CARTEL REGULATION 2023

Contributing editor
A Neil Campbell
McMillan LLP

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

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

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and South Korea.

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

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

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

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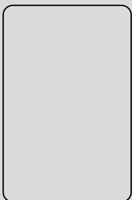

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Foreword

A Neil Campbell
McMillan LLP

This 23rd edition of *Cartel Regulation* is the most current and comprehensive source of information about cartel laws and enforcement around the world.

Cartel provisions are at the centre of every competition law regime. This reflects a consensus that certain types of competitor coordination are so unlikely to have pro-competitive or efficiency-enhancing benefits that it is appropriate to prohibit and penalise them without a case-specific assessment of anticompetitive effects.

There has been a decline in the use of immunity, amnesty and leniency regimes in many jurisdictions in recent years. The cumulative deterrent effects of large penalty and damage exposures in an increasing number of jurisdictions may be contributing to reductions in cartel activity. However, 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.

The evolving digital economy has also become a major focus for competition agencies around the world. While much of the policy and enforcement activity relates to unilateral conduct and market power, there is also increasing attention paid 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 being tackled with gusto by cartel enforcement agencies.

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 or other remedies. The criminal liability and vast civil damages exposures in some jurisdictions add further challenges for parties under investigation and their advisers, as well as for enforcement agencies. The extent and depth of cross-border coordination between some agencies is significant, although it is constrained by confidentiality rules and rights of defence, and is less frequent than in merger reviews.

Cartel Regulation 2023 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. This year's volume provides in-depth coverage of 26 of the most active jurisdictions.

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 legislative 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 is also addressed, along with information about the interface between private and agency proceedings.

The chapters in *Cartel Regulation 2023* have been prepared by leading experts in each jurisdiction. We appreciate their efforts in providing 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.

Australia

Carolyn Oddie and Felicity McMahon

Allens

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

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

Changes

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

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

- clarifies that cartel conduct must take place in trade or commerce (ie, within Australia or between Australia and places outside Australia);
- repeals the per se prohibition on exclusionary provisions and expands the definition of 'output restriction' in the prohibition against cartel conduct to cover restrictions on acquisition (in addition to restrictions on production, capacity and supply); and
- amends the joint venture exception to cartel conduct by:
  - extending the exception so it more clearly applies to joint ventures for the acquisition of goods or services (in addition to joint ventures for the production or supply of goods or services);
  - broadening the exception so it applies to a provision contained in an arrangement or understanding (in addition to a provision contained in a contract);
  - imposing additional requirements on the party wishing to rely on the exception – in addition to demonstrating that the cartel provision is 'for the purposes of' the joint venture, a party is now required to demonstrate that:
    - the cartel provision is reasonably necessary for undertaking the joint venture; and
    - the joint venture is not being carried on for the purpose of substantially lessening competition; and
  - increasing the standard of proof so a party wishing to rely on the exception must prove the relevant matters 'on the balance of probabilities' (previously, a party only needed to produce evidence of 'a reasonable possibility' that relevant matters exist, in which case the onus would switch to the ACCC or prosecution).

Prior to its repeal, subsection 51(3) of the CCA provided a limited exemption for certain conduct relating to intellectual property rights, including conditional licensing and assignment of patents, and 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.

On 27 October 2022, Parliament passed the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022, which increased the maximum penalties for breaches of the CCA (including cartel provisions) for both companies and individuals.

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 or gave effect to (or both) 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 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 exemption power was introduced into the CCA in November 2017 under section 95AA. This power enables the ACCC to specify that one or more provisions of Part IV of the CCA do not apply to certain conduct, in effect providing a safe harbour for the businesses covered by the exemption. The ACCC must be satisfied that the specified conduct does not substantially lessen competition or, 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 the right of the Commonwealth, the states, the territories and local government bodies insofar as they carry on a business.

However, the Crown in the right of the Commonwealth, the states and the 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, the latter 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 other such materials 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 by 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 a 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, New Zealand, Papua New Guinea, the Philippines, South Korea, 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, the following applies:

- If the respondent does not admit liability and contests the matter, the case will go to a civil trial on liability. The usual pretrial steps will be undertaken, including the exchange of relevant documents through discovery and filing of written evidence (usually through affidavits and supporting documentation). The matter then proceeds to a hearing where witnesses and experts may be subject

to cross-examination and the parties make submissions in support of their case. If the court finds that the offences have been proved, it will make declarations of contravention and a further hearing takes place to determine the appropriate penalty.
- If the respondent admits liability, the parties will file an agreed statement of facts and admissions with the court, and potentially also a suggested penalty.

Criminal proceedings are commenced when the 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, the following applies:
- 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 the 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 a 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, although 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 of imprisonment or a fine of A$440,000 per offence, or both. Individuals can also be subject to orders disqualifying them from managing a corporation and community service orders.

In October 2021, a manager of pharmaceutical ingredient company Alkaloids of Australia was the first individual to plead guilty to a criminal cartel charge since the criminal provisions were introduced in 2009. Sentencing for this individual is yet to take place.

In June 2022, four individuals involved with money transfer business Vina Money Transfer were the first individuals to be convicted for criminal cartel conduct in Australia, receiving varying terms of imprisonment ranging from nine months to two years and six months. All individuals were, however, immediately released on recognisance orders. The fifth individual involved in the case pleaded not guilty and charges were eventually dropped in September 2022.

For companies, the maximum fine for each criminal cartel offence is the greater of:
- A$50 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, 30 per cent of the corporation's adjusted turnover during the breach period of the offence.

The court can also impose injunctions.

There have been four criminal cartel convictions in Australia against corporations 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; and
- in 2022, Vina Money Transfer pleaded guilty to criminal cartel conduct and was fined A$1 million.

Two corporations have pleaded guilty to criminal cartel conduct and the Federal Court is yet to hand down its judgment on the fines, including:
- pharmaceutical ingredient company Alkaloids of Australia, which pleaded guilty to criminal cartel conduct in November 2021; and

- waste management company Bingo Industries, which pleaded guilty to criminal cartel conduct in 2022.

Civil and administrative sanctions

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

For individuals, the maximum civil penalty is A$2.5 million per offence.

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

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 action of the Australian Competition and Consumer Commission (ACCC) followed similar enforcement actions against Yazaki and other cartel participants by competition regulators in the United States and Japan.

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

Guidelines for sanction levels

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

Civil penalties

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

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

Criminal penalties

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

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

Compliance programmes

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

In Australia, one of the factors relevant to the court's decision to impose civil penalties for an infringement of the CCA is whether the company has a corporate culture conducive to compliance with the CCA and takes corrective measures in response to an acknowledged contravention. Accordingly, the existence and scope of implementation of a compliance programme will be a relevant factor in considering the level of a civil penalty to be imposed on a company for 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 incidence – 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 case of *ACCC v Nippon Yusen Kabushiki Kaisha* (NYK), NYK was fined A$25 million for its involvement in an international cargo shipping cartel. The fine of A$25 million incorporated a significant discount of 50 per cent that, 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 reoffend; 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 the 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 are 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 actions.

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.

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

Where the CDPP is satisfied that the applicant meets the criteria for criminal immunity (which are the same as the conditions for civil immunity), it will initially provide a letter of comfort to the applicant. This is generally provided at the same time that 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 on 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, that party may instead cooperate with the ACCC.

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

A party is eligible for amnesty plus if it:

- is cooperating with the ACCC in respect of the first cartel investigation; and
- 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 that 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 is 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 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 at 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.

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, 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;
- either demonstrate that it has 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 of a cartel, the cooperating party may be required by the ACCC or the CDPP to make admissions, agree to a statement of facts or give evidence against the remaining cartel participants.

DEFENDING A CASE

Disclosure

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

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

In criminal proceedings, the prosecution owes a duty of disclosure to the court, not to the accused. However, common law principles require that defendants are entitled to know the case against them, including the evidence that will be adduced in support of the charges and any other material that may be relevant to the defence. These principles are supplemented by a range of state and territory legislation, which requires the prosecution to disclose certain material to defendants. The Statement on Disclosure in Prosecutions by the Commonwealth from the Commonwealth Director of Public Prosecutions (CDPP) 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 civil liability or legal costs incurred in defending or resisting proceedings in which the person is found to have such 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 the 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 a penalty imposed under an Australian or a 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 Australian tax law).

International double jeopardy

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

Other than the relevant maximum penalty, courts are not constrained when imposing penalties or awarding damages. There is no general principle that precludes the imposition of penalties on a corporation or

individual where the corporation or individual has already been subject to sanctions overseas. However, if penalties are to be imposed on the basis of the corporation's annual turnover for the preceding 12 months, the court will disregard turnover in relation to goods or services supplied outside of Australia.

Getting the fine down

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

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

- an early guilty plea by the contravener;
- cooperating and assisting the authorities with their investigation; and
- implementing a compliance programme with appropriate antitrust compliance structures, guidelines and systems 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?

On 13 May 2021, the Australian Competition and Consumer Commission (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 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. The 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, as well as a divisional branch secretary. The charges related to allegations of attempts to induce scaffolding service suppliers to enter into cartel arrangements regarding prices for scaffolding services provided to builders in 2012–2013.

On 25 October 2021, the ACCC commenced civil proceedings against two roof tiling businesses, First Class Slate Roofing and RAD Roofing Specialists, for alleged bid rigging in August and September 2019. In September 2022, the Federal Court ordered the two businesses and the sole directors of each business to pay penalties totalling A$420,000 for engaging in cartel conduct.

Between August 2021 and February 2022, all criminal cartel charges made in the alleged banking cartel involving senior executives from Citigroup, Deutsche Bank AG and ANZ were dropped. Criminal proceedings were commenced in 2018 in relation to institutional share placement that took place in August 2015.

Alkaloids of Australia, a pharmaceutical ingredient company, pleaded guilty to criminal cartel conduct in November 2021. A waste management company, Bingo Industries, pleaded guilty to criminal cartel conduct in August 2022. The Federal Court is yet to hand down its decision on fines in both proceedings.

In June 2022, the Federal Court ordered Vina Money Transfer to pay a fine of A$1 million for its price-fixing conduct after it pleaded guilty. Four out of five individuals involved, also charged with criminal cartel conduct, pleaded guilty and were convicted with imprisonment terms ranging from nine months to two years and six months.

In September 2022, the ACCC commenced civil proceedings against Ashton Raggatt McDougall Pty Ltd and its former managing director, Anthony John Allen, alleging that they engaged in cartel conduct by attempting to rig bids for the tender for a building project at Charles Darwin University. The ACCC alleges that, following the issue of a tender for the second phase of the Charles Darwin University project, Mr Allen sent emails to eight other architectural firms requesting them not to submit a bid.

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.

In addition, Parliament recently passed a bill that increased the maximum fine for each criminal cartel offence under the Competition and Consumer Act 2010 (Cth) to the greater of:

- A$50 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, 30 per cent of the corporation's adjusted turnover during the breach period of the offence.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Cartel Act 2005 and the Competition Act 2002 are the relevant pieces of legislation.

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 prosecutorial 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?

Following the latest 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. The competent Ministry of Digitalisation and Economy (now the Ministry of Labour and Economy) enacted two implementing regulations, concerning the application of the leniency programme and the service and execution of documents within the European Competition Network. Both implementing regulations entered into force on 25 November 2021.

As regards the leniency programme, the BWB issued its new Leniency Guidelines in August 2022. It also published its Guidelines on Sustainability Agreements in September 2022.

Substantive law

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

Section 1, paragraph 1 of the Cartel Act 2005 is equivalent to article 101, paragraph 1 of the Treaty on the Functioning of the European Union.

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 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 2005 applies to legal entities and individuals acting as sole entrepreneurs.

Individuals may also be held accountable if 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 resale 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 through 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 for 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. 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 EU 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 their investigations. There is also intense cooperation with the European Commission (within the framework and based on article 22 of Regulation (EC) 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 Cartel 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 (ECJ) for a preliminary ruling (Case No. C–151/20, *Nordzucker and others*). On 22 March 2022, the ECJ delivered a judgment. According to the ECJ, the *ne bis in idem* principle precludes an EU member state from fining a company for an infringement on the basis of conduct that has had an anticompetitive object or effect in the territory of that member state, even though that conduct has already been referred to in a final decision of a competition authority in another member state, provided that that (later) decision is not based on a finding of an anticompetitive object or effect in the territory of the first member state.

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 Cartel 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, which 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 (the 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 as the Supreme Cartel Court forms a decision based on the case file. The time frame 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, which entered into force on 1 January 2006.

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 2005 establishes some basic criteria 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 list of mitigating circumstances in the Cartel Act 2005 is non-exhaustive and authorities could accept compliance programmes as a mitigating factor based on current rules. Accordingly, compliance programmes can play a role in settlement negotiations with the Federal Competition Authority (BWB) when it comes to determining the settlement sum and have occasionally been recognised by the Cartel Court in an overall assessment of mitigating circumstances.

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 that has 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, which entered into force on 21 August 2018, 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 applicable 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?

Any party that has suffered harm may assert damage actions, including generally direct and indirect purchasers. The relevant provisions of the Damages Directive 2014/104/EU have been transposed into national law (ie, 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 umbrella damages (Case No. 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 (specifically, in Case No. C–435/18, *Land Oberösterreich v 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 they actually suffered such a 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 that 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 the Damages Directive 2014/104/EU have been transposed into national law (ie, 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.

In August 2022, the BWB released its new Leniency Guidelines. These include further guidance on procedural aspects of the leniency programme, including the practical application and interplay of enforcement institutions in context with immunity from criminal liability available to employees of leniency undertakings under section 209b of the Austrian Criminal Procedure Code.

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 in 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 BWB's Leniency Guidelines, 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 BWB's Leniency Guidelines, 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.

Section 7, paragraph 3 of the Regulation Regarding the Application of the Leniency Programme provides that facts presented by a second (or further) applicant that enable the BWB to apply for a higher fine (against other participating undertakings) are not taken into account when calculating the (reduced) fine for the applicant presenting these facts. The Leniency Guidelines refer to this concept as 'partial immunity'.

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 generally 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 2005 from disclosure in the context of private damages claims.

Settlements

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

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 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 Procedure 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 regarding 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 parties, 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 as this 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 has been subject to a proceeding before the European Court of Justice (ECJ) (Case No. C–151/20, *Nordzucker and others*). According to the ECJ's Judgment of 22 March 2022, the conduct can be pursued or sanctioned by a competition agency even though this conduct has already been referred to by a competition authority of another EU member state in a final decision, provided that the (later) decision is not based on a finding of an anticompetitive object or effect in the territory of the member state whose competition authority adopted the earlier decision. Generally, based on a general principle of international law, the 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 no longer available– the infringing company may still endeavour to cooperate and reduce the fine by negotiating and agreeing to a settlement.

UPDATE AND TRENDS

Recent cases

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

The Federal Competition Authority (BWB) and the criminal law enforcement agencies are still investigating a major cartel case in the construction sector. Investigations date back to 2017. In 2022, the Cartel Court imposed a fine of €62.35 million on 17 February 2022 on PORR Group, which became final in April 2022. This is the highest antitrust fine ever imposed on a company in Austria to date.

More recently, in September and July 2022, the BWB issued several announcements on its website on having reached further settlements with two additional construction companies.

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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?

Following the latest 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. The competent Ministry of Digitalisation and Economy (now the Ministry of Labour and Economy) enacted two implementing regulations, concerning the application of the leniency programme and the service and execution of documents within the European Competition Network. Both implementing regulations entered into force on 25 November 2021.

As regards the leniency programme, the BWB issued its new Leniency Guidelines in August 2022. It also published its Guidelines on Sustainability Agreements in September 2022.

Belgium

Pierre Goffinet and Pauline Van Sande

Strelia

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

In Belgium, article IV.1 of the Belgian Code of Economic Law (CEL) contains the general prohibition on cartels. The Belgian Competition Authority (BCA) rules on cartels that appreciably prevent, restrict or distort competition in a relevant Belgian market, or within a substantial part of it. Based on Regulation (EC) No. 1/2003, the BCA should also apply article 101 of the Treaty on the Functioning of the European Union (TFEU) in cases that are 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 terms, and the preparation of guidelines for the application of competition rules. The Board is composed of a president, a competition prosecutor general, a chief economist and a general counsel.

The BCA is divided into two main divisions:

- the Investigation and Prosecution Service (IPS), an investigative service; and
- the Competition College, a decision-making body.

The IPS is entrusted with the investigation of cartel cases. Each cartel case is looked into by a team of investigators, led by a competition prosecutor to whom the case has been allocated by the competition prosecutor general. The IPS is in charge of dealing with complaints, handling and organising cartel investigations, closing or settling cartel cases and drawing up reasoned draft decisions to be submitted to the Competition College if the case is neither closed nor settled. The Competition College is the decision-making body for all infringement cases that are not settled or closed by the IPS. The Competition College decides by reasoned decisions on the merits of cartel cases.

The Market Court of the Brussels Court of Appeal has exclusive jurisdiction to hear appeals lodged against the BCA's decisions. Set up in January 2017, the Market Court is a specific chamber of the Brussels Court of Appeal that specifically adjudicates on matters belonging to the exclusive competences conferred on the court (eg, antitrust cases). Appeals should be introduced within 30 days of the date of notification of the decision. The Market Court is always composed of three judges for two reasons:

- the Market Court always pronounces in first and last instance; and
- the cases are often very technical and usually of a multiple nature.

The Market Court functions both in French and Dutch.

Changes

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

On 17 March 2022, the Law of 28 February 2022 transposing Directive (EU) 2019/1 (the ECN+ Directive) into Belgian law entered into force.

