance programmes or policies, evidence of obstruction of justice, and self-reporting. The minimum multiplier is 0.75, but the final fine is usually the result of extensive negotiation as part of the plea-bargaining process.

Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

In July 2019, the DOJ updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations to credit companies with effective compliance programmes. Specifically, the DOJ states that having an effective compliance programme can result in the DOJ recommending a fine reduction to the sentencing judge. The recommended fine may be within the range provided by the Guidelines or may be a downward departure from the Guidelines. The DOJ does not have a formula for determining what reduction, if any, it will recommend.

Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

The US antitrust laws do not subject individuals charged with or convicted of antitrust violations to orders prohibiting them from serving as corporate directors or officers. The Securities and Exchange Commission's regulations, however, do provide for disqualification of, among others, corporate directors or officers upon conviction of any felony or misdemeanour in connection with the purchase or sale of any security, which may be read to include antitrust violations tied to the purchase or sale of securities (Rule 262(a)(1), Rule 503(a)(1) of Regulation CF and Rule 506(d)(1) (i)). Equally significantly, in selecting directors and senior-level officers, corporations generally look for candidates with a strength of character, inquiring minds and a reputation for good judgment and wisdom. It is difficult to conceive of how a corporation could continue to rely on a director or officer who is subject to an order in a cartel case – that is, someone who had participated in cartel activities and either been convicted or is a cooperating witness – without exposing the corporation to liability or increased criticism from activist investors or corporate gadflies.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment of federal contractors from government procurement procedures is available as a discretionary sanction in response to cartel infringements. The Federal Acquisition Regulation System governs the process through which government agencies procure goods and services. The agency head or his or her designee may determine whether to debar a contractor convicted of a violation of federal or state antitrust laws relating to the submission of offers (48 CFR section 9.406-1, -2). Contractors that have been found liable in a civil enforcement proceeding may also be debarred. Whether to impose the sanction and for how long requires the debarring official to consider both aggravating and mitigating factors, but the length of debarment usually should not exceed three years (48 CFR section 9.406-4). Suspension from government contracts is also available as a sanction before conviction or civil judgment. A contractor may be suspended for the duration of an investigation and any associated legal proceedings on suspicion of or indictment for antitrust violations unless proceedings have not been initiated after 18 months.

Unless they have previously been convicted, contractors must receive notice and an opportunity to be heard before being debarred. Suspension requires notice but may be imposed before being heard (48 CFR section 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 (48 CFR section sections 9.406-5, 9.407-5).

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The DOJ does not pursue the same defendant for the same conduct in both criminal and civil proceedings. Proof of a criminal violation requires knowledge and intent. Where such evidence is weak, the DOJ may choose not to prosecute criminally. That decision can be made before or during an investigation. Likewise, where a case presents novel issues of law or fact, the DOJ may opt instead to pursue civil remedies (Antitrust Division Manual at III–12).

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Direct purchasers are preferred plaintiffs under the antitrust laws and federal precedent. The Supreme Court's holding in *Illinois Brick Co v Illinois*, 431 US 720 (1977) bars indirect purchasers from asserting federal antitrust claims based on claims that direct purchasers 'passed on' the overcharge. Many states, however, have enacted 'Illinois Brick repealer statutes', to provide standing for indirect purchasers to bring claims under state antitrust and unfair competition laws. The Supreme Court further limited the standing of indirect purchasers to assert antitrust claims in *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519 (1983) (*AGC*). In *AGC*, the court established a balancing test to determine the standing; namely:

- the directness of the plaintiff's injury;
- the existence of more direct victims of the antitrust violation;
- the potential for duplicative recovery; and
- the likelihood that apportionment of damages would be overly complex or speculative.

Purchasers that acquired the affected product from competitors of the cartel members who are not themselves members of the cartel do not have the standing to seek damages from cartel members on the theory that it was the cartel members' conduct that allowed the non-cartel competitors to take advantage of the increased prices (an 'umbrella damages' theory).

As a practical matter, state-law claims brought as class actions will be consolidated into the federal multi-district litigation under the Class Action Fairness Act of 2005.

Section 4 of the Clayton Act provides for a private right of action to enforce section 1 of the Sherman Act. The Clayton Act entitles successful antitrust plaintiffs to treble damages, calculated based on the amount of overcharge the plaintiff paid as a result of the cartel activity, and also to compensate for their attorneys' fees and associated costs of litigation. Defendants in private civil suits face joint and several liability, meaning that a single defendant could find itself responsible for the total damages for the entire cartel, trebled, plus attorneys' fees and costs. While damage claims and even awards against defendants may be enormous, particularly in the context of class actions, no individual plaintiff may recover more than its actual damages, trebled. Civil trials are rare and settlements are common because of the *in terrorem* effect that results from the prospect of treble damages and joint and several liability. Recent class-action settlements routinely exceed US$100 million. The largest antitrust settlement in history, in the *Visa-Mastercard Antitrust Litigation*, was US$27 billion.

The Clayton Act does not provide a remedy for successful defendants to recover their costs of litigation.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Most private civil antitrust lawsuits are brought as class actions under rule 23 of the Federal Rules of Civil Procedure. In a class action, a representative plaintiff or group of plaintiffs sues on behalf of all similarly situated plaintiffs. Classes and subclasses of plaintiffs may be defined based on geographic location, product purchased or characteristics of the plaintiffs themselves. The class format allows for enormous efficiencies for plaintiffs, enabling them to establish liability for the entire class at once, to avoid inconsistent findings of fact or adjudications of law, and to define a clear process for establishing damages for each plaintiff. Where individual damages are small and not worth the cost of litigation, the efficiencies of the class format allow victims of cartel behaviour the possibility of recovery when it would otherwise have been infeasible.

Rule 23 sets forth the standards for courts to assess whether a claim may be adjudicated on a class-wide basis. To qualify for class treatment, plaintiffs must plead and prove the following rule 23 factors:

- numerosity (that the class is so numerous that joinder of every individual plaintiff is impracticable);
- commonality (that there are questions of law or fact common to the class);
- typicality (that the claims or defences of the class representatives are typical of the class); and

- adequacy of representation (that the class representatives will adequately represent the interests of the class).

Also, plaintiffs must prove that common questions of law and fact will predominate over any individual questions and that the class action device is a superior method for adjudicating the dispute. In many 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 and factual evidence gleaned from discovery, often resulting in multi-day evidentiary hearings. See *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3d Cir 2008).

Participation in the class is not compulsory. Certain putative class members may elect to opt out and pursue their own claims parallel to the class, usually cooperating with class counsel on certain discovery or drafting efforts that jointly benefit them, but with the power to diverge from the class in issues of strategy, discovery, other litigation processes and settlement. Such opt-out plaintiffs are usually corporations or individuals with large damages, who do not wish to defer to or be bound by decisions or settlements made by class counsel on behalf of the rest of the class.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Individuals and corporations may apply for leniency through the Department of Justice's (DOJ) leniency programme. If the application is granted, the applicant receives full immunity from criminal prosecution. Applicants that satisfy the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub L No. 108-237, 118 Stat. 661 (22 June 2004), may also become eligible for benefits in private civil cases, including a reduction from treble to single damages, and the elimination of joint and several liability. The requirements under ACPERA include cooperation with plaintiffs in civil actions. In October 2020, ACPERA's sunset provision was repealed and the act was reauthorised and signed into law.

To obtain leniency, an applicant must ordinarily be the first to report illegal activity to the government, before the commencement of an investigation (Type A leniency). This 'first in' requirement is true for both individuals and corporations. The applicant must not have been the ringleader of the cartel, must have promptly and effectively terminated its participation in the cartel, must fully disclose all relevant facts regarding the illegal activity and fully cooperate with the government investigation, and must make restitution to victims. Further, the DOJ must determine that granting leniency would not be unfair to others. Even if an investigation has already begun, obtaining leniency may still be possible for a first-in applicant as long as all other requirements are met and the DOJ does not already have evidence that warrants a conviction (Type B leniency).

For individual applicants who do not meet all the requirements, leniency may still be possible at the discretion of the DOJ, but it is usually more limited.

Further details about the DOJ's leniency programme may be found on the DOJ's website.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Formal leniency is available only to the first-in applicant, and no formal leniency programme exists for cooperating parties who are not the leniency applicant. Under Federal Sentencing Guidelines (the Guidelines), however, cooperation is a mitigating factor that judges may consider in sentencing. Similarly, the DOJ has the discretion to treat cooperating parties with greater leniency during an investigation or the plea-bargaining process.

The DOJ also has the discretion to enter into non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). In practice, NPAs and DPAs are rarely used in the cartel context because of the existence of the DOJ's leniency programme. In rare instances, however, applicants who were not 'first in' for leniency have received DPAs as a reward for their efforts in cooperating with the DOJ's investigation. NPAs remain a disfavoured approach for all but the 'first in' applicant; however, the DOJ recently updated their policies to allow prosecutors to grant DPAs (although not NPAs) to cooperating companies with effective compliance programmes (consistent with the DOJ's guidance on compliance programmes) in place. A compliance programme in and of itself does not guarantee a DPA, but an effective compliance programme will be taken into account when choosing whether to grant a DPA. NPAs and DPAs are more commonly granted to individuals who cooperate with the government's investigation, rather than corporations.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

To receive amnesty under the DOJ's leniency programme, the applicant must be the first to file. There is no formal leniency available for subsequent cooperating parties.