Although the law does not entail a full overhaul of Belgian competition law, the transposition does entail a number of important changes to the CEL. Besides the changes necessary to transpose the ECN+ Directive, the legislator also took the opportunity to streamline a number of procedural elements to remedy difficulties encountered by the BCA in practice. With regard to cartel regulation, the main changes are:

- the amendment of the Criminal Code to grant immunity from criminal prosecution to natural persons who have been involved in an offence of bid rigging (public procurement) and who have applied to the BCA for immunity; and
- the extension of the legal basis of the BCA's leniency program,e by transferring provisions from the Leniency Guidelines to the law (article IV.54–IV.54/6 of the CEL).

Substantive law

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

Article IV.1 of the CEL provides the substantive law on cartels. This provision is similar to article 101 of the TFEU both in drafting and in application. The first paragraph contains the prohibition, the second paragraph the nullity sanction and the third paragraph the legal exception or declaration of inapplicability. The main difference from substantive EU law is the fourth paragraph, regarding natural persons.

According to article IV.1, paragraph 1 of the CEL, all agreements between undertakings, all decisions by associations of undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or significantly distort competition in the Belgian market concerned or in a substantial part of that market are prohibited, and in particular those that consist of:

- directly or indirectly fixing purchase or selling prices, or other contractual terms;
- limiting or controlling production, sales, technical developments or investments;
- sharing markets or sources of supply;
- applying, with regard to trading partners, unequal conditions for equivalent services, thereby placing them at a competitive disadvantage; and

- 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 bearing on the subject of such contracts.

Such agreements shall automatically be null and void according to article IV.1, paragraph 2 of the CEL.

Article IV.1, paragraph 3 of the CEL contains the conditions that need to be fulfilled for the prohibition of article IV.1, paragraph 1 of the CEL to be inapplicable.

While article IV.1, paragraph 1 of the CEL includes a cartel prohibition for undertakings (legal persons), article IV.1, paragraph 4 of the CEL includes a prohibition on natural persons from engaging in cartel activity. Natural persons are prohibited from negotiating, agreeing, deciding or concerting with one or more competitors in the context of the activities of an undertaking or association of undertakings with regard to:

- fixing prices when selling products to third parties;
- limiting the production or sale of products; and
- allocating markets or buyers.

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 undertaking or undertakings concerned occurs on a lasting basis). To escape the application of cartel regulation for new joint ventures, it is necessary that the newly created joint venture is full-function (ie, autonomous at the operational level – it must have sufficient resources to operate independently on a market, be engaged in activities beyond one specific function for the parent companies and operate on a lasting basis).

Non-concentrative alliances are agreements that fall under antitrust rules and, in particular, under article IV.1 of the CEL (the cartel rules). Consequently, a self-assessment of the nature of the alliance or joint venture is needed to determine whether cartel laws are applicable.

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 natural persons (acting in the course of a company's activities) or legal persons (including associations of undertakings).

First, the notion of an 'undertaking' is very broad. It is defined in article I.6/12 of the CEL as 'any natural or legal person pursuing an economic objective on a long-term basis, and its associations'. The definition used in the CEL differs from the classic definition of undertaking in EU law, which encompasses any entity engaged in economic activity, regardless of its legal status or financing. The difference between both definitions, however, does not have any immediate impact on the scope of Belgian cartel regulation, because it is strongly aligned with EU law.

Second, in Belgium, individuals acting in relation to the business activity of an undertaking may be held liable for antitrust infringements. However, individuals can only be held liable and fined if the Belgian Competition Authority (BCA) finds an infringement of article IV.1 of the CEL or article 101 of the Treaty on the Functioning of the European Union (TFEU), or both, in the same case by the undertaking or association of undertakings in the context of whose activities the natural person acted. The only exception to this rule is when the undertaking or association of undertakings no longer exists and has no legal successor. In that case, the natural person alone can be held liable.

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 of the CEL applies to cartels that take place outside the jurisdiction of the BCA, provided that their anticompetitive effects occur within the Belgian territory or a substantial part thereof. Infringement decisions are generally limited to the effects of the infringement in Belgium.

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

On 27 July 2015, the BCA adopted provisional measures, whereby it imposed on professional association Fédération Equestre Internationale the provisional suspension of an exclusivity clause contained in its World General Regulation, which is applied in several EU member states and in countries outside the European Union (including, among others, the United States, China, Mexico and Qatar) (see Case No. CONC-V/M-15/0016). This decision has been confirmed by the Brussels Court of Appeal (see Judgment of 28 April 2016).

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 a specific exemption or defence in relation to export cartels. However, the CEL only applies to agreements 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 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 the autonomous behaviour of companies, it constitutes a justifying cause exempting the companies from all consequences of a violation of antitrust rules, both in respect of the public authorities (fines of up 10 per cent of the turnover) and other economic operators (actions for damages). However, if state action, government-approved activity or regulated conduct only favours the conclusion of agreements in breach of antitrust rules or reinforces the effect of such an agreement, the companies remain liable under antitrust law.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Investigation and Prosecution Service (IPS) of the Belgian Competition Authority (BCA) is in charge of investigating cartels. It may initiate an investigation following a complaint ex officio at the request or injunction of the Minister of Economic Affairs, or at the request of public institutions or public bodies in charge of supervising an economic sector, while taking into account the enforcement priorities set by the managing board of the BCA.

If the information gathered is not sufficient to continue investigating, the IPS can decide to close the file. However, if the investigation was initiated following a complaint, the prosecutor in charge of the file can only close the case by a reasoned decision motivating that the complaint is inadmissible, ungrounded or prescribed by time limitation (article IV.44 of the Belgian Code of Economic Law (CEL)). A complaint can also be dismissed by a reasoned decision in view of the available resources or priorities of the BCA. This decision shall be notified by a registered letter to the complainant, indicating that the file can be consulted at the BCA's premises. The complainant may appeal the closure of the investigation to the Competition College of the BCA within one month of being notified.

If the information gathered is sufficient to continue the investigation, the competition prosecutor general may ask the undertakings whether they are interested in initiating discussions on settlement proceedings. This can be done at any time during the procedure before the submission of a decision proposal. In the event that no settlement is reached or possible, the prosecutor in charge of the file 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 are requested to reply to the statement of objections within two months and may access the non-confidential version of the case file. After this, the prosecutor submits a draft decision to the president of the BCA, taking into account the remarks of the undertakings concerned. In the draft decision, the objections are stated, the infringement is defined and a decision to be taken by the Competition College is proposed. The undertakings concerned are notified of the draft decision and they are allowed access to the non-confidential version of the case file. They are requested to submit their written observations within one month, after which the written procedure is closed. The hearing before the Competition College takes place within two months of submission of the written observations. The Competition College decides on the merits of the case within one month of the hearing.

Investigative powers of the authorities

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

The law accords several investigative powers to the competition prosecutor general and the prosecutors in charge of the case file.

First, prosecutors may request the undertakings concerned for all necessary information under article IV.40 of the CEL. The request for information indicates a deadline by which the information should be provided. If the required information is not (fully) provided within the set time limit, a motivated decision can be adopted requiring the undertakings to provide the requested information. If the undertaking still fails to provide the information, it can be fined up to a maximum of 1 per cent of its worldwide turnover.

Second, prosecutors may gather all information, and summon any representative of an undertaking and any natural person – whenever such representative or person may be in possession of relevant information – to appear for questioning and take any written or oral statements or testimony (article IV.40/1 of the CEL).

Third, the prosecutor and mandated personnel of the BCA may conduct unannounced inspections (dawn raids) under article IV.40/2 of the CEL. A dawn raid requires the prior authorisation of an examining judge. In addition to the authorisation of the judge, a decision needs to be issued by the prosecutor in charge of the case specifying the subject matter and purpose of the inspection. The prosecutor and the mandated BCA personnel – if necessary, with the assistance of the police – can access the premises of the undertakings, means of transport and any other location where relevant information may be found, including the homes of the directors and other employees of the undertakings, as well as the homes and premises used for professional purposes of natural and legal persons, internal or external, in charge of the commercial, accounting, administrative, fiscal and financial management of the undertaking.

In addition, the prosecutor and the mandated BCA personnel can question the undertaking's staff regarding facts or documents related to the purpose of the inspection warrant. They may also seize or copy elements related to their investigation. They may review information and documents, both in paper and electronic form, except for legally privileged documents or information out of the scope of the inspection warrant. They may affix seals for the duration of their inspection. However, seals may not be affixed for more than 72 hours if the inspection takes place in the homes of the director or employees, or the homes or premises of an adviser of the undertaking.

Announced inspections at the premises of a company without the prior authorisation of a judge are also possible. However, in that case, the prosecutor cannot seize any element.

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 Organisation for Economic Co-operation 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?

The BCA cooperates significantly with the national competition authorities (NCAs) of neighbouring countries (ie, France, Luxembourg, Germany and the Netherlands).

This cooperation helps the BCA to collect evidence in different jurisdictions (ie, due to the assistance provided by parallel dawn raids). In addition, it enables cartel participants to claim a reduction of the fine on the basis of the *ne bis in idem* principle if a neighbouring NCA has previously penalised the company based on the same facts (see the BCA's decision of 28 February 2013 in Case No. 13–10–06/Meel and the *Brabomills* judgment of 12 March 2014). The guidelines on the calculation of fines adopted by the BCA on 3 September 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 or an NCA of a neighbouring country of Belgium makes a

finding of an infringement of article 101 of the 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 prosecutor in charge of the case file. 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 EU 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 that is 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 BC applies the same rules as the European Commission (ie, sufficiently precise and consistent evidence to establish the existence of an infringement).

Before the Competition College of the BCA, the burden of proof of an antitrust infringement rests on the prosecutor in charge of the investigation. However, companies can demonstrate that the agreement falls within the scope of an EU Block Exemption Regulation or challenge the prosecutor's finding on the existence of appreciably restrictive effects. To sustain such a defence, the undertaking needs to provide the necessary evidence.

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 mostly 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.

In addition, the latest changes to the Belgian Code of Economic Law (CEL) simplify the possibility of using irregularly obtained evidence (article IV.40/6 of the CEL).

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

The Investigation and Prosecution Service 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 prosecutor in its reasoned decision. Furthermore, the Market Court cannot exercise its full jurisdiction in cases regarding the application of article 101 of the 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 No. 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 – 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.

The Market Court may ask the BCA to communicate the procedural file and other documents submitted to 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 in relation to public procurement. Such practices are punishable by imprisonment and fines to 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 Competition College of the BCA may impose fines of up to 10 per cent of the worldwide consolidated turnover (depending on whether the infringement took place before or after 3 June 2019). Upon a request from the 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 that have participated in cartel activities.

Judicial courts adjudicating a cartel case are not entitled to impose fines. They can only award 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?

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, deviating from 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 be taken into account, and the leniency and settlement programmes.

The basic amount of the fine will be related to a proportion of the value of 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 in a cartel. 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 due to the settlement (ie, an additional reduction of 10 per cent of the final amount of the fine).

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 faults 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 on involved individuals serving 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 public procurement procedures an applicant or a tenderer who participated in cartel activities less than three years prior. 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 that it has 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. Bid rigging of public procurement procedures is the only cartel activity that is also considered to be a criminal offence under article 314 of the Criminal Code.

In a recent judgment, the Court of Justice of the European Union ruled, following a preliminary reference by a Belgian court, that the duplication of procedures and penalties is possible (Judgment of 22 March 2022, *Bpost v Belgian Competition Authority*, C-117/20, EU:C:2022:202). However, it ruled that this is only possible if the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame, and if the penalty that is imposed in the proceedings that took place first is taken into account in the assessment of the second penalty, meaning that the resulting burden for the persons concerned of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed. If these conditions are not fulfilled, a *ne bis in idem* defence is, in principle, feasible.

However, the most recent changes to Belgian competition law change the interplay between competition law and criminal law in cases of bid rigging of public procurement. The legislator modified article 314 of the Criminal Code by adding two paragraphs. Following the transposition of Directive (EU) 2019/1, known as the ECN+ Directive, natural persons that are granted immunity from fines under competition law are also protected from sanctions under criminal law if certain conditions are fulfilled. Article 314 of the Criminal Code stipulates that, if individuals apply to the BCA for immunity and they inform the public prosecutor of this request (by submitting a copy of the immunity application), they will be granted immunity from criminal sanctions as well. Moreover, the article institutionalises the cooperation between the public prosecutor and the BCA when such a request for criminal immunity is made. This has several consequences regarding the possibility of parallel procedures and the feasibility of the *ne bis in idem* defence:

- In the case of natural persons, the issue of parallel procedures and sanctions is now clearly set out in the law. In principle, they will receive immunity under criminal law if they inform the public prosecutor of their immunity application under competition law.
- Criminal immunity is only foreseen for natural persons. Undertakings (legal persons) still face criminal sanctions. Therefore, if a natural person requests criminal immunity, the public (criminal) prosecutor will be informed of the bid rigging activities and will be able to start an investigation on this basis, potentially leading to criminal sanctions being imposed on the undertaking. In such a situation, if the conditions of the *Bpost* judgment are respected, criminal sanctions are in principle possible, even if the undertaking receives (partial) immunity under

competition law. In our view, however, this entails discrimination between natural persons and legal persons, which could lead to a change of the law or could be used to appeal the criminal sanction.
- Without the immunity request of a natural person, the public (criminal) prosecutor will be able the start a criminal procedure in case of bid rigging. However, to avoid a *ne bis in idem* defence, it needs to ensure that it respects the conditions as enumerated in the *Bpost* judgment. However, in such a situation, there is no institutionalised cooperation with the BCA and, in most cases, the BCA will not cooperate to protect its leniency programme (through which most of the cartel cases are discovered). Consequently, we consider that, in this situation, it will be difficult to fulfil the condition of coordination of procedures and the condition that the procedures are conducted within a proximate time frame.

Besides criminal penalties, judicial courts can also condemn undertakings involved in cartel activities to the payment of damages (private enforcement). The goal of private enforcement is to compensate for the damage caused by cartel activities and, therefore, serves a different goal than public enforcement. Private and public enforcement can occur in parallel.

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 fault, damage and a causal link (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 of the moment the plaintiff knew 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 €97.50 and a maximum of €39,000.

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 consumer protection associations acting as group representatives. 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. Consumers living in Belgium should express their willingness not to participate in the collective action (an opt-out mechanism). Consumers not based in Belgium 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 rule on the admissibility of the action. If admissible, the Brussels Court of Appeals should fix a time limit enabling the parties to reach an agreement regarding compensation for the harm suffered. Such an agreement will then be homologated by the Brussels Court of Appeals but shall not constitute a finding of liability of the defendant. If no agreement has been concluded, the Brussels Court of Appeals shall decide on the merits of the case.

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

On 22 March 2018, the Belgian Federal 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 articles IV.54 to IV.54/6 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 secret cartels (including hub-and-spoke infringements).

Under the leniency programme, undertakings, associations of undertakings and individuals can obtain immunity for infringement of the cartel prohibition.

Undertakings and associations of undertakings that are first to apply can receive full immunity from fines. Full immunity can be obtained in two types of situations (Type 1A and Type 1B), 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.

Type 1A immunity 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.

Type 1B immunity is granted if:
- the applicant is the first to submit information and evidence that enables the BCA to establish an infringement;
- the BCA did not have sufficient evidence to find an infringement in connection with the cartel; and
- no undertaking or association of undertakings is already granted full immunity (Type 1A) in connection with the same infringement.

For individuals involved in one or more prohibited practices, such as directors or senior employees of parties to a cartel, immunity from fines is also available if they contribute to proving the existence of the cartel and the identification of the participants by:

- providing information not previously available to the BCA;
- providing evidence of a cartel, the existence of which had not yet been established; or
- admitting their involvement in an infringement of article IV.1, paragraph 4 of the CEL.

Individuals applying for immunity and fulfilling all conditions will all receive full immunity. They do not need to be the first in.

Both companies and individuals must also respect other procedural conditions to benefit from full immunity including, among others, that the applicant:

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

Since the adoption of the Law of 28 February 2022, natural persons may now also be granted immunity from criminal prosecution provided that they:

- submit a request for immunity from prosecution with the BCA; and
- provide the Criminal Prosecutor's Office with all available information concerning the offence and other participants.

This last condition can be fulfilled by submitting the request for immunity from prosecution, as prepared by the BCA, to the Criminal Prosecutor's Office. If such criminal immunity is requested, the Criminal Prosecutor's Office must inform the BCA.

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 their participation to the alleged cartel, etc).

Regarding individuals, full immunity applies no matter the rank of their leniency application. However, 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, even if that individual works for another company.

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 for legal persons is based on the first-come, first-served principle.

The first applicant for immunity can obtain full immunity from the fine. 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.

For natural persons, there is no first-come, first-served system. All applicants can receive full immunity.

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 prosecutor general to submit (orally or in writing) a marker (ie, an application protecting the rank of the applicant). The marker application should contain a certain minimum amount of information. If a marker is accorded, the decision will determine a time period within which a full application for immunity should be provided. If the necessary information is provided within the set deadline, the full application is deemed to be submitted on the date on which the marker was granted. If the information is submitted at a later time, the applicant loses its spot in the leniency queue.

After the submission of an immunity or a leniency application (and when the investigation is sufficiently advanced if the competition prosecutor general has decided to open proceedings), the competition prosecutor general submits a draft opinion to the Competition College of the BCA 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 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 an undertaking, an association of undertakings or an individual that has been involved in a cartel. The applicant should be the first to submit evidence to the BCA. The required 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. Moreover, they can also apply for immunity from fines by cooperating with a request from an undertaking or association of undertakings. In the event that an individual did not apply for immunity, they can only be fined if an infringement is established in the same case with respect to the undertaking or association of undertakings in the context of whose activities the natural person has acted.