There is no significance to being 'second in', although, generally, the earlier a company begins cooperating with the government the greater the potential it has to receive a downward departure from the fine recommended under the Guidelines.

The DOJ's 'amnesty plus' programme is designed to create an incentive for later-cooperating parties to confess wrongful conduct outside the scope of the existing investigation. Under amnesty plus, if a later-cooperating party applies for leniency for one or more other cartels, that party, in addition to receiving full leniency for those separate cartel violations, would receive a considerable discount on any criminal fine assessed concerning the initial cartel violation. This contrasts with the DOJ's 'penalty plus' policy, under which the government will seek fines and prison sentences at the upper end of the range recommended by the Guidelines if a company was aware of additional antitrust violations but chose not to report them.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

To preserve its position as the first filer, a company that finds evidence of criminal cartel behaviour should contact the DOJ as quickly as possible to obtain a marker. The marker is then valid for a certain time (often 30 days, although this may be extended or shortened on a

case-by-case basis) to allow the company to perfect its application. This process usually involves a rapid and comprehensive internal investigation, involving document collection and review and witness interviews.

The decision of whether to seek amnesty is highly fact- and company-specific. If the evidence of criminal activity is unambiguous and the company is prepared to devote the considerable human and financial resources demanded of an amnesty applicant as part of its obligation to cooperate fully, seeking amnesty quickly may be advisable. If the evidence is ambiguous or weak, or the company judges that the risks and burdens of cooperation outweigh the potential benefits, amnesty may not be the company's strongest option. Given the government's high burden to prove criminal liability beyond a reasonable doubt, if strong defences (eg, jurisdictional or statute of limitations defences) exist, the better option may be to put the government to its proof.

If amnesty is unavailable, the company may face the decision whether to plead guilty or to take its risks at trial. As with the decision whether to seek amnesty, the decision whether to plead is highly defendant- and situation-specific, requiring consideration of the strength of the evidence, the strength of any available defences, and the risks associated with accepting a plea, which could expose the defendant to liability in follow-on civil cases.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Leniency recipients must cooperate fully and transparently with the DOJ's investigation in exchange for complete immunity. Also, if a leniency recipient satisfies the ACPERA requirements (including cooperation with the civil plaintiffs), it may be eligible for reduced civil damages (single, rather than treble), and may avoid joint and several liability.

There are no formal requirements defining the level of cooperation expected of subsequent cooperating parties. Ordinarily, the DOJ will request desired documents or access to witnesses, and then the party's response will be the product of negotiation. If a party pleads guilty in exchange for a reduced sentence, cooperation requirements are usually outlined in the plea agreement.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The DOJ must keep confidential the identity of the applicant, the fact it has been granted amnesty, and the substance of any negotiations with the applicant or subsequent cooperating parties. Depending on the nature of the cartel and the parties involved, however, the identity of the leniency applicant often does not remain a secret, at least among the other defendants. Plea agreements, by contrast, and the cooperation provisions contained within them, are made public.

In the related civil litigation, both the fact of amnesty and the ordinary-course materials produced by the recipient may become discoverable. Parties usually negotiate strict protective orders limiting the use of such materials to the litigation and designate documents with varying levels of confidentiality restrictions during discovery. If the case goes to trial, the confidentiality of these materials will be determined on a document-by-document basis, although given the public interest in the adjudicative process, it is often impossible to prevent disclosure of all documents. Trials are typically open to the public.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Most criminal cartel prosecutions are resolved via plea agreement rather than at trial. The parties typically negotiate the scope of the defendant's agreement, often using the Guidelines as a starting point for negotiations. The negotiated agreement must be presented to the court for approval. Judges have the discretion to approve or modify such proposed agreements but usually defer to the DOJ's recommendation.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a corporate defendant receives immunity under the DOJ's leniency programme, current employees, officers and directors will also receive immunity if they admit any wrongdoing and continue to assist the government's investigation. The DOJ also has the discretion to include specifically named former employees, officers and directors in the grant of immunity.

Where a company agrees to a plea bargain, its directors, officers and employees will similarly receive immunity from future prosecution, save for those who have been carved out of the plea. The DOJ's practice is to carve out several targets of the investigation who may be indicted for wrongful conduct associated with the violations outlined in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, although not always, higher-ranking executives who held pricing authority and actively promoted the cartel activity, whose prosecutions may serve as a warning to others. The DOJ may also choose to carve out individuals who attended cartel meetings and entered into the agreements on behalf of the company, against whom the documentary evidence is often the strongest. The DOJ generally seeks to prosecute individuals who were in a position to stop the illegal conduct, both because of their knowledge of the cartel and their position of authority. In the past year, the DOJ has indicted two CEOs in connection with its cartel enforcement activities.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The process of applying for leniency, once the decision is made to do so, moves extremely quickly. Typically, the application begins with a phone call by counsel to the DOJ, to establish the applicant's marker as the first to file. Usually, some information regarding the nature of the illegal conduct and the evidence supporting it must be shared at this time, but merely putting in the marker does not require disclosure of full details of the scope of the cartel and the applicant's involvement. If the agency accepts the marker, the applicant must move rapidly through an internal investigation, including collection and review of documents and witness interviews, to prepare a formal proffer of evidence to the DOJ establishing that the company satisfies the requirements to obtain leniency.

Successful applicants will receive a conditional letter of amnesty, setting forth the requirements of cooperation by which the company must abide to maintain its immunity. Compliance with these requirements is strict and inflexible, necessitating complete transparency with the agency and the immediate and full disclosure of all evidence of illegal cartel activity. Failure to comply may result in the loss of immunity.

In all dealings with the enforcement agencies, complete candour and truthfulness are essential. Immunity will not be granted for illegal activity that is not disclosed. Equally important is to prevent obstruction of justice in the form of intentional or even careless destruction of documents or other evidence. Penalties for obstruction of justice are severe, sometimes exceeding those of the underlying crime itself, and may be pursued independent of or parallel to penalties for the initial antitrust violation.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

The enforcement authority is required to disclose evidence or information favourable to a criminal defendant, including evidence that would tend to prove innocence, permit impeachment of government witnesses, or mitigating evidence that would tend to reduce a criminal sentence (*Brady v Maryland*, 373 US 83, 87-88 (1963)). Generally, the Department of Justice (DOJ) provides defendants with the majority of its investigative materials anyway. Under certain circumstances, the government must also disclose any statements of its witnesses that relate to the subject matter on which the witness testified (Jencks Act, 18 USC section 3500).

Representing employees

38 May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

If there is no conflict or potential conflict of interest, counsel may simultaneously represent both a corporation and its employees that are under investigation. During a government investigation, however, conflicts may arise that necessitate obtaining separate counsel for the individuals. This can occur when the DOJ identifies an individual as a target of the investigation, and the individual's interests and the company's interests diverge, each potentially having an incentive to place responsibility for the illegal activity on the other. It may also occur during the company's internal investigation or preparations for litigation when previously unknown evidence of the individual's illegal activity emerges. The existence of conflicts is not unusual, and must continually be assessed on a case-by-case basis throughout the investigation. Occasionally, the DOJ will demand that an individual be provided separate counsel, either because a genuine conflict exists or as a strategic move to try to obtain greater cooperation from the individual. There may also be reasons apart from conflicts of interest in which it may be advisable to obtain separate counsel for an individual, especially if that person expresses that this is his or her desire. Ultimately, the decision whether separate counsel is necessary belongs to the lawyer and the clients, not the DOJ.

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Multiple corporate defendants

39 May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is generally inadvisable for the same counsel to represent multiple corporate defendants in a single civil case when those defendants are not part of a single corporate family. While it is common for counsel to represent both a parent and subsidiary company in single litigation, because generally, these entities share a unity of interest, such unity is far murkier or non-existent in the case of unaffiliated cartel participants. In practice, these joint representations rarely occur. In the criminal context, joint representations may not satisfy the defendant's Sixth Amendment right to effective assistance of counsel. Different lawyers or teams of lawyers within a firm may sometimes represent different defendants in the same matter with appropriate disclosure and waivers.

Payment of penalties and legal costs

40 May a corporation pay the legal penalties imposed on its employees and their legal costs?

Legal penalties and legal costs are treated differently for indemnification purposes. It is not permissible for a corporation prospectively to agree to indemnify an employee for future illegal activity. In some cases, however, indemnification for past criminal activity has been allowed. It is permissible for a company prospectively to agree to indemnify an employee for legal defence costs. Most company by-laws permit such indemnification.

Taxes

41 Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Punitive payments to governments or their agencies or instrumentalities for violations of law, including fines and penalties, are generally not tax-deductible. These include payments settling potential liability for fines or penalties, or amounts forfeited as collateral posted in connection with proceedings where fines or penalties are possible. Compensatory damages paid to a government or government agency or instrumentality are usually not considered to be a fine or penalty.