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 and 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 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 competition prosecutor general can ask the companies if they are interested in starting discussions to conclude a settlement agreement. If so, the prosecutor in charge of the case indicates the range of fines that would be imposed on the company outside a settlement procedure. The prosecutor issues a draft decision based on the bilateral discussions where it identifies the objections and 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 and its liability. The companies should also agree on the indicated fine. The prosecutor then reduces the final amount of the fine by 10 per cent. It is always possible to persuade the prosecutor 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 in 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 prosecutor general 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
- the cartel's estimated duration.

The leniency or immunity application is deemed to be submitted at the meeting with the competition prosecutor general.

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 a 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 at the premises of the BCA, unless the applicant has disclosed the content to third parties. The Investigation and Prosecution Service 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 prosecutor general. Such a request can be made orally or by a written application and should include:

- the name and 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;
- the cartel's duration; and
- information on any past or possible future leniency applications to another competition authority in the European Network of Competition Authorities or in a third country.

The competition prosecutor general 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 of the BCA. 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 of Belgium (Dutch, French or German) or in any other official EU language, provided that this has been agreed before with the prosecutor in charge. Evidentiary elements can be submitted in their original language. The competition prosecutor general, the prosecutor in charge or the president of the Competition College 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 prosecutor. The file contains the documents and data used by the prosecutor to make the statement of objections sent to the companies or to write the draft decision submitted to the Competition College of the Belgian Competition Authority (BCA) (ie, it includes the immunity and leniency applications of all the applicants). However, 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 and leniency applications.

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?

External 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?

External counsel may represent multiple companies involved in cartel activities, provided that 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 when 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 *ne bis in idem* principle (see the BCA's decision of 28 February 2013 in Case No. 13–10–06/Meel and the *Brabomills* judgment of 12 March 2014).

In the case of settlements, the Investigation and Prosecution Service 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 (article IV.60(1) of the 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 a 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. A Belgian peculiarity is that, in settlement cases, a commitment to pay claims resulting from private damages actions can lead to a reduction in the fine.

UPDATE AND TRENDS

Recent cases

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

Following an investigation by the Belgian Competition Authority (BCA) into alleged illegal behaviour consisting of resale price maintenance and restriction of online sales, cosmetics company Caudalie offered commitments 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 (see Case No. ABC-2021-P/K-09).

Caudalie appealed the BCA's decision before the Market Court and further requested that the Market Court suspended 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 the following:

- Article IV.52(1)/7 of the Belgian Code of Economic Law (CEL) is the only legal basis allowing the BCA to accept commitments. However, the BCA's infringement decision was based on article IV.52(1)/2 of the CEL. These two provisions being mutually exclusive, the BCA could not provide for commitments in its decision.
- The BCA 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.

On 1 December 2021, the Market Court, in a decision on the merits, annulled the BCA's decision on the basis that the Competition College erred in law. It ruled that the commitments proposed by Caudalie based on article IV.52(1)/7 of the CEL could not be imposed on the basis of article IV.52(1)/2 of the CEL. This provision only allows the BCA to decide that an anticompetitive practice exists, order it to cease in accordance with conditions determined by the BCA and impose a fine. It does not provide for the possibility to accept commitments offered by the parties.

On 18 February 2022, the prosecutor of the BCA's Investigation and Prosecution Service (IPS) in charge of the case file adopted a settlement decision sanctioning two pharmaceutical wholesalers for their participation in a cartel. It imposed fines of €29.8 million on Febelco CV and Pharma Belgium-Belmedis SA. The two companies have acknowledged their participation in two separate offences, one regarding transfer orders and one regarding flu vaccines. Febelco received full immunity for having revealed the existence of the cartel. Pharma Belgium-Belmedis SA received a 40 per cent reduction under the leniency programme for providing evidence that strengthened the IPS' ability to establish the existence of the infringements. In addition, in the context of the settlement procedure, the fines imposed on the companies were reduced by 10 per cent as they acknowledged their participation in the infringements and their resulting responsibility (see Case No. 22-IO-06-AUD, *Grossistes en produits pharmaceutiques*). This case is a hybrid settlement because a third company, CERP, was also subject to the investigation but chose not to enter into settlement discussions. The procedure is still ongoing in relation to CERP.

On 13 April 2022, the BCA imposed a fine of €36 million on four cigarette manufacturers (Philip Morris Benelux BVBA, Établissements L Lacroix Fils NV, British American Tobacco Belgium NV and JT International Company Netherlands BV). These companies were receiving confidential and commercially sensitive information on their competitors from their customers between 2011 and 2015 without objecting, and had even requested such information.

First, concerning the behaviour itself, the Competition College ruled that the fact that the exchanged pricing information was not definitive or binding does not change their strategic nature. It allowed competitors to discern future strategies and modify their behaviour accordingly, and they should not necessarily have done so. The Competition College stated that 'systematic' does not require that every announcement be forwarded to every competitor, nor was it relevant from how many customers the information was obtained or whether they received information about every new price list or every time about all other manufacturers. The key point is that it happened repeatedly during the duration of the infringement.

Second, concerning the duration, the Competition College stated that not the date of first sending a price list but of first receiving without protest in principle determines the commencement of the infringement. In addition, it states that the infringement lasted for as long as price lists were in force, which allowed the determination of competitors' prices. This extends the duration of the infringement beyond the duration of the exchange.

Finally, the Competition College considered the behaviour to be a concerted practice and not a hub-and-spoke cartel because there was no active involvement of the hubs. Therefore, the illegal behaviour consisted of the parallel tacit agreement to receive the price lists of other manufacturers and not the sending of price lists to wholesalers (see Case No. MEDE-I/O-17/0020, *Tabak*).

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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?

On 17 March 2022, the Law of 28 February 2022 entered into force, transposing Directive (EU) 2019/1 (known as the ECN+ Directive) into Belgian law. The legislator used this opportunity to include several other changes to procedural elements to remedy difficulties encountered by the BCA in practice.

Based on the recent comprehensive change, there is no ongoing review of the Belgian legal framework. Such a review is not anticipated.

Brazil

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Law No. 12,529/2011 (the Antitrust Act) is the current Brazilian antitrust law, and 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 in the advanced discussion stage 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).

Substantive law

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

A cartel is 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 a '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 as well as public and private corporations, and 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 Administrative Tribunal concluded that ANSAC's exports to Brazil did not result in harmful effects on competition in 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 Superintendency will determine the evidence to be submitted, which may include, among others:

- the hearing of witnesses;
- requests for additional information from the defendants, companies, associations or other entities; and
- economic studies.

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 Administrative 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 their 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 Administrative Tribunal may only be challenged before the federal courts.

Before the initiation of the administrative process, CADE's General Superintendency 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 demands a written answer, the company or individual may also refuse to answer for fear of self-incrimination. However, it is important to submit a document in compliance with the defined deadline stating that it will remain silent, otherwise there is a risk of being punished by not complying with the request for information's deadline.

The General Superintendency may conduct inspections at the head offices, establishments, offices, branches or subsidiaries of the investigated company where inventories, objects and 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 lest CADE interpret 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 the Criminal Prosecutor's Bureaus in 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 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 such 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 Administrative Tribunal is responsible for the final adjudication in the administrative sphere.

At the Administrative Tribunal, antitrust violation cases, such as cartels, will be adjudicated in a public adjudication session by the Administrative Tribunal's full court. The defendant has 15 minutes to orally provide the defence arguments before the reporting commissioner reads their vote. After that, the votes of other commissioners are collected. The decisions are taken by a majority of votes. The Administrative 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 the 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 Administrative 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 as a 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 Administrative Tribunal. According to the decision, CADE is the entity defined by the law to define whether 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 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 the Criminal Prosecutor's Bureaus in different Brazilian states.

Civil and administrative sanctions

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

Administrative sanctions are imposed by CADE's Administrative Tribunal, pursuant to article 37 of Law No. 12,529/2011 (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 the estimation thereof is possible;
- 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 a 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 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 on the economic order.

Regarding civil liabilities, 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 in the advanced discussion stage in Congress that, once approved, will introduce relevant changes to 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 Administrative 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 Administrative 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?

Article 38, subsection VI of 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 Administrative Tribunal's discretion. There are some CADE precedents concerning bid rigging in which these were 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 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 for 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, a bill in the advanced discussion stage in Congress intends to include double damages and limit joint liability in relation to the beneficiaries of the leniency agreement and of defendants that executed leniency or settlement agreements.

There are still few private damage claims in Brazil related to antitrust violations 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 defend 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.

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 applicable administrative process, attending to any investigation action when requested at its expense; 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 Administrative Tribunal issues its

decision on the merits. Should the Administrative Tribunal acknowledge such fulfilment, the case will be dismissed with relation to the applying defendant or defendants 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 a 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 to 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 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 on CADE's website, named Click Leniency (*Clique Leniência* in Portuguese). Such an 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 from the General Superintendency. The online marker request rules came into effect on 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 influence 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 other such materials 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 No. 21/2018:

- the history of conduct (including amendments and attachments) of leniency agreements;
- those listed in article 44, section 2, 49, 85, section 5e and article 86, section 9 of Law No. 12,529/2011 (the Antitrust Act), as well as in articles 91 to 94 and 219 of CADE's Internal Regulation;
- 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 6, items I and 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 Administrative 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 No. 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. However, there are recent decisions from lower courts supporting the confidentiality of documents from CADE's records, according to Resolution No. 21/2018.

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

A TCC application can be divided into four phases:
- securing a marker;
- negotiating and submitting the content of the history of conduct (with a detailed description of the conduct) and the documents of evidence to be provided;
- gaining the approval of the TCC by the Administrative 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 Administrative 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 agreement or settlement agreement (TCC)). In this sense, it is guaranteed that all pieces of 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 interest 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 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 (CADE) database available on its website, since September 2021, CADE has adjudicated 10 cases, of which seven involved cartels (including one international cartel with direct or indirect effects within Brazilian territory), two involved unilateral conducts and one involved the uniformisation of commercial conducts.

Such cases involved the following products:
- automotive filters;
- polyethylene pipes and connections;
- coating resins;
- sea freight;
- telecommunications; and
- liquefied petroleum gas.

In brief, between September 2021 and September 2022, the fines imposed on the companies amounted to approximately 2 billion reais, with values up to 630.8 million reais for each company. Fines imposed on individuals related to those companies ranged up to 2.8 million reais each. There were, in total, five leniency agreements, 15 adhesions to leniency agreements and 23 requests for leniency plus.

Moreover, 23 requests for settlement agreements (TCCs) were agreed upon and authorised by CADE between September 2021 and September 2022, involving sectors such as infrastructure, foreign currency exchange, automotive lock parts, and cardiovascular orthosis, prosthesis and related materials, amounting to approximately 632.4 million reais in contributions. Another request for settlement in the infrastructure sector was rejected, due to the insufficiency of the proposed contribution to CADE.

Furthermore, in the past year, CADE has also shelved three administrative proceedings because of a lack of evidence and declared the expiration period of the statute of limitations regarding individuals in two administrative 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 is a bill under analysis by the House of Representatives that proposes the following changes to Law No. 12,529/2011:

- double damage granted to the parties affected by cartels and uniformisation of conduct between competitors (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.

As at September 2022, the proposed bill is being analysed by Brazil's House of Representatives. It was approved by the Commission of Constitution and Justice in July 2022 and should be subsequently forwarded for approval or veto by the President of Brazil.

Furthermore, CADE has published Ordinance No. 416 instituting the Click Leniency Click Leniency (*Clique Leniência* in Portuguese), which became effective on 1 October 2021. The main purpose of this ordinance is to establish rules for receiving and treating marker requests for negotiating leniency agreements electronically. Prior to these rules, the marker requests were 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 of the 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 – known as the ECN+ Directive – and Directive (EU) 2019/633, 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 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 the local level as well as in other EU 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. Dawn raid procedures were expanded 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, some modifications in the leniency procedures also affected the cartel framework. 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 it has broader options for enforcing fines and other measures against infringing companies and their corporate groups.

Other more significant changes in recent years have concerned the following:

- In January 2018, an amendment and supplement to the LPC became effective, implementing into Bulgarian law the provisions of Directive 2014/104/EU on antitrust damages actions.
- 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 the 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).
- 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 the 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 to pursue and which to reject if it does not fall within the annual priorities that the CPC 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 well-being of consumers;
- strategic significance of the policy for the application of the rules for the 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 of the TFEU. The LPC prohibits horizontal and vertical agreements and concerted practices between undertakings (ie, 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 at a 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 of the TFEU. However, in its practice, the CPC – similarly to the European Commission – has constantly viewed cartels as one of the most serious infringements of competition law. Following the practice of the European Commission and the European Court of Justice, 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' (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 – that is, 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 Programme (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 Nos. 1312 and 1313 of 5 December 2019), the CPC reaffirmed its approach that fixing 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 among 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 that 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 European Commission and the European Court of Justice – 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) of the 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 Nos. 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 European Commission (ie, group exemptions of certain categories of research and development agreements and specialisation agreements).

EU legislation, in particular article 101 of the 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 European Court of Justice and European Commission practice as well as the European Commission 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 of the 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 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 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 of the TFEU, not under the merger control regime. 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 of the 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, professional organisations, public authorities and individuals performing an economic activity for profit, among others.

The LPC also applies to individuals (in their personal capacities, not as undertakings) 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). Provided that the cartel does not affect the Bulgarian market, the LPC does 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), the Commission for Protection of Competition (CPC) has the authority to apply (and usually does so) article 101 of the 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 of the TFEU to the case and, if applicable, will follow the EU acquis (including European Competition Network 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 European Commission Notice on Cooperation within the Network of Competition Authorities, the CPC could be considered a well-placed authority to apply article 101 of the 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 to the LPC introduce such with respect to unfair trade practices, but for antitrust infringements). Thus, the general exemptions and defence strategies (group exemptions and proving pro-competitive effects) would apply. It is expected that the CPC will broaden the scope of possible exemptions at the EU level for sustainability agreements. These, however, are still being discussed between the European Commission and national competition authorities.

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 European Commission, the mere fact that a particular industry is in collapse could not serve as an exemption or a mitigating factor for cartel activity unless the parties can demonstrate pro-competitive benefits under article 17 of the LPC, similar to article 101(3) of the 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 and 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). Conversely, 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 intellectual property 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 – that is, 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' were 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. However, to aid state authorities in not issuing competition-abusive legislation, the CPC has adopted guidelines for compliance of legislative acts with 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 European Commission and European Court of Justice case law for that defence. We are not aware of a regulated conduct defence ever having been 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.

Most often, the CPC initiates a cartel investigation based on sector inquiries conducted by the European Commission 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 programme 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 chair, 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. It also does not 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 of the Treaty on the Functioning of the European Union;
- 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, any state authority, EU competent authorities and, pursuant to the latest amendments under the ECN+ Directive, 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 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 conduct inspections of the 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 a European Commission investigation. Most cartel investigations in Bulgaria in 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 for Sofia District, 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 for Sofia District. The CPC case handlers and other specified persons (such as information technology 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 their 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 European Commission, 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 with 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 Bulgarian Petrol and Gas 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, Moldova, Montenegro, North Macedonia, 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 European Commission and other EU member states' national competition authorities (NCAs) by receiving and rendering assistance and exchanging information under the procedure set forth in 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) and Directive (EU) 2019/1 (the ECN+ Directive). Based on the ECN+ Directive and the amendments to the local legislation, the CPC may forward or request information obtained during the course of a cartel investigation to the European Commission 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 EU member state procedural documents in the course of the pending investigation, including, among others:

- statements of objections and final acts or decisions;
- acts on imposition and enforcement of fines and periodic penalties; and
- assistance with the actual enforcement of fines and periodic penalties under a facilitated and unified recognition procedure.

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 – based on how the CPC uses information and resources 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 European Commission. In accordance with article 11 of Council Regulation (EC) No. 1/2003 of 16 December 2002, the CPC informs the European Commission of any formal investigative measures under article 101 of the TFEU. Before a decision is adopted, including on a cartel case, the CPC is required to provide the European Commission 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 chair 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 – that is, 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 Directive (EU) 2019/1 procedural rules (for public officials, only those with need-to-know status 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, a modification of the imposed fines, and a 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 covid-19).

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 Directive 2014/104/EU on antitrust damages actions.

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 process 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 Supreme Administrative Court 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:

- failing to assist the CPC during the investigation;
- damaging the integrity or destroying the seals that have been placed during dawn raids; and
- providing 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 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 and 50,000 leva. Individuals who fail to cooperate and assist the CPC during the investigation are fined between 500 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 to 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 EU competition authority has already sanctioned the party). Mitigating circumstances may allow for a 10 per cent reduction in 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 European Commission;
- 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 the fact that they ended the infringement before the CPC intervention as a mitigating circumstance. 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, alleged 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 in 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 where 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 is 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 is able to hold members of a trade association responsible for payment of the fine imposed on the association for competition breaches; moreover, in the 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 European Competition Network 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 means 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 processes 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?

In January 2018, an amendment and supplement to the Law on Protection of Competition (LPC) was introduced to facilitate efforts by victims of cartels and other antitrust infringements to claim compensation (the Private Damages Amendment). Under the LPC, any direct or

indirect purchaser (a natural person or a legal entity) may claim full compensation for damages caused by an infringement of the 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 the 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 Directive 2014/104/EU on anti-trust damages actions) 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*), 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 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 the 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 Directive (EU) 2019/1 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 sufficient grounds 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 submitted 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 an 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 European Commission and the relevant competition authorities of the member states. The leniency application to the European Commission will not be considered 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 the Rules for 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 its 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, make 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 hearings 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 or 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 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 has 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 a preference for 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 reopen 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 European Commision are not recognised by the CPC and will not give the protection admitted to leniency applications submitted to the CPC. If the European Commission is the best-placed authority to investigate particular cartel activity, an undertaking applying to the European Commission 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 European Commission or with EU national competition authorities). 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 Supreme Administrative Court (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?

Provided that 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 can 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 due to 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 in 2020 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 2019–2020 period also showed an increased number of bid rigging cases. These cases, which previously only comprised 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.

* *The content of this chapter was accurate as at 6 October 2021.*

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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 of the Act was replaced with a per se criminal offence to address hardcore 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 at the discretion of the court.

In December 2009, the Bureau issued its Competitor Collaboration Guidelines that set 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. 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 April 2020, the Bureau issued a statement providing specific guidelines relating to competitor collaboration during the exceptional circumstances created by the covid-19 pandemic.

In June 2022, the Act was amended to introduce a new criminal offence prohibiting no-poach and wage-fixing agreements between employers. This offence will come into effect in June 2023.

Substantive law

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

Section 45(1) 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 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(1) 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. Courts have determined that section 45(1) does not apply to any agreement between competitors relating to the purchase of goods or services.

Section 45(1) could potentially 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.

In June 2022, the Act was amended to introduce a new criminal offence in section 45(11.1), providing that an employer who conspires, agrees or arranges any of the following with another employer will have committed an offence:

- fixing, maintaining, decreasing or controlling salaries, wages or terms and conditions of employment; or
- not soliciting or hiring each other's employees.

Unlike the main conspiracy offence in section 45(1), which is limited to agreements between competitors, this new wage-fixing and no-poach offence also applies to employers who are not competitors.

This new wage-fixing and no-poach offence will come into force in June 2023. The Bureau has indicated that it plans to publish enforcement guidelines following a public consultation process.

Joint ventures and strategic alliances

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

The Bureau's Competitor Collaboration Guidelines have indicated that the criminal provision in section 45 of the Act 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 substantially lessen or prevent competition 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 may be laid against both a corporation and individuals such as its senior managers, officers or directors. Competition Bureau (the Bureau) personnel have indicated that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the Public Prosecution Service of Canada (PPSC) seek jail terms. For example, 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 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 of Competition (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. 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 the 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 countries that treat cartel conduct as criminal offences and that have extradition treaties with Canada can be extradited to Canada pursuant to the applicable extradition treaty (eg, the United States or the United Kingdom, among others). 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 United States and were sentenced by the US Federal Court in the Southern District of Illinois.

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, under section 48, 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, which was recently upheld by the Federal Court of Appeal.

The Bureau issued a statement in July 2022 indicating that it will not take enforcement action under this provision.

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 of Transport 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 exempting an airline joint venture from the application of sections 45 (criminal conspiracy), 47 (bid rigging), 90.1 (civil competitor agreements) and 92 (mergers). The Commissioner provides input to the Minister of Transport 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-poach and wage-fixing agreements

The newly enacted section 45(1.1) prohibits employee no-poach and wage-fixing agreements between employers, regardless of whether the employers are competitors.

Other buy-side agreements

Buy-side agreements for the purchase of products and services – other than the purchase of labour services in the employment context – 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 a 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 of Competition (the Commissioner) to believe, on reasonable grounds, that a criminal offence has been committed, the Commissioner will launch a formal inquiry under section 10 of the federal Competition Act (the Act). In addition, the Commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Industry (the Minister) or by an application made under oath by six residents of Canada (a six-resident application). 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 inquiries. 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 on 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 order) 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, using 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.

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 provide 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 their possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information. The June 2022 amendments to the Act clarify that a person outside Canada who carries on business in Canada or sells products into Canada may also be subject to such subpoenas.

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. The June 2022 amendments to the Act now extend this long-arm authority to include written returns of information under oath.

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, 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 agencies in 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 are 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 have also been instances of informal coordination of independent and parallel investigations into numerous international cartels. Parallel searches or other formal enforcement powers have been coordinated 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 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 MLATs and other inter-agency cooperation, a company defending a cartel investigation that has multi-jurisdictional implications, particularly one involving the United States or the European Union, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is 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 for 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 section 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 a 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:

- 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 (including for bid rigging) attract significant penalties – criminal fines with no statutory maximum or up to 14 years of imprisonment. There is also no maximum fine for foreign-directed conspiracies. 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 of the Act. 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 maximum fine 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, as was the case in several recent domestic cartel prosecutions in the construction industry.

For competitor collaboration cases that do not involve hardcore cartel conduct, the reviewable practice provisions in section 90.1 permit the Competition Bureau (the Bureau) to pursue a prohibition order against the conduct in question. Alternatively, it might be possible for the Commissioner of Competition (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 up to C$15 million for subsequent orders. In contrast, fines are not available for competitor agreements reviewable practice.

To date, there have been very few competitor agreement reviewable practice or joint dominance cases. 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?

The Criminal Code enumerates a range of binding sentencing principles and factors. They provide considerable latitude and the determination of a sentence is ultimately a matter at the discretion of the court. The aggravating and mitigating factors to be considered when sentencing organisations (including corporations) include:

- 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 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 – 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, 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 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 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 an 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 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 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 an 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). A proposed draft of the revised Ineligibility and Suspension Policy was released for public consultation in the autumn of 2018. To date, it has not been finalised.

Many provincial (and also municipal) governments have established their own 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 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 47 of the Act), proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts (and vice versa). The choice of which enforcement track to pursue is a matter of discretion for the Commissioner and DPP.

The Bureau's Competitor Collaboration Guidelines, which were updated in 2020, indicate that hardcore 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 reviewable practice. 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 a 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 of Competition 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 multi-jurisdictional 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 Multi-jurisdictional 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 class proceedings involving the foreign exchange markets, 13 defendants have thus far agreed to settlements, which collectively exceed C$110 million. In 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. 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.

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 that 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 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 key change made to the leniency programme. Until 2018, 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. The percentage of the fine reduction is now 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.

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 have 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.

The timing of the leniency application is an important consideration in the determination of the percentage of the fine reduction that will be available to the applicant. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, provided that they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation. 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 to 10 per cent discount in the corporate fine for the first offence and potentially 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, immunity is only available to the first qualifying applicant and 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 Bureau 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.

Where parties in private actions seek access to the Bureau's file, 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 (*R v Maxzone Canada Corporation*).

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 had approached the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their

knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming no other contrary factors exist (eg, subsequently working for another party to the cartel). Subsequent cooperating parties may be able to obtain protection for some of their directors, officers and employees, but these determinations will be made on a case-by-case basis.

While immunity or leniency may be revoked where a party fails to comply with the immunity or leniency programme requirements, the revocation generally will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer retains its immunity or leniency (provided that 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 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 ordinarily will not 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 of Competition and 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 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, conflict of interest can potentially arise 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 they act for the corporation alone and, if such employees 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, Competition Bureau (the Bureau) investigators or DPP

prosecutors 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. Nevertheless, 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 (imposed by a court of law for a breach of any public law); and
- statutory (imposed as a result of the application of statutes (eg, the federal 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, in the same case, 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.

Similarly, the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has also expressed the view that indirect sales into Canada made by a cartel participant can be taken into account 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. This decision has been upheld on appeal.

The Bureau released its 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?

Recent amendments to the Act in June 2022 introduced a new offence against wage-fixing and no-poach agreements between employers, which will come into effect in June 2023.

The Canadian government is expected to initiate a broad consultation about competition law reform in the autumn of 2022, which may consider other cartel-related issues. Further amendments to the Act may be proposed following the consultation.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Anti-monopoly Law of China of 2008 (AML) is the main piece of 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 Commission of the State Council (AMC) issued the Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements and the Guidelines on the Undertakings' Commitments in Antitrust Cases (the Commitments Guidelines), which provide more detailed provisions to regulate cartels and leniency. Finally, 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.

The SAMR is responsible for the investigation of the cartel arrangements that extend beyond a province, are relatively complex or have a significant nationwide impact. The SAMR may assign certain cartel cases to the PMRD if the target companies are located in one province. Where the SAMR deems it necessary to investigate the cartel directly, it may investigate on its own. For these assigned cartel cases, the SAMR may accompany the PMRD to carry out on-site dawn raids and the PMRD will report to the SAMR from time to time regarding the development of the investigation. If the PMRD finds no cartel behaviour, the SAMR may accept this conclusion. However, if the SAMR does not agree with the approach of the PMRD, it may rule on the matter as if it had not assigned the case to the PMRD. The 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 policymaking 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, the 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 the AMC on the Platform Economy (the Platform Economy Guidelines).

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, provided that an agreement 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 research and development (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 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 agreements

The AML introduced a new article to deal with hub-and-spoke cartels, which provides that '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.

Safe harbour

The AML stipulates the following:

> *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 a safe harbour for undertakings in highly competitive markets 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 markets and enterprises that have a great influence on market competition.

Monopoly agreements in the field of the digital economy

The new AML added several articles addressing cartels in the digital economy. Undertakings in the digital economy shall not use technological means, platform rules or data and algorithms, among others, to engage in monopolistic behaviours prohibited in this chapter (horizontal monopoly agreements, vertical monopoly agreements and hub-and-spoke agreements).

Cartel rules in the Platform Economy Guidelines

Hub-and-spoke agreements centred on the platform

The Platform Economy Guidelines pointed out that competing undertakings on 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 an agreement falls within the scope of monopoly agreements under the AML, whether the competing undertakings are using technical means, platform rules, data or algorithms, among others, to eliminate or restrict competition may be taken into account.

Algorithm collusion

The Platform Economy Guidelines provide that:

> *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, R&D and 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 standard formula for calculating prices. The nature of 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, market allocation can be further divided into geographic market allocation, product market allocation and market share allocation.

In geographic market allocation, undertakings assign exclusive territories for each cartel member (online and offline markets could also be so allocated).

In product market allocation, undertakings allocate the exclusive rights on certain categories, volume and timing of sales of products to each cartel member.

In 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.

In customer allocation, customers are allocated among the undertakings, so an undertaking will not sell its products or services to customers allocated to another cartel member.

Group boycotts

A group boycott is an agreement among competing undertakings not to do business with a targeted undertaking. This arrangement could target 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 that are in competition with them can also be determined as a group boycott.

Output agreements

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 has investigated and fined bid rigging-related conduct by applying article 13 of the AML in several high-profile cases, including the *Auto Parts and Bearings* case (2014) and the *Auto Maritime Transportation* case (2015).

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 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 consumer welfare. New technology and products are results of innovation. This cartel rule under the AML is vitally important for preserving competition in innovation and ensuring the best outcome for consumers.

Information exchanges

Information exchange among undertakings is not presumptively illegal in China unless 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 exchanges, 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 versus 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 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 of fulfilling 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 that '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 licence 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 that the driving licence was forged).

However, in the appeal of *China Rail Finance Leasing Co, Ltd v Tianjin Branch of the State Administration of Foreign Exchange*, the First Intermediate People's Court of Beijing held that the determination of a party's illegal conduct should satisfy both objective and subjective requirements (ie, there should be conduct that violates the administrative law and there should be subjective fault). 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 cartel being formed.

Establishment of a joint venture by competitors

Although the AML looks sceptically upon agreements between competitors, the 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, among others, from a common source in order of economic scale to increase their purchasing power to balance with market power;
- the research joint venture – enables participating companies to increase innovation, reduce R&D costs and possibly create better quality products;
- the production joint venture – integrates or creates a shared production facility among the participating companies; and
- the distribution joint venture – integrates 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 the 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 concerns. 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 being of higher quality, thus benefitting the consumers. However, a production joint venture may achieve economic scale, thus lowering the cost of production and improving efficiency, which is also good for the consumers of the participants' product.

No competition between a joint venture and its participating companies

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 'non-compete clauses'.

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 are laid out below.

Duration

The term of the non-compete clause should not be too long. There are no guidelines on 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 from flowing between the competing joint ventures and the 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:

- it is a commercial contract, which is easier to unwind if it does not work out;
- the relationship between the parties to a strategic alliance is simple and flexible; and
- it 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 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 of 2008 (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 Chinese domestic market. There have been a number of cartel cases – including the *LCD Panel* case (2013), the *Auto Parts and Bearings* case (2014) and the *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 must be 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, among others, of agricultural products. The relevant 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 can still be caught under the AML. For instance, the above agriculture exemption 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.

The term '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 is a special economic organisation that is 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 to carry out business operations and management.

Active pharmaceutical ingredients

The Guide to the Pricing Behaviour 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 and gross profit rate, among others, 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 abuse of dominance, merger control and abuse of administrative power related to the API. According to the Draft API Guidelines, in a cartel investigation, the State Administration for Market Regulation (SAMR) or the Provincial Market Regulatory Department (PMRD) have 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 to prove that market competition is not seriously restricted.

The Draft API Guidelines also state that the API, in general, constitutes an independent market and may be further divided. This means that 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 the following:

- 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 the 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 are subject to further revision. No matter how this document will be revised, as stated in article 20 of the Draft API Guidelines, the SAMR and PMRD will strictly and severely investigate antitrust acts related to APIs.

Automobiles

According to article 5(1) of the Antitrust Guidelines for the Automotive Industry (the Auto Guidelines) issued by the Anti-monopoly Commission 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 the impact thereof 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 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 (the FCR Opinions) were issued in 2016. The purpose of the Fair Competition Review System is to prevent policymaking 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 undertakings to engage in monopolistic practices in violation of the AML and cannot set government pricing exceeding the pricing authorities. Therefore, according to the above provisions and opinions, cartels endorsed under 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 local government. Undertakings that follow 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 the Provincial Market Regulatory Department (PMRD) may also initiate an investigation if it has reason to believe that there has been a cartel infringement.

Pre-investigation

At this stage, the 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 the SAMR before initiating the investigation.

Initiation of an investigation

The SAMR or PMRD may initiate an antitrust investigation at their own discretion if one believes that there is a good case to pursue. The PMRD shall, within seven working days of the initiation of an antitrust investigation, report the case to the 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 the SAMR or PMRD. The SAMR or 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 an at least 80 per cent mitigation of the fine. The second may receive a 30 to 50 per cent mitigation. The third may receive a 20 to 30 per cent mitigation. In exceptional cases where leniency is provided to more applicants, they may receive a no more than 20 per cent mitigation.

Fact-finding and dawn raids

The SAMR and PMRD have broad investigative powers and, during the fact-finding stage, the 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 requesting the undertaking to provide documents.

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

The 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 that 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 the SAMR. If such measures are properly implemented in the agreed period of time, the 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 the SAMR to attend an expert argumentation meeting to give an expert opinion on the findings and preliminary decisions of the SAMR.

Oral notice for the finding of the case

After the expert argumentation meeting, the SAMR will orally release its findings and its preliminary decision to the undertaking under investigation. The oral notice may include the proposed fine base and the proposed rate of fine. The undertaking can provide the SAMR with a statement or argument to challenge the facts and the law's application.

Prior notice for the administrative penalty

After communication between the SAMR and the undertaking under investigation, the 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 or 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, the 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 or terminating an investigation, will be released to the public through the SAMR's website.

Administrative review or administrative lawsuit

If the undertaking does not accept a decision made by the 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, the SAMR's internal priorities and the cooperation of the undertakings under investigation, among other factors.

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 of 2008 (AML) grants the SAMR and PMRD broad investigative powers, including the ability to:

- conduct on-site 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 mail and electronic data, among others, of the investigated undertaking, interested parties and other relevant entities or individuals;
- seal up and detain relevant evidence; and
- enquire about the bank accounts of the undertakings.

The SAMR and PMRD do not need to obtain court orders for searches, seizures or 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 the SAMR or 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 its counterparts in other jurisdictions. Since the enactment of the Anti-monopoly Law of China of 2008 (AML), China 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, South 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 the 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 for Competition (DG COMP) of the European Union signed an MOU, which created a dedicated framework to strengthen cooperation and coordination between DG COMP and Chinese authorities concerning legislation, enforcement and technical cooperation regarding cartels, other restrictive agreements and abuse of dominant market positions.

In May 2019, the 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, the 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, the 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 Organisation for Economic Co-operation and Development (OECD). However, the consolidation of China's three antitrust agencies will smooth communication and coordination between the SAMR and the ICN and OECD. As a member state of the United Nations (UN), 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 the 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 the State Administration for Market Regulation (SAMR) or Provincial Market Regulatory Department (PMRD) establishes a finding of a monopoly agreement, it will issue a formal penalty decision and a public announcement. Usually, the SAMR or PMRD is obliged to issue a prior notice for the administrative penalty 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 the administrative penalty and the formal decision, and the 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 the SAMR or 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, the SAMR or the PMRD bears the burden to prove the existence of a cartel. Once the 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 that 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 a 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 exist. 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 the SAMR or 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

Competent authorities

Administrative review is a procedure that generally applies to penalties imposed by administrative agencies. For the penalty decision made by the SAMR, the application for administrative review shall be submitted to the SAMR. Decisions made by the PMRD can be challenged either at the provincial government level or with the 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 the SAMR or PMRD (the administrative counterpart), or undertakings that have an interest in a specific administrative decision of the SAMR or 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.

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

Administrative lawsuit

An undertaking can challenge a SAMR or PMRD penalty decision via an administrative lawsuit in a court. For a PMRD decision, 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 the 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 that has interests in a specific administrative decision of the SAMR or PMRD has the right to initiate an administrative lawsuit. The interests could be:

- the decision of the SAMR or PMRD involves its right to fair competition;
- the revocation or change of the decision of the SAMR or PMRD involves its lawful rights and interests; or
- the undertaking has made a complaint to the SAMR or PMRD and it has not handled the case.

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.

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 a fixed term of imprisonment of not more than three years or criminal detention and may also be fined.

The crime of bid rigging is not a concept that originated in the Anti-monopoly Law of China of 2008 (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 of the above pieces of legislation date from earlier than the AML in 2008 and the crime of bid rigging is not part of the AML.

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 to 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 a fixed term of imprisonment of not more than three years, criminal detention or 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 where the obstruction occurred. 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?