Private damages awards or settlements may be considered business expenses under the tax laws – and therefore may be deductible, to an extent. It may also be possible to structure settlements in ways that maximise the ability of the payer to deduct or minimise the tax obligation incurred by the recipient. Understanding the tax implications of any penalty, settlement, compensatory damages award or other such payment will require the advice of a tax specialist.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The DOJ does not recognise a principle of international double jeopardy, meaning that it does not consider the fact that another jurisdiction may have prosecuted a defendant for a crime as a bar to US enforcement. Generally speaking, however, the DOJ does in certain circumstances consider the enforcement actions taken by other jurisdictions in recommending fines or other sanctions. For example, the DOJ has recommended in some plea agreements that time served in the foreign jurisdiction be counted as time served toward a defendant's US sentence.

In civil cases, double recovery by a plaintiff is generally not permitted, and private damage awards will be reduced by amounts a plaintiff receives from other parties, including amounts paid in settlements. The principle of collateral estoppel may also bar a plaintiff from maintaining a claim in the United States against a defendant against whom it obtained a judgment on the same facts in a foreign jurisdiction.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

Approaches for reducing fines vary from case to case and party to party. Until recently, the DOJ did not typically consider the presence of a pre-existing compliance programme to be a strong mitigating factor that would merit a significantly reduced fine. However, in July 2019, the DOJ updated its 'Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations' to credit companies with effective compliance programmes. In addition to allowing for reduced sentencing, an effective compliance programme can lead to a significantly reduced fine. Compliance initiatives that a company takes after an investigation commences may contribute to lowered fines, but this is one factor among many, several of which are beyond the control of the defendant once the investigation has begun, such as the nature of the past criminal conduct itself or the volume of commerce affected. One of the meaningful ways a defendant may be able to reduce the fine is through early cooperation, although that decision may not always be advisable for all defendants. Adopting an effective compliance programme is the surest method to uncovering cartel activity in real time, which can put the company in a position to apply first for leniency.

Generally, however, because fines are set through settlement negotiations, the best way to secure a lower fine is to negotiate from a position of strength. This requires the development of a robust defence from the outset, preserving the company's right to contest the government's case at trial, while at the same time looking for opportunities to cooperate proactively with the government in exchange for a reduced fine.

UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

In *AMG Capital Management v Federal Trade Commission* the Supreme Court unanimously held that the Federal Trade Commission is not authorised to seek monetary relief (disgorgement) to secure restitution under section 13(b) of the Federal Trade Commission Act. While section 13(b) authorises the Federal Trade Commission (FTC) to seek temporary and permanent 'injunctions' against practices, the court found that section 13(b) did not authorise the FTC to seek disgorgement (despite the FTC's longstanding practice of doing so).

In *United States of America, et al v Google LLC* the Department of Justice and the attorneys general of several states have filed antitrust claims against Google alleging that Google illegally maintained a monopoly over the markets for internet search and search advertising through exclusive contracts with wireless carriers, manufacturers of mobile devices and mobile software developers.

In *In re Packaged Seafood Antitrust Litigation* the United States Court of Appeals for the Ninth Circuit decertified classes of seafood purchasers pursuing antitrust conspiracy claims against large seafood manufacturers. The court held that the lower court failed to determine whether the statistical model relied on by the plaintiffs to show class-wide impact included a substantial number of uninjured class members and that, if the model did include a substantial number of uninjured class members, plaintiffs could not demonstrate the 'predominance' required to proceed as a class action.

Regime reviews and modifications

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Not applicable.

Vietnam

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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. A number of provisions of the legislation are guided by Decree 35/2020/ND–CP (the Guiding Decree), which provides for, among other matters, guidance on the substantial lessening of competition test (including safe harbours) and the competition proceedings.

Competition-related provisions and industry-specific infringements and exemptions can also be found in specialised instruments such as the Insurance Business Law 2000, the Telecommunications Law 2009 and the Law on Credit Institutions 2010.

The Penal Code 2015 (as amended) is the sole legislation governing criminal cartel offences.

Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The National Competition Commission (NCC) is Vietnam's principal competition watchdog. Under the purview of the Ministry of Industry and Trade, the NCC amalgamates the investigative and adjudicative functions formerly discharged by the Vietnam Competition and Consumer Authority (VCCA) and Vietnam Competition Council respectively. The NCC is in charge of administrative competition violations.

Criminal competition violations are investigated by the police, prosecuted by the procuracy (ie, public prosecutors) and adjudicated by the courts. There is no separate investigative body, tribunal or court dealing with criminal competition violations.

Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

The most significant change to date is the Competition Law 2018, which introduces, among other things, a shift in regulatory approach from form-based to effect-based (ie, cartel violation is now assessed on the basis of its impact on competition rather than whether it falls within a statutorily prescribed list of prohibited conducts), a leniency policy, the NCC and a new merger control regime.

A decree providing for the formal establishment of the NCC is expected to promulgate later in 2021, although the exact date has not been publicly disclosed.

The Penal Code 2015 (as amended), which came into force on 1 January 2018, is another noteworthy development because for the first time it criminalises certain cartels and imposes criminal liabilities on commercial entities.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

The Competition Law 2018 provides for a non-exhaustive list of restrictive agreements, some of which are illegal per se and some subject to the substantial lessening of competition test (articles 11 and 12 respectively).

Accordingly, the following behaviour is strictly prohibited among horizontal and vertical cartels:

- bid rigging;
- restriction of non-cartel participants' market access or business development; and
- removal of non-cartel participants from the market.

The following behaviour is strictly prohibited among horizontal cartels and conditionally prohibited (ie, are only prohibited if they actually or potentially restrict competition) among vertical cartels:

- price fixing;
- allocating market share or customers; and
- restricting output.

The following behaviour is conditionally prohibited among horizontal and vertical cartels:

- restrictions on research and development;
- agreements to impose certain contractual conditions on other businesses or forcing other businesses to accept obligations not directly related to the subject matter of the contract;
- agreements on refusal to deal;
- agreements to limit the upstream or downstream markets; and
- other restrictive agreements.

'Restrictive agreement' is defined as an agreement in any form which has or is capable of having a competition-restraining effect. As such, informal exchanges such as instant messages or verbal conversations can also be considered an agreement. Furthermore, information exchange is also forbidden if it enables undertakings to engage in anticompetitive conducts. The NCC may in practice rely on such form of agreement and other circumstantial evidence to ascertain a cartel violation.

As for conditionally prohibited cartels, the NCC will assess whether they cause or are capable of causing a significant competition-restraining impact on the basis of the factors stipulated in article 13.1 of the Competition Law 2018 and elaborated in article 11.2 of the Guiding Decree, namely:

- the individual and combined market share of the cartel participants;
- market barriers;
- restrictive impact on R&D or technological advance;
- impact on access to essential infrastructure;
- any increase in purchase price or switching costs; and
- any control over sector-specific essentials.

Article 11.3 of the Guiding Decree provides for safe harbours on the basis of the market share of the involved undertakings. Accordingly, conditionally prohibited horizontal cartels will not be deemed to have an actual or potential competition-restraining impact if the combined market share of the participants is less than 5 per cent. For vertical cartels, the threshold is if the individual market share of each cartel participant is less than 15 per cent.

The Competition Law 2018 also provides for exemptions in certain cases. In particular, except for bid rigging and the restrictive agreements on the removal of non-participants from the market or on the restriction of non-participants' market access or business development, illegal cartels are eligible for exemption for a maximum of five years if they are beneficial to consumers and satisfy one of the conditions provided in article 14.1 of the Competition Law 2018.

Furthermore, as from 1 January 2018, under article 217 of the Penal Code 2015, the following cartels are criminally prosecutable if they generate an illegal gain of at least 500 million Vietnamese dong or cause another undertaking a loss of at least 1 billion dong:

- restriction of non-participants' market access or business development;
- removal of non-participants from the market; and
- the following horizontal cartels where the parties' combined market share totals at least 30 per cent:
  - price fixing;
  - allocation of market or customers;
  - output restriction;
  - R&D restriction;
  - agreements to impose certain contractual conditions on other businesses; or
  - forcing other businesses to accept obligations not directly related to the subject matter of the contract.

Bid rigging is prosecutable under a separate provision (article 222 of Penal Code 2015) and only individuals can be held criminally liable.

Joint ventures and strategic alliances

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Restrictive agreements are broadly defined and include an agreement of any kind that has an actual or potential substantial competition-lessening impact. As such, joint ventures and strategic alliances may be caught by the Vietnamese cartel regime.

However, it is noteworthy that under Vietnamese competition law a joint venture that results in the creation of a new independent legal entity is deemed an economic concentration and thus will not be subject to cartel laws.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

6 Does the law apply to individuals, corporations and other entities?

The Competition Law 2018 applies to 'undertakings', which is defined as organisations and sole proprietorships conducting business activities, and include, among other things, public service companies and foreign businesses operating in Vietnam. When a person acting on behalf, at the direction or with the approval 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?