The SAMR or PMRD may impose the following penalties against cartel arrangements according to the AML:
- order the illegal act to cease;
- confiscate illegal income; and
- order the undertaking to pay a fine of 1 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 million 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, the SAMR or PMRD may impose a fine of not more than 5 million yuan. Where the case is serious, the registration and administrative authorities for social organisations may deregister the industry association pursuant to the law.

In recent years, enforcement against cartels has increased, with increasingly higher penalties imposed on cartel members and any industry association organising 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 reached 1.24 billion yuan, representing 4 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, which is the maximum fine available for industrial associations 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 that loses 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 the 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?

Determining 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, the 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 the 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 the SAMR, this approach could increase deterrence and unify the standard of antitrust enforcement in China.

Determining the ratio of the fine

The SAMR or PMRD shall consider the factors of the nature, extent and duration of the monopolistic behaviour to determine the ratio of the fine.

Nature of 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.

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.

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 or 1 per cent; and
- if the undertaking under investigation voluntarily confesses an illegal act that is not yet known to the SAMR or PMRD or has performed meritorious service in cooperating with the SAMR or PMRD, the penalty may be reduced by 1 per cent.

Evaluation of damage caused by monopolistic behaviour

Factors to be considered include, but are not limited to, market share, impairment to the interest of consumers, market entry and competition restraint.

Adjustment

After determining the basic fine ratio based on the nature, extent and duration of the monopolistic behaviour, the SAMR or PMRD could adjust the fine ratio based on the specific circumstances of the case.

Circumstances where the fine ratio may be increased include:

- the SAMR or PMRD has ordered the undertaking to cease implementation of the monopolistic behaviour, but the undertaking refuses to do so; and
- the undertaking refused to cooperate with the SAMR or PMRD during the antitrust investigation process.

Circumstances where the fine ratio may be reduced include:

- being coerced or induced by others to implement monopolistic behaviour;
- actively confessing monopolistic behaviour that the SAMR or PMRD has not yet identified; and
- cooperating with the 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, no administrative penalty may be imposed:

- if the violation is minor and corrected in a timely manner, and it does not cause harmful consequences;
- for anyone who violates the law for the first time with minor consequences and makes timely corrections; and
- if the party has sufficient evidence to prove that there is no subjective fault.

Illegal earnings

According to article 28 of the Law on Administrative Penalties of 2021, the term 'illegal earnings' refers to the money obtained from the implementation of illegal acts.

Illegal earnings are limited to the money obtained from the product or service involved. The money obtained from products or services not involved in 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 of 2021, illegal earnings shall be confiscated. In some cases, illegal earnings are difficult to calculate and are not confiscated. However, the 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 of the State Council 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 the 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 the SAMR and PMRDs, if the compliance programme is effective, there should be no suspicious cartel activities at all.

Establishing or strengthening an antitrust compliance programme going forward, even after the 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 directors, supervisors or senior officers of a company due to conducting a cartel.

The Antitrust Compliance Guidelines for Undertakings encourages undertakings to:

- establish and improve anti-monopoly compliance assessments as well as 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 are not law and 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 the SAMR or PMRD does not preclude private civil litigation against the same conduct. Both standalone and follow-on actions after the decision of the SAMR or PMRD are permitted.

Tian Junwei v Carrefour and Abbott (2016) was a follow-on private litigation of a National Development and Reform Commission (NDRC) penalty decision against baby formula manufacturers for resale price maintenance. The suit was dismissed since the court considered that the penalty decision submitted by plaintiff Tian Junwei could not prove that there was a monopoly agreement between Carrefour Shuangjing Store and Abbott. More specifically, the decision of an administrative penalty issued by the 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 of 2008 (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 the 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 Tian Junwei, 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 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 that 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 (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 of winning.

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 the 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 are 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 that 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 an 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-collecting capabilities. If it can use this ability to make it fight against the undertaking that implements monopolistic behaviour in litigation, it can increase the likelihood of the plaintiff's victory and help to 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 of 2008 (AML). The 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 the undertaking voluntarily reports the relevant facts and provides material evidence.

According to the Guidelines for the Application of the Leniency Programme to Cases Involving Horizontal Monopoly Agreements (the Leniency Guidelines) published in June 2020, the immunity and mitigated rate shall be determined according to the following rules:

- for the first applicant, the SAMR or PMRD may grant immunity to such an 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 to 50 per cent;
- for the third applicant, the fine amount may be mitigated by 20 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, the 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 the SAMR or PMRD require it to continue carrying out the cartel acts 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 the SAMR or PMRD.

The undertaking must also cooperate promptly, continuously, comprehensively and sincerely with the investigation, properly preserving and providing evidence and information. It must not conceal, destroy or transfer evidence, 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 the SAMR or PMRD.

Basic elements of the immunity programme

According to the Leniency Guidelines, 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 in 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.

The term 'material evidence' refers to evidence that plays a critical role in the launch of an antitrust investigation or the determination of a monopoly agreement by the SAMR or PMRD, including:

- for the first in:
  - providing sufficient evidence for an antitrust investigation to be launched, if the SAMR or PMRD had no clues or evidence; and
  - providing evidence that the SAMR or PMRD can use to determine whether 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, the 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 the SAMR or 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 the SAMR or PMRD for mitigation. The 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 to 50 per cent for the second applicant;
- 20 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 the SAMR or PMRD because the relevant 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 deadline for initiating or completing an application for immunity (ie, full leniency or amnesty) or partial leniency is the issuance of the prior notice for 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 notice for the administrative penalty.

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, the SAMR or 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, the SAMR or 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 the 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, which can be extended to 60 days under special circumstances), the 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 form. In certain cases, the leniency application can be made orally through dictation to the 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, voluntarily report the circumstances of its cartel activities and provide material evidence that can help the 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 the 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 the SAMR or PMRD must not be disclosed without the consent of the SAMR or PMRD; and
- the applicant must 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, to attract more leniency applications, the SAMR and PMRD 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, the SAMR or PMRD keep the identity of the leniency applicants confidential during investigations. However, the applicants' identities will be revealed in SAMR or PMRD final decisions. Usually, the SAMR or 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), the National Development and Reform Commission 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 of the State Council in 2019 and published in June 2020. According to the Commitments Guidelines, the 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 the SAMR or PMRD before the decision to suspend the investigation, a settlement negotiation could be conducted. The process of a 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 the SAMR or PMRD;
- the undertaking may negotiate with the SAMR or PMRD regarding the content of the commitments and address all concerns of the authority; and
- if the 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, the SAMR or 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 the 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 or consumers, or the public interest, the 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 the SAMR or 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 the SAMR or 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. The 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, the SAMR and PMRD 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 the SAMR or PMRD.

In *Calcium Gluconate API* (2020), Shandong Kanghui Medicine, Weifang Puyunhui Pharmaceutical and Weifang Taiyangshen Pharmaceutical were pharmaceutical distributors in China. They purchased and distributed the calcium gluconate active pharmaceutical ingredient (API) for injection from August 2015 to December 2017. The SAMR found that they held a dominant position in China's sales market for the calcium gluconate API for injection and had abused their dominance by selling products at unfairly high prices and imposing unreasonable trading conditions on clients. The 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, the SAMR sent a prior notice to the companies outlining the details of its planned decision as well as their legitimate rights to make statements or arguments, or to apply for hearings. Shandong Kanghui Medicine 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 the SAMR due to reasons of confidentiality.

This case indicates that, when challenging SAMR or PMRD penalty decisions in administrative litigation, administrative review or hearing before the decision, the undertaking under investigation may not gain access to the 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 of 2008 (AML) unless they obstruct an investigation. However, the law does not prohibit counsel from representing employees as well as their corporation, provided that 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. Counsel can represent them all to defend the case.

For multiple corporate defendants that 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 for immunity, there is no way to compromise. Therefore, it is not advisable for 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 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 of 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 that complies with the norms of production and business activities, and that 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 that complies with the norms of production and business activities, therefore they 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?

The 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 the 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 monopolistic conduct. If the plaintiff already received damages or amounts paid in settlements from the defendant in civil cases in other jurisdictions, such an 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;
  - other circumstances specified by laws or the State Council;
  - the specific form and effect of the cartel arrangement realises the public interests or efficiencies;
  - the causation between the cartel arrangement and the public interests or efficiencies can be shown; and
  - the cartel arrangement is necessary 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 prove that:

- it was coerced by other undertakings to implement the cartel;
- it was forced or coerced by administrative authorities to implement the cartel;

- it cooperated with the SAMR or 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' violations of the AML;
- it neither played a leading role in the cartel nor coerced other undertakings to implement the cartel;
- it had 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?

Glacial acetic acid 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 (APIs) in China. The three undertakings agreed to raise the price for the 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 State Administration for Market Regulation fined the three undertakings 4 per cent of their turnover for the preceding year (the year before the investigation was launched) and confiscated the illegal earnings.

Tianjin port yard cartel and leniency application

Twenty-seven undertakings operating container yard services at the 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 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 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 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 anti-monopoly law will be issued soon.

The new law will add many new rules, which need to be further clarified. They include, but are not limited to, the following:

- a safe harbour standard for cartels; and
- guidance on 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.

* *The content of this chapter was accurate as at 22 October 2021.*

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant legislation is the following:

- the Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law), which repealed and supplanted the previously existing Protection of Competition Law of 2008 (Law No. 13(I)/2008, as amended by Law No. 41(I)/2014);
- the Law on Actions for Damages for Infringements of Competition Law of 2017 (Law No. 113(I)/2017); and
- the Regulations on the Immunity from and Reduction of Administrative Fines in Cases of Restrictive Collusions Infringing Section 3 of the Law or/and Article 101 of the Treaty on the Functioning of the European Union (Leniency Programme) of 2011 (Regulation 463/2011).

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 competent authority for the enforcement of cartel matters in Cyprus is the Commission for the Protection of Competition (CPC), which has been granted the powers to investigate, enforce competition rules and issue infringement decisions, and impose administrative fines and sanctions upon findings of cartels.

The CPC is assisted by the Service of the CPC, which provides preliminary evaluation and reports to the CPC.

Changes

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

The Law was enacted on 23 February 2022, repealing and replacing previous legislation, to transpose the ECN+ Directive (EU) 2019/1. The new regime ensures better harmonisation in proceedings that have been instigated in parallel with other national competition agencies and affords the CPC more extensive guarantees of independence, resources and effectiveness in its enforcement and fining powers.

Substantive law

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

Section 3 of the Law is the applicable provision. It prohibits agreements, concerted practices and decisions of associations of undertakings whose object or effect is the prevention, restriction or distortion of competition within Cyprus. In particular, section 3 regulates those that:

- directly or indirectly fix prices or any other trading conditions;
- limit or control production, markets, technical development or investments;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions, thereby placing certain undertakings at a competitive disadvantage; and
- make the conclusion of contracts subject to supplementary obligations that are not connected to the subject of such contracts.

Although it is not specified within the provision whether cartels are deemed to restrict competition by object or effect, the case law has evolved in such a way that they are considered to be hardcore infringements that prevent, restrict or distort competition by object.

The level of knowledge or intention is irrelevant for attributing liability for cartel infringement. The key element for establishing liability is participation in a cartel that has as its object or effect the prevention, restriction or distortion of competition.

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 law to the extent that they fall within the Law's definitions related to undertakings.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

The recently enacted Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law) applies to undertakings and associations of undertakings.

The term 'undertaking' is defined as any entity engaged in economic activities, regardless of legal status or the way in which it is funded. An 'association of undertakings' is defined as any company, partnership, association, society, institution or body of persons, having a legal personality or not, that represents the trade interests of autonomous undertakings and takes decisions or enters into contracts for the promotion of those interests.

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 the jurisdiction to the extent that such conduct affects competition in Cyprus by either its object or its effect.

As per the recently introduced provisions of the Law relating to extraterritoriality, the Commission for the Protection of Competition has been granted extensive powers to effectively enforce the Law outside its jurisdiction, both during the investigation phase and the sanctioning phase.

Export cartels

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

No provisions within the Law contain exemptions or defences concerning conduct that affects only customers or other parties outside the jurisdiction.

Industry-specific provisions

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

No provisions within the Law concern industry-specific infringements.

Section 3 of the Law may be declared inapplicable to specific categories of agreements, concerted practices and decisions by associations of undertakings by order of the Council of Ministers based on section 5(1) of the Law. Orders relating to the motor vehicle sector, the insurance sector and vertical agreements have been issued by the Council of Ministers.

Government-approved conduct

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

The Law does not apply to undertakings that have been assigned to operate services of general economic interest or that have the character of a revenue-producing monopoly, insofar as it obstructs them from the performance of the tasks assigned to them by the state (section 7(1)(b) of the Law). Section 7(2) of the Law presumes that the tasks cannot be carried out in another financial or technical way that is compatible with the Law.

Undertakings that have no discretion in respect of their conduct but comply with mandatory government decisions or regulations cannot be held liable for competition law infringements.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Commission for the Protection of Competition (CPC) may initiate an investigation either on its own (ex officio) or following the submission of a complaint.

In conducting an investigation, the CPC has the power to collect information concerning a potential infringement or infringements, acting on its own authority or on behalf of other national competition agencies, or both.

To that end, the CPC may address written requests to undertakings, associations of undertakings or other natural persons, or public or private entities requesting the provision of information within a reasonable time frame, which cannot be less than 20 days. Where necessary, the CPC may request the provision of additional information or clarifications within a set time frame, which cannot be less than seven days.

Upon enactment of the Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law), the CPC was vested with greater authority to conduct interviews, being empowered to summon any natural or legal person of interest to receive statements and collect evidence or information with regard to the subject of the investigation. Failure to comply, or the provision of false or inaccurate information – or a combination thereof – are regulated by the new framework, which empowers the CPC to impose relevant administrative fines.

The CPC may also conduct unannounced inspections (dawn raids), and enter the premises of undertakings and associations of undertakings (with the exemption of residences).

In cases where the CPC ascertains the existence of a prima facie case of infringement, the investigation stage concludes with a written statement of objections, which is sent to the undertaking or undertakings investigated or to a designated representative.

Undertakings or associations of undertakings that form the object of CPC investigations may access the entire administrative file, with the exceptions of confidential information, business secrets and, where applicable, leniency applications. In cases where the CPC finds that the complaint does not fall within the Law or that no reasonable grounds for the suspected infringement exist, it issues a decision.

Investigative powers of the authorities

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

The CPC derives the following regulatory powers from its authority as the competent national authority or as an authority acting on behalf of NCAs established in other EU member states:

- to collect information through written requests to undertakings, associations of undertakings, other natural or legal persons, or public or private entities;
- to subpoena natural or legal persons for interviews for the purpose of receiving statements and information concerning the subject of the investigation, with an additional power to issue administrative fines in cases of failure to comply;
- to enter premises, land and means of transport of undertakings or associations of undertakings (with the exception of residences) for the purpose of conducting an inspection (dawn raid) – the inspection of residences or any other location not included herein may be conducted only upon issuance of a duly reasoned judicial warrant;
- to examine and take copies or extracts of records, books, accounts and other documents related to the business (regardless of the medium used for their storage) – following the new legal framework, this power may extend to digital or electronic evidence and, in general, all evidence regardless of format or manner of storage;
- to seal any business premises and records, books, accounts and other documents to inspect them;
- to ask representatives or employees questions and record their answers; and
- to conduct sectoral inquiries or inquiries into particular types of agreements in several sectors when suspecting a restriction or distortion of competition due to the trend of trade, the rigidity of prices or other circumstances.

In relation to the final point above, the CPC may request information and conduct inspections. Moreover, it may publish a report on the results of its inquiry, as well as use the evidence acquired for potential infringement 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?

The Commission for the Protection of Competition (CPC) is part of the European Competition Network, the European Competition Authorities Network and the International Competition Network.

The CPC has had in place a memorandum of cooperation with the Hellenic Competition Commission since 2014 and has cooperated with other competition authorities in the past, including the French Competition Authority and the Irish Competition and Consumer Protection Commission, for staff training purposes.

The recently enacted Protection of Competition Law of 2022 (Law No. 13(I)/2022), incorporating the ECN+ Directive (EU) 2019/1, enhances mutual cooperation among national competition agencies through the introduction of new clauses for the provision of assistance with conducting investigations, disclosure of documents with a cross-border interest and the enforcement of sanctions, as well as the enforcement of administrative fines to guarantee effective implementation of the competition law framework.

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 has no significant interplay with any other jurisdictions in relation to cross-border cases.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

Cartel proceedings are adjudicated or determined by the Commission for the Protection of Competition (CPC) following the completion of the investigation stage. Upon examination of evidence collected during the investigation stage, the CPC decides whether a prima facie case of infringement can be established.

In cases where it ascertains the existence of a prima facie case of infringement, the CPC draws up a statement of objections and addresses it to the undertakings concerned, providing a reasonable time frame for the submission of their written observations. At this stage, and upon assessing the seriousness of the potential infringement, the CPC may also adopt interim measures based on proportionality grounds.

The new provisions provided in the Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law) have vested the CPC with the power to reject further examination of complaints of potential infringements of the Law on the basis of its enforcement priority criteria.

The undertakings concerned may request to develop the arguments contained within their written observations in an oral proceeding. The CPC has the discretionary power to approve their request.

The CPC may reserve its decision for a later date. If it intends to impose an administrative fine, it is obliged to inform the undertakings concerned of its intention and reasoning, and provide a strictly limited period of 30 days for the submission of any observations.

The level of the fine is determined by the gravity and duration of the infringement, and may be up to 10 per cent of the turnover achieved by the infringing undertaking in the preceding year.

If an administrative fine is imposed following an infringement decision, the undertakings concerned must, unless expressed otherwise, arrange payment of the administrative fine within a 60-day time frame from notification of the decision.

In cases of ongoing infringement, the CPC may issue a decision ordering its termination within a set time frame. In cases where the infringement has already ceased, the CPC may condemn it through a declaratory decision.