Export cartels that only affect foreign markets are not subject to the Competition Law 2018 because the legislation only applies to cartels that cause or are capable of causing a restrictive impact on the Vietnamese market.

Industry-specific provisions

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Several industry-specific legislations, mainly in the banking and insurance sectors, do provide for industry-specific infringements and exemptions. Article 14.2 of the Competition Law 2018 also recognises that industry-specific agreements are to be conducted in accordance with the relevant industry-specific legislation.

In particular, article 9.2 of the Law on Credit Institutions 2010 (as amended) prohibits anticompetitive conducts that are actually or potentially harmful to national monetary policies, the safety of the credit institution system, national interests or the lawful rights and interests of others. Horizontal and vertical cartels on market division and foreclosure are illegal per se under article 10.4 of the Insurance Business Law 2000 (as amended). Article 10.1 of the same, however, provides for exemptions for insurers and insurance brokers with respect to, among other things, reinsurance, co-insurance, loss assessment and information exchange for risk management.

Government-approved conduct

10 Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

According to article 8.1(a) of the Competition Law 2018, government-sanctioned or government-mandated actions are exempted from cartel regulation in declared states of emergency. It follows that during a declared emergency crisis cartels are permitted if approved by, or formed at the request of, the competent authority.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

A National Competition Commission (NCC) investigation can be initiated by whistle-blowers (via the leniency programme), formal complaints from aggrieved parties, or information from third parties on the potential existence of a restrictive agreement.

In the event that a party lodges a formal complaint, the NCC has seven working days from receipt of the complaint to assess its validity and completeness before notifying the complainant and defendant. Then within 15 calendar days of such notification, the NCC will assess the substantive content of the complaint to either formally launch an investigation or request the complainant to supplement further information.

Alternatively, the NCC can at its own initiative commence a competition probe within three years of the date on which the alleged cartel activity started if there are probable grounds to believe a cartel violation has been committed.

The time limit for investigation is nine months for a typical cartel and one year for a complex case. During the course of the investigation, if there are indications of a criminal offence then the NCC shall transfer the file to the competent authorities.

Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

The NCC is empowered to request information on the violation from relevant parties, collect information and conduct 'investigative measures' via its subordinate the Competition Investigation Agency, and request other competent authorities to temporarily seize evidence, facilities used to commit the violation, licences or practising certificates, search vehicles, objects or premises.

Neither the Competition Law 2018 nor the Guiding Decree elaborates on the meaning of 'investigative measures'. It is also understood that the Competition Investigation Agency may also cooperate with other competent authorities to conduct a dawn raid on suspected undertakings, although in practice the agency has never done so. Note that court orders are not required to invoke these investigative actions and interim measures.

INTERNATIONAL COOPERATION

Inter-agency cooperation

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Vietnam Competition and Consumer Authority (VCCA) has engaged in various multilateral and bilateral cooperation programmes with international organisations and national competition watchdogs, ranging from International Competition Network, UNCTAD, to OECD and Japan Fair Trade Commission. For the time being, these programmes mainly focus on competition policy-making and enforcement experience.

Given the Competition Law 2018's widened scope of application to cover extraterritorial conduct, the National Competition Commission (NCC) is expected to continue and reinforce cooperation on areas such as consultation and information exchange with its overseas counterparts to detect, investigate and prosecute any potential cross-border infringements.

Most recently, VCCA officials attended the virtual 16th East Asia Top Level Officials' Meeting on Competition Policy and 13th East Asia Conference on Competition Law and Policy in September 2021.

In 2020, the VCCA also chaired the ASEAN Experts Group on Competition and coordinated with overseas agencies and organisations, such as the Japan Fair Trade Commission, German Corporation for International Cooperation GmbH, the Australian Embassy and the Australian Competition and Consumers Commission (ACCC), in various projects aimed at enhancing antitrust enforcement and promoting consumer welfare.

Interplay between jurisdictions

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The authors have not observed any significant interplay with other jurisdictions in cross-border cases to date. Whether and to what extent interplay between jurisdictions affects the investigation remain to be seen.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Once the investigation is concluded, the National Competition Commission (NCC) chairperson must establish a council comprising of NCC members to decide on the case. The council may request the investigating body (ie, the Competition Investigation Agency) to conduct additional investigation for a maximum of 60 calendar days if the evidence is found insufficient to ascertain a cartel violation, or hold an investigative hearing if there is sufficient evidence; the hearing must be conducted in public unless the case involves sensitive matters such as state secrets or trade secrets. Within 60 calendar days of its establishment or receipt of the investigative report and conclusions on additional investigation, the council must decide whether to impose sanctions on and, where necessary, apply remedies to the parties concerned. This decision will be published on the NCC's website for 90 consecutive days from its effective date.

Burden of proof

16 | Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the NCC in administrative cases, or public prosecutors if the case is criminally prosecuted. If the offence is established, the onus will shift to the defendant to form a defence. The burden also falls on the undertaking seeking exemption under article 14 of the Competition Law 2018 to satisfy the provision.

Where the NCC has issued a decision on a competition case, the aggrieved party seeking to claim damages must establish that they in fact incurred a loss or damage and such loss or damage was caused by the illegal cartel activity. In the absence of such decision by the NCC, in addition to proving losses and causation, the claimant must also prove that the defendant engaged in an illegal cartel activity.

In respect of civil enforcement, the standard of proof is essentially 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

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Given that direct evidence is not always available, especially when it comes to cartel activities, circumstantial evidence is usually acceptable to initiate an investigation into complaints by aggrieved parties or whistle-blowers. However, circumstantial evidence alone may not be sufficient to establish an offence in a criminal proceeding or to conclude that there exists an anticompetitive agreement prohibited by laws.

Appeal process

18 | What is the appeal process?

A party may appeal against a decision by the NCC following a two-phased process.

Administrative complaint

The first phase, the administrative complaint, unfolds as follows. Within 30 calendar days from the date of receipt of a decision on the alleged infringement, any party dissatisfied with such decision, either in part or in whole, may lodge a complaint to the NCC's chairperson (complainant).

Within 10 calendar days of the date of receipt of such complaint, the NCC's chairperson must notify the complainant and concerned parties in writing of their decision whether to accept or refuse jurisdiction; in the event of refusal, a reason must be clearly stated.

Within five working days from the date of accepting jurisdiction, the NCC chairperson shall establish a complaint resolution council, which comprises of him or herself and the remaining NCC members who did not sit in the council adjudicating the infringement.

Within 30 calendar days for normal cases or 45 calendar days for complex cases from the date of its establishment, the council must issue a decision resolving the complaint.

Administrative litigation

The second phase, the administrative litigation, commences when the appellant is still unsatisfied with the decision on resolution of the complaint and unfolds as follows:

Within 30 calendar days of receiving the complaint resolution decision, an unsatisfied undertaking shall file a lawsuit against a part or the whole of such decision at a competent administrative court.

Within three months (in normal cases) or four months (in complex cases) of acceptance, the court must issue the first instance judgment. The time-limit may be prolonged if the first instance stage is temporarily suspended, adjourned or otherwise delayed.

Any appeal must be made within 15 calendar days of pronouncement of the first instance decision.

Within three months (in normal cases) or five months (in complex cases) of acceptance, the court must issue the appellate judgment. Similarly, the time limit may also be prolonged due to any suspension, adjournment or delay.

SANCTIONS

Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

With respect to criminally prosecutable cartels (except bid rigging), primary penalties vary depending on the severity of the behaviour and whether the violator is an individual (eg, executives of the undertaking participating in the illegal cartel) or corporate. Accordingly, if the cartel generates an illegal gain of more than 500 million dong and less than 3 billion dong, or causes loss to a third party in the range of 1 billion dong to less than 5 billion dong:

- individuals will be fined from 200 million to 1 billion dong, or subject to a non-custodial sentence of up to two years, or a prison sentence from three months to two years; and
- corporates will be fined from 1 billion to 3 billion dong.

If the illegal gain generated from, or loss caused by, the cartel exceeds the above thresholds, or if the cartel crosses either of the above thresholds and involves an exacerbating factor (ie, recidivism, implementing the cartel with sophisticated and elaborate means, or implementing the cartel in abuse of dominant or monopolistic position):

- individuals will be fined from 1 billion to 3 billion dong, or subject to a prison sentence from one year to five years; and
- corporates will be fined from 3 billion to 5 billion dong, or subject to suspension from six months to two years.

As a secondary sanction in combination with any of the above primary sanctions, individuals may also be fined from 50 million to 200 million dong or prohibited from holding a position or practising for one to five years. Corporates may be fined from 100 million to 500 million dong or prohibited from conducting certain business(es), or mobilising capital for one to three years.

With regard to bid rigging, an individual may be sentenced for up to 20 years and forbidden from holding a position or practising for up to five years or confiscated of part or all of their assets.

It is noteworthy that the leniency policy does not apply in case of criminal prosecution. Instead, a separate amnesty regime shall apply.

As of this writing, the authors are not aware of any criminally prosecuted cartels.

Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The main administrative sanction is a monetary fine (except where the violator is a state agency, in which case the National Competition Commission (NCC) shall request the agency in question to cease the violation, take remedial actions and recompense).

The maximum fine is 10 per cent of the violator's total turnover in the previous year for prohibited horizontal cartels, and 5 per cent for unlawful vertical cartels. In any event, the imposed administrative fine cannot exceed the lowest level of criminal monetary fine.

In addition to fines, the NCC may impose supplementary penalties (eg, confiscation of illegal gains) on and take remedial measures (eg, removal of unlawful terms and conditions in agreements or commercial transactions) against the violators depending on the nature and severity of the breach.

The minimum fine for all types of prohibited cartels is 1 per cent of the violator's total turnover.

Given that the current cartel regulation regime is in its early stage (Decree No. 75/2019/ND-CP on dealing with competition law violations only took effect from 1 December 2019), the authors have not observed any instance where a violator was fined under the new regulations. As for the expired Competition Law 2004, there were only two cases in which several undertakings were found to have engaged in prohibited cartels. The first case, a pupil insurance cartel, resulted in no fine because all participants had prematurely terminated the price-fixing agreement, while the other, a 19-participant car insurance cartel, was fined a total (including procedural fees) of 1.8 billion dong.

Guidelines for sanction levels

21 Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Decree No. 75/2019/ND–CP provides for, among other things, general principles for the calculation of administrative fines 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 of turnover, and 1 per cent to 5 per cent for prohibited vertical cartels. In principle, the authority will start at the average of the applicable range and the fine reduction or increase must not exceed the minimum or maximum level of fine.

Accordingly, a cartel participant may receive a fine reduction if they:

- prevent, mitigate or remedy inflicted damage;
- come forward and fully assist with the investigation;
- are a first-time offender; or
- commit the offence under duress.

Factors already taken into account when applying the leniency policy are not considered mitigating factors for administrative sanction purposes.

By contrast, a cartel participant may receive a heavier administrative fine if they:

- are not a first-time offender;
- take advantage of situations of hardship (eg, war, natural disasters, pandemic) to commit the offence;
- continue the cartel despite a cessation request from the authority; or
- commit the offence on a large scale (eg, in terms of volume or value of goods).

In respect of criminally prosecutable cartels, the Penal Code 2015 (as amended) also provides for sentencing principles. As a general rule, when deciding the sentence, the court shall consider the nature and severity of the offence as well as any mitigating or aggravating factors. For individuals, the court also considers the violator's personal background and character.

Accordingly, a cartel participant may receive a more lenient criminal sanction if they:

- prevent, mitigate or remedy inflicted damage;
- did not inflict considerable damage; or
- fully assist with the detection and investigation of the crime.

In addition to the above factors, others may be taken into consideration depending on whether the violator is an individual or a corporate. In the former case, other relevant mitigating factors include that the violator committed the offence under duress, turns themselves in, expresses a cooperative attitude or contrition, or makes atonement for their violation. On the other hand, a corporate violator may receive a lighter sanction if it has made considerable contributions to social welfare.

The list of mitigating factors applicable to criminal sanctions is not exhaustive. The court has considerable leeway to decide whether to accept other factors when deciding on a sentence.

As for aggravating factors, second-time offenders or dangerous recidivists will be subject to heavier sanctions. In addition, for individuals, abusing one's power or position to carry out the prohibited cartel is also an aggravating factor.

Compliance programmes

22 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The mere existence of a compliance programme will not help reduce administrative fines because it is not a factor in the exhaustive list of mitigating factors. On the other hand, with regard to criminal sanctions, the court may take such a programme into account when deciding the sentence. Considering that there has not been any instance where a competition violation has been criminally prosecuted, this matter remains untested. In any case, an effective compliance policy may prove crucial for early detection of cartel activity, thereby putting an undertaking in a favourable position in the leniency application process or strengthening the undertaking's defensive strategy should a criminal prosecution be pursued.

Director disqualification

23 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Yes. Individuals found guilty of a criminally prosecutable cartel may, in addition to a pecuniary fine or prison sentence, also be prohibited from holding a position or practising for up to five years.

Debarment

24 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement procedures is available as a discretionary sanction in response to cartel infringements and depends on the nature and severity of the infringement. As such, the relevant decision-making authority varies.

The primary authority is the organisation or individual entitled to issue debarment decisions with respect to projects within their scope of management. The ministries, heads of ministerial-level agencies and chairpersons of provincial people's committees have the authority to, upon recommendation by such organisations or individuals, debar violators within their respective scope of management, or, in the case of the Ministry of Planning and Investment, nationwide.

The length of debarment ranges from six months to five years depending on the severity of the infringement.

Parallel proceedings

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

If the violation is criminally prosecutable, criminal penalties shall be pursued to the exclusion of administrative sanctions. Otherwise, if the violation does not meet the threshold for criminal prosecution, administrative sanctions shall apply.

In either case, a violator may in addition to criminal or administrative sanctions be held liable for damages pursued in a civil action.

PRIVATE RIGHTS OF ACTION

Private damage claims

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

The applicable laws, specifically the Competition Law 2018 and the Law on Protection of Consumer Rights 2010 (as amended), do not differentiate between direct and indirect purchasers. Likewise, the laws are also silent on passing on and double recovery issues. As of this writing the authors are not aware of any private cartel damage claims in Vietnam. Therefore, it remains to be seen whether the courts would accept a passing on defence, whereby the defendants seek to prove that the claimants incurred no actual loss because they have passed it on to parties further down the supply chain (eg, end consumers) in the form of, for instance, price increases or reduction in discount rate.

The laws do not provide for double, treble, or any other forms of punitive or exemplary damages for that matter. On the other hand, cost awards, which include attorney's fees and other reasonable expenses for preventing and alleviating damages (eg, interim measure charges, examining service fees, etc), can be recovered. In practice, it is usually subject to the court to determine whether expenses used to prevent and alleviate damage or loss are reasonable.

Class actions

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions for civil or commercial disputes are generally not available and often only allowed in certain limited cases such as labour or consumer protection issues.

In a consumer protection dispute, for instance, the Law on Protection of Consumer Rights 2010 (as amended) mandates that the Provincial Consumer Associations shall be in charge of filing the lawsuit either on behalf of the consumers to protect the latter's rights and interests or in their own name to protect public interests.

The Civil Procedure Code 2015 (as amended) also provides for a mechanism that arguably bears some resemblance to class action regimes. In particular, under article 42, the court may consolidate or merge similar cases (usually if they have the same defendant(s) or the same or similar legal relations) that it has already accepted into a single case for resolution provided that the merger and resolution of such cases adhere to the laws. How this mechanism works in practice, especially when there is a significant number of individual disputes, remains to be seen.

To the authors' knowledge, there has not been any competition law class action so far in Vietnam.

COOPERATING PARTIES

Immunity

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Law 2018 provides for a leniency programme, under which co-conspirators participating in a cartel may turn themselves in and assist with a National Competition Commission (NCC) investigation in exchange for either full immunity from, or a reduction of, fines for breach of competition law which the NCC would have otherwise imposed on them. This is the first time the leniency programme is introduced.

As the Competition Law 2018 regulates individuals and corporates alike, either may apply for leniency and the policy applies to all leniency seekers in the same manner.

To qualify for leniency an applicant must:

- have partaken or is currently partaking in a cartel;
- voluntarily come forward before an investigation is launched;
- declare honestly and provide all evidence of the infringement which is significantly valuable to dismantle the cartel;
- cooperate fully with the competition authority during the investigation; and
- not be a ringleader or a coercer.

Furthermore, only three whistle-blowers are eligible for leniency, with the first entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine reduction respectively.

The leniency policy is only applicable to administrative sanctions and does not extend to criminal penalties. Instead, a separate amnesty mechanism under the Penal Code 2015 (as amended) is applied (the word 'amnesty' is used when referring to the Penal Code leniency policy to avoid confusion).

Accordingly, amnesty may be available to individuals if they turn themselves in, cooperate with the investigation, inform on accomplices, and 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, and proactively prevent or mitigate consequences.

A corporate may be exempt from criminal sanctions if it has fully remedied and compensated for all damage or loss inflicted. This exemption is, however, entirely at the court's discretion.

There is currently no official guideline on how the NCC shall implement the leniency policy. As such, many areas related to the leniency policy and the implementation thereof remain largely untested.

Subsequent cooperating parties

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

After the first whistle-blower has come forward, only two subsequent cartel participants are eligible for a partial fine reduction. They are subject to similar eligibility requirements as the first whistle-blower, although the NCC may apply a higher threshold in assessing the overall value to the investigation of the evidence they provide.

Given the lack of official leniency guidelines, the NCC would have significant discretion in determining whether an undertaking qualifies for leniency.

Cartel participants not eligible for leniency policy can attempt to reduce the fine level by taking advantage of the mitigating factors stipulated in Decree 75/2019/ND–CP.

Going in second

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

The first whistle-blower will be entitled to full immunity, while the second and third shall receive a 60 per cent and 40 per cent fine

reduction respectively. Other than the policies mentioned above, there is no 'immunity plus' or 'amnesty plus' option, nor a 'penalty plus' regime.