Burden of proof

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

The burden of proof rests with the CPC, which must prove infringement beyond a reasonable doubt.

However, the burden of proof in relation to the invocation of defences or exemptions lies with the undertaking making the claim.

Circumstantial evidence

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

An infringement may be established by using circumstantial evidence and without direct evidence of actual agreement. However, such circumstantial evidence must be considered holistically. The evidence must be sufficiently accurate, convincing and converging to support an allegation of infringement.

Appeal process

18 | What is the appeal process?

Decisions issued by the CPC may be challenged before the Administrative Court of Cyprus on the basis of article 146 of the Constitution of the Republic of Cyprus within 75 days from the date of its publication or the date on which the undertaking was notified of the CPC decision.

A decision issued by the Administrative Court may be subsequently appealed before the Supreme Court of Cyprus within 42 days from its issuance.

SANCTIONS

Criminal sanctions

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

The Protection of Competition Law of 2008 (Law No. 13(I)/2008, as amended by Law No. 41(I)/2014) did not contain any provisions for the imposition of criminal sanctions for cartel activity.

Criminal sanctions for legal or natural persons may be imposed only in the context of non-cooperation with the Commission for the Protection of Competition (CPC) during inspections, failure to comply with a final decision, a decision for the adoption of interim measures or failure to comply with the duty of secrecy, or a combination thereof.

Civil and administrative sanctions

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

The CPC may, depending on the gravity and duration of the infringement, impose the following administrative sanctions:

- fines of up to 10 per cent of the total annual turnover of an undertaking; and

- fines of up to the sum of 10 per cent of the total annual turnover of every undertaking that is a member of the infringing association of undertakings.

Additionally, for each day that an undertaking fails to comply with a final decision or a decision imposing interim measures issued by the CPC, the latter may impose upon the former a fine of up to 5 per cent of its average daily turnover for each day that the infringement continues.

Fines are calculated in accordance with the worldwide turnover achieved by the undertaking or undertakings in the preceding financial year.

For the purposes of the imposition of administrative fines following infringement findings, under the Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law), the CPC may expand the notion of undertakings to enforce fines against parent companies as well as economic and legal successors of corporate entities, notwithstanding changes in their corporate structure.

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 Law does not contain any guidelines or principles for setting fines. In practice, when setting a fine, the CPC considers the gravity and duration of the infringement, as prescribed in section 24 of the Law, and may take into account the European Commission's guidelines on setting the fine. Fines may also be reduced through participation in the leniency programme, the provisions of which are contained in the Regulations on the Immunity from and Reduction of Administrative Fines in Cases of Restrictive Collusions Infringing Section 3 of the Law or/and Article 101 of the Treaty on the Functioning of the European Union (Leniency Programme) of 2011 (Regulation 463/2011) (the Leniency Programme).

Compliance programmes

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

The Law does not contain any guidelines or principles for setting fines. In practice, when setting a fine, the CPC considers the gravity and duration of the infringement, as prescribed in section 24 of the Law, and may take into account the European Commission's guidelines on setting the fine. Fines may also be reduced through participation in the Leniency Programme.

Director disqualification

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

The Law contains no provisions concerning director disqualification.

Debarment

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

The Law contains no provisions concerning debarment from government procurement procedures 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?

Given that the Law does not provide for criminal sanctions in relation to cartel infringements, and that administrative sanctions are imposed only on undertakings and associations of undertakings, parallel proceedings are not applicable.

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, or public authority, that has suffered damage due to a competition law infringement may bring an action for damages (private damage claim) before the district courts of Cyprus on the basis of the Law on Actions for Damages for Infringements of Competition Law of 2017 (Law No. 113(I)/2017) (the Law on Damages).

Actions for damages are available to both direct and indirect purchasers.

A plaintiff bringing an action under the Law on Damages may seek to be fully compensated. Full compensation means the restoration of the party who has suffered damage to the situation it would have been in had the infringement of competition law not occurred. This includes actual loss and loss of profit, as well as interest due from the time the damage occurred until the time when the compensation is paid. Full compensation does not include punitive damages.

Indirect purchasers must prove that:

- the defendant has infringed competition law;
- the infringement resulted in the imposition of an additional charge to the direct purchaser of the defendant; and
- the plaintiff (indirect purchaser) has purchased the affected product.

Passing-on may be used as a defence by defendants, provided that they prove that the plaintiff has passed on, either fully or partially, the overcharge imposed from the infringement.

There are no specific provisions for relief on umbrella purchaser claims. However, such claims may be possible under European Court of Justice case law (Case No. C-557/12, *Kone AG and others v ÖBB-Infrastruktur AG*).

The level of damages is single and compensatory, as the Law on Damages stipulates that an infringing party should not be subject to multiple liabilities when the overcharge has been passed on along the supply chain (section 15).

As at September 2022, there is no case law on actions under the Law on 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?

The Law on Damages does not contain any provisions that allow class actions.

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 current such programme has been in place since 2011 under the Regulations on the Immunity from and Reduction of Administrative Fines in Cases of Restrictive Collusions Infringing Section 3 of the Law or/and Article 101 of the Treaty on the Functioning of the European Union (Leniency Programme) of 2011 (Regulation 463/2011) (the Leniency Programme). The Leniency Programme provides two kinds of beneficial treatment to cooperating undertakings:

- immunity from the administrative fine; and
- reduction of the administrative fine.

Immunity may be granted to the first undertaking that submits evidence sufficient to either initiate an inspection for an alleged infringement or find an infringement. Immunity cannot be granted if the Commission for the Protection of Competition (CPC) already possesses sufficient evidence for either of the aforementioned or if the CPC has already granted conditional immunity to another undertaking.

An undertaking seeking immunity must fulfil the following conditions:

- cooperate fully, actively and on a continuous basis with the CPC, from the date of submission to the completion of the procedure;
- terminate its involvement in the alleged infringement at the time of submitting its leniency application (unless the CPC considers it reasonably necessary to act otherwise to preserve the integrity of the inspections carried out); and
- demonstrate that it has not incited other undertakings to participate in the infringement.

Undertakings that have incited others to participate may, however, apply for a reduction of the administrative fine.

The granting of immunity or reduction of the administrative fine under the Leniency Programme does not exclude an undertaking's civil liability in private litigation.

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 apply for a reduction of the administrative fine, provided that they have submitted evidence of significant added value, meaning that it strengthens the CPC's ability to prove the alleged infringement.

Undertakings applying for a reduction of the administrative fine must also cooperate fully, actively and on a continuous basis with the CPC, and terminate their involvement in the infringement at the time of submitting evidence (unless otherwise instructed by the CPC).

A subsequent cooperating undertaking applying for a reduction of the administrative fine and meeting the above conditions is eligible for a reduction of up to 50 per cent of the administrative fine, depending on whether it was the first, second or third undertaking to have applied.

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?

Subsequent cooperating parties may be granted a reduction of the administrative fine by the CPC if they fulfil the necessary conditions. More specifically, the second cooperating party may benefit from a 30 per cent to 50 per cent reduction of the applicable administrative fine. The third cooperating party, and thus second under the administrative fine reduction procedure, may receive a 20 per cent to 30 per cent reduction. Subsequent parties may receive a reduction of up to 20 per cent.

There is no immunity plus or amnesty plus treatment available.

Approaching the authorities

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

Although the Leniency Programme does not contain a specific deadline for the submission of immunity applications, time is of the essence when applying, given that immunity is granted only to the first applicant that meets the conditions.

The first immunity applicant may apply for a marker to ensure priority until the collection of all necessary information is complete. If the marker is perfected within the time frame provided by the CPC to that end, the application is considered to have been submitted on the date the marker was granted.

Applications for a reduction of the administrative fine may be submitted at any time prior to the issuance of a decision by the CPC concerning an alleged infringement. However, if they are submitted after the issuance of the statement of objections, they may be disregarded by the CPC.

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?

Participating undertakings must cooperate fully, actively and on a continuous basis with the CPC from the date of submission of the leniency application to the date the procedure is completed.

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 a leniency applicant, the content of its application, and the nature and extent of its cooperation are protected until a statement of objections is drawn up by the CPC, unless the latter is bound by another legal obligation or has obtained the consent of the applicant to disclose the information.

The Leniency Programme does not differentiate between the levels of confidentiality applicable to the cooperating parties.

Moreover, unless the applicant has consented or the information became known in a different way from the CPC, the latter cannot use information submitted by undertakings whose application was rejected.

Subject to its obligation to disclose documents upon which it intends to base its decision and its duty to secrecy, the CPC shall refuse requests submitted by third parties for access to a leniency application and the information contained therein.

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 relevant legislation does not contain any provisions in relation to plea bargains, settlements or other resolutions following negotiation.

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 relevant legislation does not contain any provisions regarding the treatment of current or former employees of undertakings participating in the 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?

To ensure its priority, an undertaking that wishes to receive immunity may initially apply for a marker until it collects all the information and evidence required by the CPC. In such a case, the undertaking must initially submit the information described in Annex II of the Leniency Programme and the CPC will subsequently determine a time frame within which the said undertaking must perfect it. Perfection is accomplished by submitting the requisite information and evidence to meet the threshold for receiving immunity. An undertaking may, prior to submitting an application, informally or anonymously contact the CPC to receive guidance concerning the immunity application.

Alternatively, an undertaking may choose to submit a formal leniency application, which should include a signed statement containing, among other things, a detailed description of the alleged cartel activity, details of the undertakings participating in the alleged cartel, potential leniency applications to other jurisdictions and evidence in relation to the alleged cartel.

Undertakings that wish to receive a reduction of the administrative fine must submit an application to the CPC along with sufficient evidence in accordance with Annex IV of the Leniency Programme. Evidence submitted voluntarily for the purpose of receiving a reduction must be clearly identified as being part of a formal application.

Applications for reduction of the administrative fine are suspended until the CPC examines any application submitted for immunity in relation to the same cartel activity.

DEFENDING A CASE

Disclosure

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

The Commission for the Protection of Competition (CPC) is not obligated to disclose the whole administrative file of the case to the undertaking or undertakings investigated. However, subject to its duty to secrecy and excluding documents constituting business secrets, the CPC must disclose all documents upon which it intends to base its decision. If said documents are already available to the undertaking or undertakings, the CPC must identify them to ensure that the former is duly informed of the documents to be used as evidence.

If, during the course of the proceedings before it, the CPC intends to base its decision on a document that has not been communicated to the undertaking or undertakings concerned, it must inform and disclose the document to the latter, while providing a reasonable time frame for its examination.

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?

Given that natural persons cannot be found criminally liable for participation in a cartel, there is no legal framework regulating the representation of employees by counsel who represent the corporation that employs them.

Multiple corporate defendants

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

Counsel may represent multiple corporate defendants as there is no restriction by law.

Payment of penalties and legal costs

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

The Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law) does not contain any provisions regarding whether legal penalties and legal costs imposed on employees may be paid by a corporation that employs them.

Taxes

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

Fines and private damages payments are generally not considered 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 Law does not contain any provisions permitting the CPC to take into account penalties imposed in other jurisdictions when the CPC determines sanctions.

The CPC may ascertain an infringement of the Law in cases where the conduct has as its object or effect the prevention, restriction or distortion of competition within Cyprus.

Regarding private damage claims, any compensation received by the same claimant in other jurisdictions will be accounted for in subsequent cases in Cyprus to avoid overcompensation of the claimant.

No case law regarding private damage claims for damages arising from cartels in Cyprus currently exists.

Getting the fine down

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

The optimal way to reduce an administrative fine is to file a leniency application.

Based on recent case law, the CPC may consider cooperation demonstrated by the undertaking and termination of the infringement upon the initiation of the investigation as mitigating factors. Moreover, in one case, the CPC has considered the existence of a compliance programme as a mitigating factor.

UPDATE AND TRENDS

Recent cases

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

Case No. 52/2021, which concerns anticompetitive agreements between professional associations, is the most recent key cartel decision. According to publicly available information, after this case, the Commission for the Protection of Competition (CPC) has not issued a ny other decision concerning anticompetitive agreements.

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 Regulations on the Immunity from and Reduction of Administrative Fines in Cases of Restrictive Collusions Infringing Section 3 of the Law or/and Article 101 of the Treaty on the Functioning of the European Union (Leniency Programme) of 2011 (Regulation 463/2011) are expected to be repealed by the proposed Immunity from and Reduction of Administrative Fines in cases of Restrictive Collusions Infringing Section 3 of the Law and/or Article 101 of the Treaty on the Functioning of the European Union (Leniency Programme) Regulations of 2022 (the Proposed Leniency Programme). The Proposed Leniency Programme purports to strengthen the effectiveness of the legal framework governing the leniency regime in Cyprus.

A proposed amendment to the Protection of Competition Law of 2022 (Law No. 13(I)/2022) (the Law) purports to impose further transparency and impartiality requirements upon the exercise of the powers vested in the CPC. The proposed amendment to the Law provides, among other things, for a 2 per cent increase in the maximum possible fine for both substantive and procedural infringements of the Law. In addition, it provides for a fine reduction of 20 per cent if the fine is paid within 45 days or as otherwise stipulated by the CPC.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Danish rules on cartels are regulated under the Danish Competition Act (the Act), which entered into force in 1998. Since the enforcement of the Act, there have been several amendments and multiple consolidated acts. The latest version of the Act entered into force on 4 March 2021. 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 the legal substance of article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Further, section 8 of the Act contains an efficiency claim for agreements, decisions or concerted practices that are caught by section 6, working as a legal exception in the same way as article 101(3) of the TFEU. Danish competition rules are interpreted in accordance with case law from the European Commission as well as the Court of Justice of the European Union.

Relevant institutions

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

The 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 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 to Danish competition law in March 2021 with the implementation of Directive 2019/1/EU of 11 December 2018 (the 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 Special 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.

In May 2022, the DCCA published a new guideline on processes in competition cases, which, among other things, provides guidance on the procedural aspects of complaints in relation to cartels.

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 resulted in significant changes to the regime. Most notable was the introduction of the civil fine regime in 2021. Prior to this, the imposition of fines for violations of the competition rules was enforced under criminal law and in accordance with the rules of Danish criminal procedure. Consequently, the new civil fine regime was a significant deviation from Danish legal tradition in relation to undertakings' infringements of competition law.

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, among others, 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.

Further, the Danish Parliament adopted a revised Public Procurement Act on 9 June 2022, the majority of the amendments of which entered into force on 1 July 2022. This act does not have any direct effects on the cartel regime but is, to an extent, relevant for competition as the rules govern the ability to exclude cartelists from participating in public procurement procedures.

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-hardcore infringements) or the exemptions in section 8 of the Act (efficiency claim).

Section 6(1) of the Act stipulates that an agreement that has an object or effect to restrict competition is prohibited, which is consistent with article 101 of the TFEU. Section 6(2) further provides a non-exhaustive list of agreements that can be encompassed within the prohibition under section 6(1).

The principle of per se illegality is not applied under Danish law. As is the case under EU law, certain anticompetitive agreements are considered hardcore 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 under 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 Danish cartel regulation. 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), and section 6(3) prescribes that agreements and concerted practices – as well as resolutions, recommendations, collegial rulebooks and the like between associations of undertakings – are subject to 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: see 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 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 an 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, 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 that has 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, 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 Special 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 whistle-blower feature on its website making it possible for employees

or others who may have knowledge of a cartel to inform the DCCA anonymously. In May 2022, the DCCA published a new set of guidelines on the processes in competition cases describing the procedural aspects of complaints in relation to cartels under headlines such as 'if you want to complain about an undertaking' and 'if the authority initiates a case against your undertaking'.

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 computer 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 standstill period for the DCCA, during which the DCCA does not work on the case. During the standstill period, the undertaking can make protests regarding material included by the DCCA that the undertaking does not find relevant for the investigation or that is covered by the principle of legal professional privilege.

When an agreement is reached as to which documents can be included in the investigation, the DCCA will commence the analysis phase, which typically lasts from 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 and iPads, among other things. 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, among other things. The DCCA is also entitled to access company vehicles.

With the implementation of Directive 2019/1/EU 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 on 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 office or private 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 installing so-called sniffer programmes on computers was introduced to 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 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 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 European Economic Area (EEA) in connection with these authorities' application of articles 101 and 102 of the Treaty on the Functioning of the European Union 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 in the Organisation of Economic Co-operation and Development (which set up the Global Competition Network), the International Competition Network and the World Trade Organization.

Interplay between jurisdictions

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

In general, jurisdictions within the European Union (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 Danish courts, while decisions on formality can first be appealed to the courts when the DCAT has decided on the case. Following a final decision on 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 Special Crime.

The DCCA may offer undertakings a fixed-penalty fine. Hence, if an undertaking admits to 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 the primary rule, the burden of proof lies with the competition authorities. The authority needs to prove 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 to the defendant undertaking, whereafter the undertaking will have to prove that the agreement meets the conditions of exemption in section 8 (similar to article 101(3) of the Treaty on the Functioning of the European Union (TFEU)).

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. Similar to article 101(1) of the TFEU, under the Danish rules on cartels, a concurrence of wills or coordinated practices are sufficient to infringe section 6 of the Act regarding anticompetitive agreements.

Case law from the Court of Justice of the European Union (CJEU) serves as guidance in relation to the inclusion of circumstantial evidence by the DCCA and the courts. In this regard, the CJEU 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 No. T–113/07, *Toshiba*).

Accordingly, the DCCA must prove its case and may include circumstantial evidence, but the DCCA and the courts are free in their assessment of the evidence.

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 administrative authority other 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 of when 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 of when the parties were 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?

Under Danish competition law, cartel conduct is perceived as a severe infringement of the competition rules, which warrants high fines and possibly imprisonment. 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

Danish kroner. 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 to up to six years if there are 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 Special Crime (the State Prosecutor) has, unsuccessfully, asserted claims for unconditional imprisonment in cartel cases as seen in, among other cases, 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 2019/1/EU 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 (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 Danish kroner. It should be noted that the courts have considerable discretion when imposing fines.