Approaching the authorities

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Given the limited scope of the leniency policy, applications should be filed as soon as possible before the NCC commences a cartel investigation, even if there is currently no formal marker system.

In practice, for various reasons applying for leniency is not always a viable option for undertakings. Deciding the best possible course of action would therefore require a pros-and-cons analysis and risk assessment. Factors to be considered include without limitation:

- the possibility of another member abandoning the cartel and coming forward first (ie, the 'race to the courthouse' effect); game theory is usually applied in this case;
- the risk of the competition watchdog already pursuing the conspiracy;
- the exposure of participants to antitrust probes in other jurisdictions (especially in the case of a cross-border cartel); and
- the possibility and severity of the sanctions and remedies imposed, including criminal sanctions; for this particular factor, as the leniency policy does not extend to criminal sanctions, an undertaking should consider carefully if the cartel is criminally prosecutable.

Cooperation

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

The Competition Law 2018 is silent on the nature, level and timing of cooperation that is required of or expected from a leniency applicant. Although all applicants are subject to the same leniency conditions, the 'significant value' required of the provided evidence may arguably differ between the first whistle-blower and subsequent applicants. In particular, emphasis will be placed on the quality of evidence provided, that is, whether and the extent to which it can help discover, investigate, penalise and remedy the violation. Examples of evidence that may prove useful to the investigators include, for instance, a signed agreement or memorandum, an implicating email or instant message exchange between the cartel participants, or a voice recording or minutes of a discussion on competitively sensitive topics (eg, pricing scheme) between them.

Confidentiality

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Competition Law 2018 does not have any explicit provision on the confidentiality obligation in respect of leniency procedure. The Law, however, mandates that if requested the NCC must keep confidential the identity of and the information provided by the informant, be it an organisation or individual. The provision may be construed to encompass all leniency applicants.

Under article 25 of the Guiding Decree, all evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will be kept confidential if legitimately requested by the participants in the competition legal proceedings. In addition, if necessary and at any stage facilitative to the cartel investigation, the NCC has the discretion to publicly disclose in whole or in part the evidence.

In light of the above, to ensure the confidentiality of commercially sensitive information, all leniency applicants should attach a written request for confidential treatment to their application and specify therein which information they wish to be kept confidential.

Settlements

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The laws of Vietnam are silent on this issue. Article 86.2 of the Competition Law 2018, however, allows the investigating authority to stay an investigation if the complainant withdraws the file and the respondent undertakes to cease the alleged violation and take remedial measures, and receives approval from the investigating authority. It is unclear to whom should the respondent's undertakings be made, and what must be approved by the investigating authority.

Corporate defendant and employees

35 When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Current and former employees of a corporate which is granted leniency are often not subject to any administrative sanction unless such individuals attempted to hinder or mislead the investigation. Criminal amnesty will be subject to criminal provisions.

Dealing with the enforcement agency

36 What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

There is currently no provision on how a leniency application should be filed with the NCC. It would follow that an application filed by a legal representative of the undertaking or an authorised person (either an external counsel or employee) is acceptable.

It is unclear if a leniency application must be made formally in writing or can be made otherwise (eg, orally or anonymously). However, given the local bureaucratic practice, the authors take the view that a leniency application should be made formally in writing.

DEFENDING A CASE

Disclosure

37 What information or evidence is disclosed to a defendant by the enforcement authorities?

All evidence must generally be publicly disclosed, except where it contains state, trade, professional or personal secrets. The latter three will only be kept confidential if legitimately requested by the relevant parties.

Representing employees

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

A counsel may concurrently represent a corporate and its employees as long as no actual or potential conflict of interest arises.

Whether and when a present or former employee should seek an independent counsel is a matter between this individual and the lawyer; the NCC would not intervene in this regard.

Multiple corporate defendants

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Multiple corporate defendants may be represented by the same counsel irrespective of their affiliation, if any, provided there is no actual or potential conflict of interest.

Payment of penalties and legal costs

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

As a general principle, any undertaking found to have committed a violation shall bear the legal consequences.

In practice, corporates might reimburse employees but such amount would not be treated as tax-deductible expenses.

Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties are not tax-deductible.

On the other hand, private damages awards, which are not considered non-deductible expenses under tax regulations, may be eligible for deduction if there is valid and accurate documentation.

For tax implications, seeking consultation from a tax specialist is advised.

International double jeopardy

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Neither the Competition Law 2018 nor Decree No. 75/2019/ND–CP specifies rules on international double jeopardy for administrative sanctions or private damages awards.

Likewise, the Penal Code 2015 (as amended) is also silent on international double jeopardy in respect of criminal sanctions.

Getting the fine down

43 | What is the optimal way in which to get the fine down?

The best way to mitigate legal repercussions, in general, is through early cooperation with the authority in discovering or investigating the offence and through remedies and compensation. These actions will be considered by the authority when assessing either leniency application or mitigating factors under both administrative and criminal sanction regimes. Thus, even if leniency is not an option, a violator may nevertheless have their fine reduced by mitigating factors.

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UPDATE AND TRENDS

Recent cases

44 | What were the key cases, judgments and other developments of the past year?

Since the National Competition Commission (NCC) has not been established, there is arguably lack of legal standing for the Vietnam Competition and Consumer Authority (VCCA) (ie, the competition authority under the former regime that is currently acting as a quasi-competition watchdog under the new regime) to investigate or handle cartel claims. Therefore, for the time being, the VCCA generally does not proactively enforce cartel cases. However, enforcement practice is expected to be more robust once the NCC is formally established.

The latest publicly known case handled by the competition regulator concerns a group of companies in the medical equipment sector. Specifically, the complainant, An Phu Trading and Medical JSC, lodged a complaint against Central Pharmaceutical 1 JSC (CPC 1) and Bbraun Vietnam Limited (Bbraun Vietnam) for refusing to provide them with the documentation necessary for their participation in a medical equipment tender solicited by a local health department. Given that the complainant was bidding with Bbraun-manufactured products, the health department required the complainant to submit a sale authorisation from Bbraun Vietnam and proof of collaboration between Bbraun Vietnam and CPC1. Bbraun Vietnam refused to provide the complainant with the former on the ground that it had issued one to the complainant's competitor, while CPC 1 refused to provide the latter citing lack

of Bbraun Vietnam's consent. Under these circumstances, the competition regulator initially took the view that the respondents' behaviour indicated a violation of the Competition Law 2018. However, when the regulator requested the parties to provide further information for the investigation, they all committed to 'permit [the complainant] to perform the awarded contract as per the bidding package', thereby effectively closing the case without any final decision or imposition of penalties.

Regime reviews and modifications

45 Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The most anticipated development at the moment is the formal establishment of the new competition regulator, the NCC. With the new law effective recently and the new regulator to be established, the competition landscape in Vietnam is expected to see drastic changes in the coming years. In the past years, cartels were one of the most common violations detected and sanctioned by the competition authority. In the near future, with the removal of the market share threshold for initiating a cartel probe and the introduction of a leniency programme, the authors anticipate that cartel investigations and enforcement will be more vigorous.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.*

Argentina	
Is the regime criminal, civil or administrative?	Administrative.
What is the maximum sanction?	200 million adjustable units (equivalent to 8.122 million Argentine pesos).
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	Yes, if they have effects in Argentina.

Australia	
Is the regime criminal, civil or administrative?	The Australian competition law regime prohibits cartels under civil law and makes it a criminal offence for corporations and individuals to participate in a cartel (or attempt to do so).
What is the maximum sanction?	For corporations: • A$10 million; • three times the total benefits that have been obtained and which are reasonably attributable to the conduct; or • where the benefits cannot be determined, 10 per cent of the corporate group's annual turnover in the preceding 12 months. For individuals: • up to 10 years in jail or fines of up to $420 000 per criminal cartel offence or both; or • a pecuniary penalty of up to $500 000 per civil contravention.
Are there immunity or leniency programmes?	Yes. The ACCC Immunity and Cooperation Policy sets out the policies of the Australian Competition and Consumer Commission (ACCC) in relation to applications for both civil and criminal immunity from ACCC-initiated civil proceedings and criminal prosecution.

Does the regime extend to conduct outside the jurisdiction?	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; and
	• the parties are in competition with each other in trade or commerce within Australia or between Australia and places outside Australia.

Austria	
Is the regime criminal, civil or administrative?	Fines of the Cartel Court for cartel activities are usually considered sanctions within the meaning of criminal law due to the severe nature of the sanction (see also article 6 of the European Convention on Human Rights).
What is the maximum sanction?	The maximum fine that may be imposed for cartel activity based on the Austrian Cartel Act 2005 is 10 per cent of the undertaking's or association's previous financial year's aggregated turnover.
Are there immunity or leniency programmes?	Yes. Immunity or a reduction of fines imposed based on the Cartel Act is available, based on the provisions of the Austrian Competition Act 2002.
Does the regime extend to conduct outside the jurisdiction?	The Austrian cartel law regime extends to conduct outside Austria's jurisdiction if the conduct affects Austria.

Belgium	
Is the regime criminal, civil or administrative?	The regime is of administrative nature with civil liability. Individuals can be administratively prosecuted and sanctioned.
What is the maximum sanction?	Fines imposed on a company cannot exceed 10 per cent of the worldwide turnover. Fines imposed on individuals cannot exceed €10,000.
Are there immunity or leniency programmes?	Both immunity and leniency regimes are available for companies and individuals under Belgian law.
Does the regime extend to conduct outside the jurisdiction?	No, the immunity and leniency regimes are limited to the cartel's activities performed by the investigated undertaking in Belgium (cooperation with neighbouring countries is very advanced).

Brazil	
Is the regime criminal, civil or administrative?	A cartel is administratively (for companies, individuals and associations) and criminally (for individuals) prosecuted in Brazil. Companies and individuals are also liable for civil damages.
What is the maximum sanction?	For companies, the maximum administrative fine is 20 per cent of the gross revenue of the company, group, or conglomerate, in the fiscal year before the initiation of the administrative process, in the field of the business activity in which the violation occurred. For individuals in managerial positions (CEOs, directors, managers, etc) directly or indirectly responsible for the violation, a maximum administrative fine of 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, a maximum administrative fine of 2 billion reais. For individuals, the maximum criminal penalty is imprisonment of five years.
Are there immunity or leniency programmes?	Yes. The leniency agreement and TCC.
Does the regime extend to conduct outside the jurisdiction?	Yes. If the misconduct has direct or indirect effects in Brazil, even if potentially.

Canada	
Is the regime criminal, civil or administrative?	The regime has both criminal and civil/administrative provisions
What is the maximum sanction?	A price-fixing, customer/market allocation, or output restriction conviction carries penalties of up to 14 years in prison and fines of up to C$25 million (five years and C$10 million for pre-2010 conduct). In foreign-directed conspiracies and bid rigging, corporations are liable to a fine at the discretion of the court. The civil/administrative provisions permit a prohibition order only.
Are there immunity or leniency programmes?	A highly successful immunity programme has been in place since 2000. It is also complemented by a formal leniency programme for subsequent cooperating parties. Further updates were released in September 2018.
Does the regime extend to conduct outside the jurisdiction?	International conspiracies directed at Canadian markets fall within the jurisdictional scope of the Competition Act. However, conspiracies that relate only to the export of products from Canada are expressly exempted.
Remarks	Amendments that came into force in 2010 have significantly changed the former 'partial rule-of-reason' approach to criminal conspiracies. The Act now provides for a per se criminal cartel offence and a civil reviewable practice dealing with other competitor collaboration agreements.

China	
Is the regime criminal, civil or administrative?	The regime is civil and administrative.
What is the maximum sanction?	10 per cent of worldwide turnover plus confiscate the illegal income.
Are there immunity or leniency programmes?	Yes. There are leniency programmes.
Does the regime extend to conduct outside the jurisdiction?	Yes. The regime has exterritorial jurisdiction.

Costa Rica	
Is the regime criminal, civil or administrative?	It is both civil and administrative
What is the maximum sanction?	The maximum sanction for economic agents conducting business, up to 10% of their turnover. For individuals acting on behalf of the economic agent up to US$ 515,000.00
Are there immunity or leniency programmes?	There are leniency programmes
Does the regime extend to conduct outside the jurisdiction?	The regime does not extend outside of Costa Rica. Still, any action taken abroad that could impact the Costa Rican market will be enforceable from a competition law standpoint.

Denmark	
Is the regime criminal, civil or administrative?	The regime is criminal. Private damage claims are possible through the criminal regime.
What is the maximum sanction?	Imprisonment may be imposed on individuals. The maximum term of imprisonment is one and a half years but may be increased up to six years in case of aggravating circumstances. Fines should not exceed 10 per cent of the legal undertaking's worldwide turnover.
Are there immunity or leniency programmes?	The Act provides for a leniency programme, which is comparable to the leniency programme set out under EU law.
Does the regime extend to conduct outside the jurisdiction?	The Act contains no extraterritoriality, except for section 29, which provides that the Act does not apply to the Faroe Islands and Greenland.

European Union	
Is the regime criminal, civil or administrative?	The procedure before the EC is administrative. The EC enjoys wide powers of investigation (eg, to request information, take statements and conduct on-site inspections). If it establishes an infringement to competition law, it has the power to impose significant fines on undertakings. EC decisions may be appealed before EU courts.
What is the maximum sanction?	Pursuant to article 23(2) of Regulation No. 1/2003, the EC may impose fines of up to 10 per cent of an undertaking's total turnover in the business year preceding the decision.
Are there immunity or leniency programmes?	The EC's leniency programme is detailed in its 2006 guidelines. The first company that denounces the cartel and actively cooperates with the EC can be granted full immunity from a fine. Provided that they bring sufficient added value to the EC, other companies can then benefit from reductions of fines that range from 30 per cent to 50 per cent for the second company that denounces the infringement, 20 per cent to 30 per cent for the third company, and up to 20 per cent for subsequent ones.
Does the regime extend to conduct outside the jurisdiction?	The Commission's jurisdiction extends to conduct outside of the EU, provided that such conduct has an effect in the EU. In the context of a cartel with a global scope, the EC may decide to include in its calculation of the value of sales, sales made outside the EEA, if sales made within the EEA alone do not adequately reflect the weight of each participant in the infringement.
Remarks	The EC does not impose fine or criminal sanctions on individuals, but such penalties exist at the national level in several member states.

Finland	
Is the regime criminal, civil or administrative?	The regime is administrative.
What is the maximum sanction?	The maximum fine can be up to 10 per cent of the undertaking's total annual turnover in the last year of its cartel participation.
Are there immunity or leniency programmes?	Yes, there is immunity and leniency programmes largely harmonised with that of the Commission and the ECN.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct has effects in Finland.

Germany	
Is the regime criminal, civil or administrative?	Administrative.
What is the maximum sanction?	Fines imposed against natural persons are limited to €1 million. An undertaking can be fined up to 10 per cent of its total turnover in the business year preceding the competition authority's decision. The competition authority can also impose a fine on an association of undertakings of up to 10 per cent of the aggregate turnover of its members operating in the market affected by the infringement.
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	The GWB applies to all restraints of competition affecting the German market, even if they were caused outside the country by foreign undertakings.

Hong Kong	
Is the regime criminal, civil or administrative?	Civil and prosecutorial regime. However, the criminal standard of proof (beyond a reasonable doubt) applies due to quasi-criminal nature of the proceedings.
What is the maximum sanction?	The pecuniary penalty is capped at 10 per cent of the group turnover in Hong Kong for each year of contravention, up to a maximum of three years.
Are there immunity or leniency programmes?	The Commission has leniency programmes for undertakings and individuals engaged in cartel conduct. Undertakings that do not qualify for leniency can cooperate with the Commission, which may recommend a cooperation discount of up to 50 per cent on the pecuniary penalty.
Does the regime extend to conduct outside the jurisdiction?	The regime applies to conduct outside Hong Kong so long as it has an impact in Hong Kong.
Remarks	Cartel conduct has been the focus of the Commission's enforcement. To date, all cases brought by the Commission to the Tribunal are against cartel conduct.

India	
Is the regime criminal, civil or administrative?	The regime is civil in nature.
What is the maximum sanction?	A penalty of up to three times the profit of the participating firm for each year of the continuance of the cartel or 10 per cent of its relevant turnover for each year of the continuance of the cartel, whichever is higher, can be imposed.
Are there immunity or leniency programmes?	A leniency programme is available in terms of the Competition Commission of India (Lesser Penalty) Regulations 2009, read with section 46 of the Competition Act 2002.
Does the regime extend to conduct outside the jurisdiction?	The regime extends to conduct outside India if such conduct has an appreciable adverse effect on competition in India.
Remarks	The development of competition law jurisprudence in India is still in its infancy. Several cases that are likely to have bearing on important aspects of the procedural law as well as the substantive law as interpreted by the CCI are still pending before the first appellate forum (ie, the NCLAT) or the Supreme Court (ie, the second and the final appellate forum) for adjudication.

Japan	
Is the regime criminal, civil or administrative?	Administrative, criminal and includes civil (private action).
What is the maximum sanction?	Criminal: servitude of up to five years and fines of up to ¥5 million for individuals, and ¥500 million for corporations (for large enterprises). Administrative: surcharge of, in principle, 10 per cent of sales of cartel goods/services over the cartel period up to the previous three years. Civil: the amount of damage; no triple damage.
Are there immunity or leniency programmes?	Yes, effective 4 January 2006. Amended as of 1 January 2010. A further amendment is expected upon the amendment of the Antimonopoly Law effective sometime in 2019 or 2020.
Does the regime extend to conduct outside the jurisdiction?	Yes, the Japan Fair Trade Commission may challenge conduct affecting the Japanese market.
Remarks	Amendment to the Antimonopoly Law regarding the reform of the administrative proceeding became effective as of 1 April 2015. Amendment to the Criminal Procedure Law regarding the introduction of the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law (eg, cartel) became effective as of 1 June 2018.