Regarding 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 the 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 Danish kroner, while the indicative level for individuals for cartel behaviour (very grave) is a minimum of 200,000 Danish kroner. 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 (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 provide for the 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 on which 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 an 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 aforementioned 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 CDA. 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 their 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 took place before the implementation of the CDA on 27 December 2016 and, consequently, recent case law gives no guidance on the new damages claim regime. However, in general, the Danish Courts have a conservative approach to damage claims. In the *Electricity Cartel* case from 2006, where the municipality of Copenhagen claimed to have suffered a loss of 320,000 Danish kroner, the District Court found that the counterfactual situation without the cartel would only have resulted in a price 3 per cent lower and fixed the damages at 50,000 Danish kroner. In the *Skandinavisk Motor Company* case from 2008, the District Court dismissed the case on the basis of an absence of actual data or calculations of the plaintiff's loss. In the *Cheminova A/S* case from 2015, where Cheminova had claimed damages in the amount of 47.2 million Danish kroner, the Maritime and Commercial High Court awarded damages of 10.71 million Danish kroner without specifying the details of the calculation.

Class actions

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

Class actions for follow-on damage claims are possible under Danish law. Class actions are regulated in Chapter 23a of the Danish Administration of Justice Act and, as a general rule, a class action is subject to the same procedure as other Danish court cases. Additionally, section 16 of the CDA 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, conduct a search or 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 of the 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 that the applicant submits information about the cartel that constitutes significant added value compared to the information already in the authorities' possession and 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?

An applicant that goes in second will be unable to fulfil the conditions of obtaining full leniency. Instead of full leniency and a fine exemption, subsequent applicants can achieve a fine reduction. Under section 23e of the Act, the second applicant for leniency can achieve a reduction of 50 per cent of the fine and the third leniency applicant can achieve a reduction of 30 per cent of the fine. The penalty reduction for subsequent applicants hereafter 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 their 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 (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 similar 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 Danish Competition Appeal Tribunal in a case from 2018. Furthermore, the DCCA is reluctant to publish information that may lead to the identification of 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 fine reduction.

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, this 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, although the DCCA has prepared a standard application. An application may be submitted to the DCCA in person, by letter or electronically through the DCCA's website. 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 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, 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?

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 natural operating expenses. As fines and other penalties are generally not considered natural operating expenses, 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, that continue to follow such a programme and that 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?

The most recent case from the Danish Competition Council (the Council) was decided on 22 June 2022. The case concerned Boligtextilbranchens Indkøbsservice AMBA (Botex), a voluntary nationwide cooperation between 24 individual retailers trading in curtains and other home textiles. Within the cooperation of Botex, a geographical division of the market was adopted, after which each member was awarded an exclusive marketing area defined according to postal codes. Members of Botex were prohibited to market themselves through household-distributed advertising material in other Botex members' exclusive areas. The geographical division was in place from May 2009 to August 2021. The Council found that such a division had a purpose to restrict competition in the retail market for household goods and, therefore, constituted an infringement of section 6 of the Danish Competition Act (the Act) and article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The case will be interesting to follow, as it will be the first case in which the Council will bring a case before the Maritime and Commercial High Court claiming a fine for an infringement of the competition rules in accordance with civil procedure, which is now required after the implementation of the new civil fine regime on 4 March 2021.

On 23 February 2022, the Danish Competition and Consumer Authority (DCCA) found that Peugeot Forhandler Foreningen (PFF), an association of independent car dealers in Denmark dealing and servicing the car brand Peugeot, infringed the Act by adopting a collective boycott. The boycott was directed at Bilbasen.dk, a digital platform for the sale and purchase of primarily used cars, and was intended to improve another competing platform, Biltorvet.dk. The DCCA found that the collective boycott had a purpose to restrict competition under section 6 of the Act and article 101(1) of the TFEU.

On 12 March 2021, the High Court of Eastern Denmark found that HMN Naturgas (HMN), two competitors and a trade organisation had illegally coordinated prices on gas furnace maintenance subscriptions. HMN offered its end users gas furnace maintenance subscriptions through independent plumbers, who themselves also offered gas furnace maintenance subscriptions to end users. In 2016, 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 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 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 in the total price for HMN's customers.

In continuation of the judgment of 12 March 2021, the Council notified the case to the State Prosecutor for Special Crime (the State Prosecutor) for review of criminal prosecution in accordance with the previous fine regime. On 21 April 2022, the District Court of Glostrup decided to impose on HMN and one of the participating competitors, Gastech-energi, a fine each of 8 million Danish kroner. At the same time, two individuals were fined 100,000 Danish kroner, one individual was fined 75,000 Danish kroner and one individual was fined 50,000 Danish kroner for their parts in the infringement.

In two cases from the retail clothing sector in June 2020, the Council found that two competing dealers had illegally exchanged information. The Council found that Hugo Boss, a producer, supplier and retailer of articles of clothing, 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 and rebates (among others) constituted horizontal concerted practices subject to the prohibition under section 6(1) of the Act and article 101(1) of the TFEU. The Council also found that the conduct 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 criminal prosecution (in accordance with the Act, prior to the implementation of Directive 2019/1/EU 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 Danish kroner for having exchanged information on prices and offered campaigns with a competitor in violation of section 6(1) of the Act. On 15 April 2022, Peugeot Forhandler Forening accepted to pay a fine of 500,000 Danish kroner for adopting a collective boycott. On 9 July 2021, Ageras A/S accepted a fine of 1.275 million Danish kroner for having used a price-fixing mechanism and minimum price levels on their digital platform for auditing and accounting services, ageras.dk. The Council found that Ageras A/S 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 the 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 Danish kroner.

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

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services offered on the platforms, as they restricted the self-employed individuals' abilities 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 DCCA established its 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.

The European Commission, on 11 May 2022, published a new block exemption regulation for vertical agreements. As a DCCA press release published on 1 June 2022 noted, this new regulation is expected to be applicable to the Danish competition rules on cartels.

European Union

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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, European Commission (EC) guidelines on the applicability of article 101 of the 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. These guidelines are currently under review by the EC. Although a new version was initially expected to be published by the end of 2022, the EC has recently announced that it will require more time to reflect on certain changes. The EC has therefore proposed to extend the validity of the current regulations until 30 June 2023.

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, the EC, which is primarily in charge of enforcing article 101 of the TFEU, has exclusive jurisdiction to both investigate – through its Directorate-General for Competition – and sanction cartels at the European level. Its decisions can then be appealed to the General Court of the European Union and, ultimately, the European Court of Justice (ECJ).

Changes

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

There are two major developments to note in 2022.

On 1 March 2022, following a review and evaluation process that started in 2019, the EC launched a public consultation on the draft revised Horizontal Guidelines as well as the draft revised horizontal block exemption regulations for agreements concerning specialisation, and research and development (HBERs). All stakeholders were invited to provide their comments on these drafts by 26 April 2022.

Major changes to the draft revised HBERs and the draft revised Horizontal Guidelines include:

- clarifications and additional guidance on the application and scope of the HBERs;
- new guidance on data sharing, mobile infrastructure sharing agreements and bidding consortia; and
- the introduction of a new section in the Horizontal Guidelines on agreements that pursue sustainability objectives.

The final revised rules were initially expected to come into force at the end of 2022, when the current rules are due to expire. The EC has, however, recently announced that it will need more time to finalise its review of the block exemption regulations – particularly on specialisation agreements – to take into account critical feedback from stakeholders received during the consultation phase with respect to pooling agreements between mobile operators and joint ventures regarding production facilities. As a result, the EC has proposed to extend the validity of the current rules until 30 June 2023.

Further, on 3 October 2022, the EC adopted a revised Informal Guidance Notice allowing businesses to seek informal guidance on the application of EU competition rules to novel or unresolved questions. The Informal Guidance Notice aims at providing a forum for businesses to consult with the EC on the legality of their actions under EU antitrust rules, thereby increasing legal certainty. On the same day, the EC decided to withdraw the temporary framework for communication adopted on 8 April 2020 to address the challenges resulting from the covid-19 pandemic considering that this framework, in light of the relative improvement of the pandemic situation, was no longer necessary.

Substantive law

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

Article 101(1) of the 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 that, 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 v Budapest Bank Nyrt and Others*, Case No. 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. The lack of precedents addressing a specific type of conduct is not considered sufficient to force the EC to conduct an analysis of the effects of the conduct. For example, in *Lundbeck* (see ECJ, 25 March 2021, *Lundbeck*, C-591/16 P), the ECJ confirmed that pay-for-delay agreements entered into between Lundbeck and generic manufacturers constituted by object restrictions of competition although this specific type of agreement, which amounts to illegal market sharing, had not been previously sanctioned.

Under article 101(2) of the TFEU, agreements prohibited by article 101(1) of the 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) of the TFEU.

However, article 101(3) of the TFEU provides that agreements whose efficiencies outweigh the anticompetitive effects can be exempted, provided that 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 an exemption. With the upcoming entry into force of the revised Horizontal Guidelines, questions also arise as to the possibility for a horizontal agreement pursuing sustainability objectives to benefit from an individual exemption although the agreement may not directly benefit end consumers, as is normally required by article 101(3) of the TFEU.

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 a cooperation agreement, which must therefore be examined under article 101 of the 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) of the TFEU.

Similarly, while they can bring benefits to final consumers and are generally exempt under article 101(3) of the 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) of the TFEU. The EC, for example, opened an investigation in 2019 targeting two French supermarket chains for possible collusion on sales activities as part of a buying alliance that they set up in 2014. The investigation is ongoing and no statement of objections has yet been issued (Case No. AT.40466, 'Opening of proceedings', 4 November 2019).

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 an 'undertaking' has been defined broadly in EU 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*, Case No. 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 of the TFEU does not apply to individuals acting as employees of an undertaking. Note that some pieces of national legislation in the European Union 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 of the TFEU has an extraterritorial 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 (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 that 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 Nos. T-342/18 and T-363/18, currently under appeal before the ECJ).

Moreover, while, according to the guidelines on the method of setting fines imposed pursuant to article 23(2)a of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (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*, Case No. AT.39610). This approach was subsequently validated by EU courts (GCEU, 2018, *Viscas*, Case No. T-422/14; ECJ, 2019, *Viscas*, Case No. 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 Regulation No. 246/2009 of 26 February 2009 and Regulation 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 or commercial arrangements (described in shipping circles as 'consortia'). Exemptions also apply in the agricultural and food sectors, where Regulation No. 2017/2393 of 13 December 2017 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 the joint planning and coordination of airline schedules.

Specific regulations used to apply in other sectors, such as insurance or telecommunications, but they have 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 in Ireland, 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*, Case No. 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 of the 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 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 of the 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*, Case No. AT.39258, confirmed by the GCEU in Cases Nos. T-324/17, T-325/17, T-334/17, T-337/17, T-338/17, T-340/17T-341/17T-343/17).

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Initiation of the proceedings

The European Commission (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, whistle-blower 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 pay-for-delay investigations launched against Lundbeck and Servier that followed the EC's sector inquiry in the pharmaceutical sector). 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) or at employees' homes 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 persons other than the companies being investigated. Such interviews are not mandatory although, after the subject has agreed to testify, they must cooperate and provide the EC with accurate information. Information collected by the EC as part of its investigation must be properly recorded (GCEU, 15 June 2022, *Qualcomm v Commission*, Case No. T-235/18).

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. 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 settlement, 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 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 it 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 sets out the main investigative powers of the EC, which notably include:

- issuing requests for information (article 18);
- taking voluntary statements from natural or legal persons (article 19);
- carrying out on-site inspections at the premises of the undertakings concerned (article 20); and
- where the circumstances require it, inspecting employees' homes and private cars – although this was exceptional, the EC has recently used this option and it may become more standard in the future with the accelerated development of remote working (article 21).

The EC may collect any information that it deems necessary for the proper conduct of its investigation. In addition, the EC may itself conduct the inspection in 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 of the TFEU), the time limit to provide the information (generally two to three weeks), and the sanctions in the case that 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, interviews are, in most cases, recorded. When they are not, this may constitute a breach of the rights of defence of the investigated undertaking or undertakings (GCEU, 15 June 2022, *Qualcomm v Commission*, Case No. T-235/18). 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.*

See ECJ, 7 January 2004, *Aalborg*, joined Cases Nos. 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 of 16 December 2002 on the implementation of the rules of competition. In the case of a formal decision, the EC must also specify the date on which it is to begin as well as state the right of the undertaking to have the decision reviewed by the ECJ. In this regard, the General Court of the European Union (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.

With the democratisation of remote working, the EC has announced its intention to increase the recourse to personal home inspections when it suspects that evidence of anticompetitive conduct may be found there. Pursuant to article 21 of Regulation No. 1/2003, when inspecting personal homes, the EC must consult the national competition authority and have obtained prior authorisation from the national judicial authority of the EU member state concerned, which shall control the proportionality of the measure envisaged. If such an inspection is authorised, the EC enjoys its usual powers except for the possibility to seal the premises and ask the person targeted by the investigation for explanations of facts or documents.

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, desktop computers, 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*, Case No. C-606/18).

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' (article 20(2)(e) of Regulation No. 1/2003), 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 provided that it is in relation to the exercise of the rights of defence); 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 (ECJ, 22 November 2012, *E.ON Energie AG*, Case No. C-89/11).

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 (ECJ, 18 June 2005, *Deutsche Bahn*, Case No. C-583/13 P). More recently, the 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 (GCEU, 5 October 2020, *ITM, Case No. T-254/17*; *Casino*, Case No. 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);
- 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 United States); and
- general trade agreements that include competition provisions, (eg, with the United Kingdom post-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, the Organisation for Economic Co-operation and Development, 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 of 16 December 2002 on the implementation of the rules of competition, 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'. 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 better 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 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?

The most significant interactions of the EC in cross-border cases are with NCAs of EU 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 article 11 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition. 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. The latter provided the former with documents, including statements and audited reports that helped it to 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. For instance, the French Competition Authority (FCA) issued a decision sanctioning a cartel in the fruit compotes sector after dawn raids were 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. These raids 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 the US 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 that 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. Positive comity provisions are rarely used in practice, as complainants usually prefer to directly address the competition authority that 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 (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) of the 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*, Case No. 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.*

See GCEU, 24 March 2011, *Viega*, Case No. 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.*

See GCEU, 12 July 2018, *ABB*, Case No. 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 European Court of Justice (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 Amann, recalled in a 2010 information note that, though the management of fine 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 18 to 24 months in the case of an appeal to the ECJ. 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 European Union for the excessive duration of the proceedings, which lasted almost six years. The judges ruled in favour of the applicants at the lower court (GCEU, 10 January 2017, *Gascogne Sack Deutschland*, Case No. 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*, Cases Nos. 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 European Commission (EC) derives its power to impose fines from article 23(2) of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, which grants it a wide scope 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 the 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, 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 updated them in 2006. They are self-binding on the EC, but not on EU or national courts, or 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 to 30 per cent depending on the egregiousness of the infringement (in practice, this percentage usually varies between 15 and 18 per cent for cartels) as well as a multiplying factor reflecting its duration. In cartel cases, the EC applies an additional percentage ranging from 15 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 grounds that the undertaking concerned had previously been sanctioned for another cartel (EC, 20 April 2021, *Freight Forwarding*, Case No. AT.39462). 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*, Case No. 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 because that undertaking did not generate any turnover during the business year preceding the date of the decision (EC, 20 May 2021, *EGB*, Case No. 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*, Case No. 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 General Court of the European Union (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.*

See GCEU, 14 May 2014, *Donau Chemie*, Case No. 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 of 16 December 2002 on the implementation of the rules of competition 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 No. 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 European Union.

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 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?

The right to compensation is enshrined in EU case law (ECJ, 20 September 2001, *Courage and Crehan,* Case No. 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 Nos. 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*, Case No. 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 seem 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 a national competition authority.

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 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 European Commission (EC) 2006 Notice on Immunity from Fines and Reduction of Fines in Cartel Case (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 of the Treaty on the Functioning of the European Union] in connection with the alleged cartel' (paragraph 8 of the Leniency Notice). 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 a national competition authority (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 whistle-blowing form allowing any individual to sound the alarm about the existence of a cartel. Furthermore, Directive No. 2019/1937 on the protection of whistleblowers, adopted in 2019, provides for:

- the creation of reporting channels within companies and administrations;
- a hierarchy of internal and external communication channels;
- the protection of a large number of profiles (eg, employees, including civil servants, shareholders, volunteers and trainees); and
- measures to protect whistle-blowers from reprisals.

Member states had until 17 December 2021 to transpose this directive. However, in January 2022, the EC opened proceedings against 15 member states (including France, Germany, Spain, Italy, Ireland and the Netherlands) for failure to respect that deadline.

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' (paragraph 24 of the Leniency Notice) (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 COMP) 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 that includes 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).

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 that, 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 of the Treaty on the Functioning of the European Union (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.*

See ECJ, 3 June 2021, *Recyclex*, Case No. 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 of the 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 to 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. A party that wishes to enter into such a 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.

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*, Case No. AT.39824), while the others settled with the EC (EC, 19 July 2016, *Trucks*, Case No. AT.39824). In 2017, the General Court of the European Union (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.*

See GCEU, 10 November 2017, *Icap*, Case No. 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, so there is 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 COMP 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 standard procedure, the statement of objections must be issued in writing, and must contain all the factual and legal elements on which the assessment of the European Commission (EC) 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 clearly understand 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 European Court of Justice (ECJ) in 2018, in a case where the General Court of the European Union (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 of the [Treaty on the Functioning of the European Union].*

See ECJ, 1 February 2018, *Schenker*, Case No. 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. 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?