Malaysia	
Is the regime criminal, civil or administrative?	Civil, however, obstructing MyCC's investigation may lead to criminal sanctions.
What is the maximum sanction?	10 per cent of the worldwide turnover of the enterprise over the period of the infringement.
Are there immunity or leniency programmes?	Yes.
Does the regime extend to conduct outside the jurisdiction?	Yes.

Mexico	
Is the regime criminal, civil or administrative?	The regime is administrative, criminal and civil. Administrative sanctions are imposed by the Federal Economic Competition Commission (COFECE). Criminal sanctions are imposed by criminal courts. Compensation for damages is awarded by federal specialised courts in competition, broadcasting and telecommunications.
What is the maximum sanction?	An individual faces up to 10 years in prison for committing cartel conduct. Fines to direct offenders add up to 10 per cent of the offender's income. Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive, respectively, fines of approximately 18 million pesos. Also, those who acted on behalf of the company face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years. In cases of recidivism, the COFECE may impose a fine of up to two times the applicable fine or order the divestiture of assets. There is no limit for damages awarded as a result of anticompetitive conduct.
Are there immunity or leniency programmes?	Yes. The first in to apply for the programme may obtain full immunity (ie, the defendant will be fined a symbolic amount). Second and subsequent qualified applicants may obtain reductions of up to 50, 30 and 20 per cent of the applicable fine. All qualified applicants will obtain full immunity from criminal liability. Immunity does not reach civil liability for monetary damages.
Does the regime extend to conduct outside the jurisdiction?	Cartel conduct performed abroad will be sanctioned by the COFECE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by the COFECE as indicia of the extensive effects of the practice in Mexico's national territory.

Mexico	
Remarks	In June 2013, the Constitution was amended to transform the competition commission into an autonomous constitutional entity and to increase the effectiveness of competition policy and law enforcement. On 7 July 2014, a new Competition Law and modifications to the Federal Criminal Code came into force. In November 2014, the CFCE issued new Regulations of the LFCE. In January 2015, the Federal Telecommunications Institute issued new regulations of the LFCE, regarding broadcasting and telecommunications industries. In June 2015, the COFECE issued new guidelines regarding the amnesty programme and the initiation of investigations. In December 2015, the CFCE published guidelines for information exchange among competitors and regarding cartel investigation procedures. In September 2016, the IFT published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to a public inquiry. In January 2017, the IFT published the Guidelines on the Immunity and Reduction of Sanctions Programme.

Portugal	
Is the regime criminal, civil or administrative?	The regime is mainly administrative and quasi-criminal, with fines and periodic penalty payments as sanctions. Civil sanctions include nullity of agreements. Third-party claims for damages may also be filed under the Damages Act (Law No. 23/18 of 5 June) and the general principles of civil liability.
What is the maximum sanction?	Fines of up to 10 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed the double of the higher limit of the fines applicable to the infringements in question.
Are there immunity or leniency programmes?	Yes. The programme provides for full immunity or reduction of the fines that would apply to the infringement.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct produces effects within Portugal.
Remarks	Law No. 19/2012 of 8 May (the Act) put in place the new Competition regime, thereby superseding Law No. 18/2003, of 11 June 2003. The Act considerably enhanced the powers of investigation granted to the Authority, notably in respect of investigation of restrictive practices.

Singapore	
Is the regime criminal, civil or administrative?	The competition law regime in Singapore is administrative in nature.
What is the maximum sanction?	The Competition and Consumer Commission of Singapore (CCCS) may impose a financial penalty (where the infringement has been committed intentionally or negligently) of up to 10 per cent of such turnover of the business of the infringing undertaking in Singapore for each year of infringement, up to a maximum of three years. In addition, the CCCS may make directions to bring an infringement to an end, or to mitigate the adverse effect of the infringement.
Are there immunity or leniency programmes?	Yes. The CCCS operates a leniency programme, which encompasses the prospect of full immunity. This programme includes a leniency plus system and a marker system.
Does the regime extend to conduct outside the jurisdiction?	Yes. Such activities will be prohibited by the section 34 prohibition if they have the object or effect of preventing, restricting or distorting competition within Singapore.
Remarks	The CCCS has the ability to enter into cooperation agreements with foreign competition bodies. The CCCS inked its first cross-border enforcement cooperation agreement with the Japan Fair Trade Commission on 22 June 2017, and its second cross-border enforcement cooperation agreement with the Indonesian Commission for the Supervision of Business Competition on 30 August 2018.

Slovenia	
Is the regime criminal, civil or administrative?	The regime is a mix of administrative and criminal.
What is the maximum sanction?	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.

South Korea	
Is the regime criminal, civil or administrative?	Administrative and criminal, with civil damages actions available.
What is the maximum sanction?	Ten per cent of relevant sales in administrative fines and a criminal fine of 200 million won for corporations, as well as a criminal fine of the same amount and imprisonment of three years for individuals.
Are there immunity or leniency programmes?	Yes, the programme is fairly effective.
Does the regime extend to conduct outside the jurisdiction?	Yes, if the conduct has an effect on the Korean market.
Remarks	Strengthening enforcement with high administrative fines and increasingly frequent criminal prosecutions.

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 partially 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: • the nationality of the cartel members; • where the cartel activity took place; or • whether the members have a subsidiary in Turkey.

Ukraine	
Is the regime criminal, civil or administrative?	Administrative sanctions for the violation of legislation on competition are imposed by the AMCU.In addition, administrative responsibility may be imposed on authorised persons or employees of an undertaking in the event of a violation by said persons of the Code of Ukraine on administrative offences.
What is the maximum sanction?	Horizontal anticompetitive concerted actions of undertakings (cartels) are subject to the severest punishments. For such actions, the AMCU regulations provide for a basic fine of 45 per cent of income (revenue) from sales of goods (works, services) or the buyer's expenses on the purchase of a product, either directly or indirectly related to the violation. The amount of the fine shall not exceed 10 per cent of the total turnover of the undertaking.
Are there immunity or leniency programmes?	Leniency programmes are allowed in Ukraine. A full release from liability is granted only to the participant in collusion that first appealed to the AMCU with its application. The proof of first application is the marker letter of the AMCU. Member cartels claiming immunity must first voluntarily notify the antimonopoly authority about their participation in anticompetitive concerted actions. At the same time, a participant has to provide information that is essential for rendering a decision on the case. Throughout the investigation, this party should cooperate as much as possible with the antimonopoly agency. The party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions; tried to control such actions; or has not provided all the evidence and information on the commitment of anticompetitive concerted actions.

Ukraine	
Does the regime extend to conduct outside the jurisdiction?	No, the regime does not extend outside the jurisdiction. To date, there are no examples of cooperation between other jurisdictions and Ukraine.
Remarks	In January 2016, the economic part of the Association Agreement between Ukraine and the EU came into force. In accordance with the agreement, a number of regulations of the EU Council and the EU Commission for the protection and development of economic competition are subject to implementation in the Ukrainian legal system. Ukraine has already taken the first steps in aligning its competition laws and law enforcement practices with EU standards by amending existing laws and regulations.

United Kingdom	
Is the regime criminal, civil or administrative?	Criminal and civil.
What is the maximum sanction?	Civil – 10 per cent of the undertaking's worldwide turnover for the previous business year. Criminal – imprisonment for a maximum of five years.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes, if an agreement is implemented in the United Kingdom.

United States	
Is the regime criminal, civil or administrative?	The US regime has criminal, civil and administrative elements. Criminal actions are, by Department of Justice (DOJ) policy, reserved for per se violations of the antitrust laws, which generally include price-fixing agreements, bid rigging, and market allocation agreements.
What is the maximum sanction?	For corporations, the maximum criminal fine is the greater of US$100 million, twice the gross gain from the offence, or twice the gross loss to victims of the offence. For individuals, the maximum criminal fine is US$1 million and up to 10 years' imprisonment. In civil litigation, there are no maximum damage awards, and private parties are entitled to recover treble their actual damages plus attorneys' fees.
Are there immunity or leniency programmes?	The DOJ's formal leniency programme provides full immunity for criminal antitrust violations for the first to file, pending satisfaction of the programme criteria. Under the Antitrust Criminal Penalties Enhancement Reform Act of 2004, the leniency recipient may be eligible for reduced civil damages (single, not treble) and avoid joint and several liability in civil litigation.
Does the regime extend to conduct outside the jurisdiction?	The Sherman Act applies to extraterritorial conduct to the extent it involves either import commerce or foreign commerce that has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. In civil actions, the plaintiff bears the additional burden of establishing that their claim arose from that direct, substantial and reasonably foreseeable effect.

Vietnam	
Is the regime criminal, civil or administrative?	All three.
What is the maximum sanction?	For corporates: a fine of up to 5 billion dong or suspension of up to two years. For individuals: a fine of up to 3 billion dong or imprisonment up to five years.
Are there immunity or leniency programmes?	There is a leniency policy applicable to administrative sanctions and an amnesty regime for criminal sanctions.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct has an actual or potential adverse impact on the domestic market.
Remarks	No official leniency policy guideline is available. There has been no prosecution under the new regime. The new competition watchdog has not been formally established. The new competition watchdog has not been formally established as yet.

* *The information in these quick references tables was last updated in November 2020.*

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