The principle *ne bis in idem*, which precludes the finding of liability or the bringing of proceedings against the same undertaking for conduct for which it has already been penalised or declared not to be liable by a prior final decision (ie, that can no longer be challenged), applies in competition law matters (see ECJ, 22 March 2022, *Nordzucker*, Case No. C-151/20). However, the EC does not take into account penalties imposed in non-member states' jurisdictions when determining sanctions for a cartel that had effects in the European Union. The ECJ recalled this principle in a 2015 ruling, judging that neither the principle ne 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 (ECJ, 9 July 2015, *InnoLux*, Case No. C-231/14). This is because, although the EC decision may target the same conduct, the intervention of the EC is justified by the fact that the conduct at stake produced effects within the European Union for which non-member states' competition authorities do not have jurisdiction to impose fines. In addition, the *ne bis in idem* principle does not prevent the pursuit of proceedings or, as the case may be, the imposition of a fine under two different sets of legislation if these pursue different objectives (ECJ, 22 March 2022, *BPost*, C-117/20).

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 to 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 in 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

In two rulings of 22 March 2022, the European Court of Justice (ECJ) clarified the scope of protection against double jeopardy in antitrust investigations, also known as the *ne bis in idem* principle. First, in the *Bpost* case (ECJ, 22 March 2022, *Bpost*, C-117/20), the ECJ ruled that the *ne bis in idem* principle does not preclude the imposition of concurrent penalties for the same facts in parallel proceedings by a competition authority and a sectorial authority if the body of legislation underlying the imposition of the two fines pursue distinct but complementary objectives, provided however that there is a certain level of coordination between the authorities. This coordination extends to the final amount of the fine and the authority acting second must take into account the fine already imposed by the first authority so that the global amount of the fines imposed reflects the overall seriousness of the offences committed. Second, in the *Nordzucker* case (ECJ, 22 March 2022, *Nordzucker*, C-151/20), the ECJ recognised the possibility for two national competition authorities to pursue parallel proceedings and impose separate fines against the same undertakings for the same conduct, provided that the finding of infringement in the first final decision is limited to the territory of the EU member state of the competition authority that imposed the fine and does not extend to the assessment of the effects of the conduct in the territory of the other member state involved. Should that be the case, the second competition authority could not impose a fine without breaching the ne bis in idem principle.

On 30 March 2022, the General Court of the European Union (GCEU) adopted several judgments concerning the *Air Freight* cartel, following the second European Commission (EC) decision issued on 17 March 2017. The GCEU dismissed most of the appeals brought by the addressees of the EC's decision but partially annulled the EC's decision insofar as it concerned Japan Airlines, Air Canada, British Airways, Cathay Pacific Airways, SAS Cargo Group and Others, Latam Airlines Group and Lan Cargo, and reduced the fines imposed on these airlines accordingly (see GCEU, 30 March 2022, Cases Nos. T-323/17 *Martinair Holland NV v Commission*; T-324/17 *SAS Cargo Group and Others v Commission*; T-325/17 *Koninklijke Luchtvaart Maatschappij v Commission*; T-326/17 *Air Canada v Commission*; T-334/17 *Cargolux Airlines v Commission*; T-337/17 *Air France-KLM v Commission*; T-338/17 *Air France v Commission*; T-340/17 *Japan Airlines v Commission*; T-341/17 *British Airways v Commission*; T-342/17 *Deutsche Lufthansa and Others v Commission*; T-343/17 *Cathay Pacific Airways v Commission*; T-344/17 *Latam Airlines Group and Lan Cargo v Commission*; T-350/17 *Singapore Airlines and Singapore Airlines Cargo v Commission*).

On 16 June 2022, the ECJ issued four judgments in relation to the *Optical Disk Drives* cartel case, setting aside the GCEU's ruling and partially annulling the EC's decision, on the grounds that the latter had failed to satisfy its obligation to state reasons in its decision regarding the participation of the undertakings involved to several separate infringements in addition to their participation to a single and continuous infringement. However, the ECJ did not reduce the fines imposed by the EC (ECJ, 16 June 2022, Cases Nos. C-697/19 P to C-700/19 P).

On 22 June 2022, the ECJ issued an important judgment for private enforcement, bringing several clarifications concerning the temporal scope of Directive No. 2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of member states and of the European Union (the Damages Directive), the quantification of the harm resulting from a cartel and the presumption of the existence of that harm. Regarding more specifically the quantification of the harm, the ECJ ruled that article 17(1) of the Damages Directive – concerning the obligation for national courts to proceed to the quantification of the harm suffered if it is established that the claimant has suffered harm – is a procedural provision, which applies to all claims brought after 26 December 2014. However, it considered that the presumption provided for in article 17(2) of the Damages Directive according to which cartel infringements cause harm is a substantive rule, which therefore cannot apply retroactively in actions for damages concerning facts that occurred prior to the transposition of the Damages Directive into the national laws of EU member states (ECJ, 22 June 2022, *Volvo and DAF Trucks*, C-267/20).

Following the opinion of Advocate General J Kokott on 14 July 2022, the ECJ's judgment is soon expected in the *Servier* case. The advocate general adopts a very strict position, considering that the ECJ should set aside the GCEU's judgment of 12 December 2018 that had partially annulled the findings of the EC in its decision, insofar as it concerned the agreement between Servier and Krka on one hand and the definition of the relevant market on the other (ECJ, 'Opinion of Advocate General Kokott', 14 July 2022, *Servier*, C-176/19 P).

Finally, in the aftermath of an abuse of dominance case, the GCEU's judgment of 19 January 2022 is worth mentioning due to its broad application. The GCEU awarded Deutsche Telekom compensation in the amount of approximately €1.8 million for the harm suffered as a result of the EC's refusal to pay default interest to the former on the amount of the fine that it had initially unduly paid to the EC, which was subsequently reduced on appeal for its infringement of article 102 of the Treaty on the Functioning of the European Union (GCEU, 19 January 2022).

EC decisions

Since the beginning of 2021, there have been 11 sanctions imposed by the EC in cartel cases. Only a selection of the decisions is presented below, focusing on the EC's activity in 2022 and the most prominent decisions of 2021, most of which concerned the financial sector.

On 12 July 2022, the EC fined two metal packaging producers, Crown and Silgan, €31.5 million in a cartel settlement concerning collusive behaviour for the sales of metal cans and closures in Germany (EC, 12 July 2023, Case No. AT.40522 – decision not yet published).

On 12 December 2021, the EC imposed a €20 million fine on the former major ethanol producer, Abengoa, for its participation in a cartel from 2011 to 2014, concerning a wholesale price formation mechanism in the European ethanol market. The EC found that Abengoa coordinated its trading behaviour with competitors to artificially increase, maintain and prevent from decreasing the levels of ethanol benchmarks. Abengoa benefited from a reduction in fine as part of a settlement procedure (EC, 12 December 2021, Case No. AT.40054 – decision not yet published).

On 2 December 2021, the EC fined several banks a total of €344 million for their participation in a foreign exchange spot trading cartel. Four of the banks involved chose to have recourse to the settlement procedure. Credit Suisse was prosecuted under the normal procedure. The EC found that some traders in charge of the foreign exchange spot trading of G10 currencies regularly exchanged information and occasionally coordinated their trading strategies through an online professional chat room called Sterling Lads (EC, 2 December 2021, Case No. AT.40135). This is the sixth decision in the financial sector since 2013. Earlier in 2021, the EC had already fined several investment banks for similar conduct relating to bonds. The EC found that these banks took part in cartels through core groups of traders working in US dollar sovereign, supranational and agency bonds, as well as 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 and split trades (EC, 28 April 2021, *SSA Bonds*, Case No. AT.40346; EC, 20 May 2021, EGB, Case No. AT.40324). Following previous annulments from the GCEU, the EC also readopted decisions in the *Euro Interest Rate Derivatives* cartel as well as in the *Yen Interest Rate Derivatives* cartel (EC, 28 June 2021, *EIRD*, Case No. AT.39914; EC, 20 May 2021, *YIRD*, Case No. AT.39861 – decisions not yet published).

Other recent cartel decisions issued by the EC include decisions in the sectors of technical developments in the area of nitrogen oxide cleaning (EC, 8 July 2021, *Car Emissions*, Case No. AT.40178) and in the sector of cross-border rail cargo transport services (EC, 20 April 2021, *Freight Forwarding*, Case No. AT.39462).

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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 guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, issued in 2011 (2011/C 11/01) and horizontal block exemption regulations for agreements concerning specialisation, and research and development. Initially due at the end of 2022, the new rules are now expected to be published in the first half of 2023. The EC has recently announced that it needs more time to consider the feedback received on the draft revised regulations and has therefore proposed to extend the validity of the current texts until 30 June 2023. This proposal is subject to public consultation until 14 November 2022.

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, a prohibition against abuse of a dominant position and 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 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 intellectual property rights 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 that impose 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?

Finnish competition law was more comprehensively reformed through the introduction of the new Competition Act that entered into force on 1 November 2011. The Competition Act brought Finnish competition law even more into line with that of the European Union and introduced some changes to, for example, the provisions concerning penalty payments. There have since been a few amendments to the Competition Act, but these have not significantly affected cartel matters.

The Finnish Act on Antitrust Damages Actions (1077/2016) 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, which is known as 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) of the 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 as follows:

- 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 that, by their nature or according to commercial usage, have no connection to 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 the 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) of the TFEU. In practice, however, hardcore restrictions are unlikely to qualify for an exemption.

If a competition restriction affects trade between EU member states, the FCCA and the Finnish courts apply article 101 of the 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 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 of the TFEU if the competition restriction affects trade between EU 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 the economic activity carried out by business undertakings. According to section 4 of the Competition Act, the term 'business undertaking' refers to 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 Competition 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 Competition 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 that concern the labour market. Furthermore, section 5 of the Competition 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 an FCCA dawn raid at the undertaking's 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 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 1 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 European 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 that 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 EU competition rules throughout the European Union.

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 cooperation network composed of 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 the 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 anticompetitive 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, 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 of 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 a fine is otherwise unjustified with respect to safeguarding competition. In fixing the amount of the 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 in 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 the 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 1 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, extent, degree of gravity and 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 the 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 in 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 the case that the association itself is unable to do so.

In addition, fines of a maximum of 1 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 (1397/2016), 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 the 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 latter 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 was held admissible under Finnish law by the Helsinki District Court in July 2013 in an interim decision. The Helsinki 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 of 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 to the 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 a reduction to the 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 European 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. Provided that 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 to the 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 FCCA 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 European Competition Network. 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 of 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.

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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 suspected cartel infringements and the ensuing 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.

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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 their involvement in the FCCA's investigations, there is no prohibition under law for a corporation to pay them.

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, extent, degree of gravity and duration of the infringement.

UPDATE AND TRENDS

Recent cases

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

On 1 July 2022, the Supreme Administrative Court (SAC) ruled on a matter concerning expanded polystyrene (EPS) insulation manufacturers. Earlier, in March 2021, the Market Court ruled on the fine proposal made by the Finnish Competition and Consumer Authority (FCCA) regarding the alleged price cartel of EPS insulation manufacturers, imposing fines amounting to a total of €3.2 million. In its decision, the SAC upheld the Market Court's decision.

On 8 September 2022, the FCCA made a fine proposal amounting to a total of €44 million to the Market Court for alleged prohibited cooperation between companies in the Finnish heating, ventilation and air conditioning (HVAC) infrastructure pipeline market. The FCCA alleges that two manufacturers of plastic HVAC infrastructure pipeline products and three wholesalers selling infrastructure pipeline products participated in prohibited cooperation between 2009 and 2016. According to the FCCA, the companies collaborated in directing business in these products to each other and hampered the activities of companies outside their cooperation.

In September 2021, the FCCA made a fine proposal of €1.9 million to the Market Court concerning the public transport sector. The FCCA alleges that six coach operators and a joint venture of some of the companies engaged in severe restrictions on competition by submitting three joint tenders that were in breach of the Finnish Competition Act (948/2011).

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 January 2022, the FCCA updated its guidelines on exempting from the penalty payment and reducing the penalty payment in cartel cases. The update is based on Directive (EU) 2019/1, known as the ECN+ Directive. The update included, among other things, clarifications on applicants' cooperation obligations and application types.

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 of the 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, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Section 2 of the GWB is modelled on article 101(3) of the 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 EU member states, national and EU competition rules are applied in parallel. However, as a result of the harmonisation of section 1 of the GWB with article 101 of the 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 chair 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 affected 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 of Düsseldorf.

If a cartel infringement constitutes a criminal offence (eg, bid rigging, pursuant to section 298 of the German Criminal Code), 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, known as the ECN+ Directive;
- regulations regarding the extension of the investigative tools and the application of the competition authority's interim measures;
- the right of companies to ask the FCO for its legal assessment of the legality of cooperations under the GWB in cases of significant legal and economic interest;
- the 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;
- the 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.

At the end of September 2022, the Federal Ministry for Economic Affairs and Climate Action (BMWK) submitted a draft bill for the 11th amendment to the GWB. According to the draft, the cornerstones of the next GWB amendment shall be:

- the introduction of new intervention instruments for the FCO in the context of sector enquiries;
- the facilitation of the skimming of benefits from cartel infringements; and
- the modification of the GWB's procedural provisions to facilitate public and private enforcement of the Digital Markets Act.

It remains to be seen to what extent the BMWK proposals will result in a government bill and be adopted by the German parliament. In view of the fact that the BMWK has indicated even more changes to the GWB in this legislative period (Competition Policy Agenda of the BMWK until 2025 of February 2022), which will end in autumn 2025, it is to be expected that the announced 11th amendment will be implemented quickly.

Substantive law

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

Section 1 of the GWB prohibits horizontal and vertical agreements between undertakings, decisions by associations of undertakings, and concerted practices that 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 of the GWB.

An 'agreement' under section 1 of the 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 (hardcore 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 hardcore restriction, while exclusive supply or distribution agreements and selective distribution systems, among others, 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) of the 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) of the GWB, provisions of the EU block exemption regulations are applicable irrespective of whether or not these agreements may affect trade between EU member states (ie, also in purely national cases).

In addition, section 3 of the 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) of the TFEU and the corresponding section 2(2) of the GWB, it is not applicable to any constellations that affect 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. However, 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 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) of the 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 of the 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 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) of the 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, there are no preconditions for the imposition of sanctions or remedies concerning 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) of the 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 of the GWB contain industry-specific provisions regarding the agricultural, energy, press and public water supply sectors. For example, pursuant to section 30(1) of the 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) of the 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 of the 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 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 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). The competition authority 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, but 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 an infringement).

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, 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 now has more than 130 members.

In Europe, the European Commission and the national competition authorities of EU 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 section 50a et seq of the German Act Against Restraints of Competition.

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 affected 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 addressee 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 of 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) of the 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. These include the rights to:

- make formal applications;
- ask or object to questions presented to witnesses and experts;
- approve a settlement between the court and the defendant independent of the approval of the public prosecutor's office;
- give consent if the defendant withdraws the appeal against the decision to fine after the beginning of the main hearing;
- issue an independent counter declaration; and
- 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, orders to desist), an appeal may be filed within one month of the rendering of the decision. An appeal to the Federal Court of Justice is only possible if the competent 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. In especially serious cases of fraud (eg, a major financial loss was caused), a prison term of six months to 10 years can apply (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 that 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) of the 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 of the 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 (FCO) imposed aggregated administrative fines of €376 million in 2018, €848 million in 2019 and €349 million in 2020. The relatively low figure of €105 million in 2021 can be explained by the FCO's limited investigation activities during the covid-19 pandemic year. As a result of the pandemic, dawn raids had to be temporarily suspended.

The competition authority may also oblige undertakings to terminate a cartel infringement. This may involve behavioural measures (ie, stopping 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 of the 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, in 2021, the FCO published its new Guidelines for the Setting of Fines in Cartel Cases. These guidelines set out a structured process for the setting of fines, starting with the definition of 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 efforts to prevent and make good the wrongdoing (compliance and compensation). These 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 of the 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 of the 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 of the 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) of the 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 European Union, or against budgets administered by the European Union or on its behalf (section 123(1) No. 4 of the GWB).

For this purpose, the competition register was introduced under the Competition Register Act. In this register, certain cartel infringements (such as those mentioned above) of companies and their representatives will be recorded, preventing them from being awarded contracts in public procurement procedures. From 1 June 2022, the authorities are obliged to enquire about whether there are any entries about the bidding company in question before awarding certain contracts (ie, those with a net value of more than €30,000) 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. Otherwise, the entry will be automatically deleted three years after its recording. The FCO has published its Guidelines on the Premature Deletion of an Entry from the Competition Register Due to Self-cleaning, in which it defines the specific requirements for self-cleaning. In parallel, the FCO has developed guidelines as well as a practical guide to assist relevant companies and contribute to a quick review of the process of self-cleaning by the authority.

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) of the 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) of the 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 its prices under the umbrella of the cartel. The same applies, mutatis mutandis, to suppliers that have become victims 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 2021 decision (II ZR 84/20), the Federal Supreme Court 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 section 81h et seq of the German Act Against Restraints of Competition (GWB). The statutory provisions are accompanied by Federal Cartel Office (FCO) Guidelines on the Leniency Programme from 2021.

The competition authority can, under the general conditions laid down in section 81j of the GWB (especially full and continuous cooperation with the competition authority), grant cartel members full immunity from, or a reduction in, administrative fines imposed by the competition authority. This will, however, not affect the criminal prosecution of the responsible individuals.

Pursuant to sections 81j and 81k of the GWB, full immunity from fines will be granted to a cartel member that:

- is the first to provide sufficient evidence that, for the first time, enables the competition authority to obtain a search warrant;
- discloses an infringement and its participation in the infringement;
- immediately ends their 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 of the 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?

Provided that 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 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 chair of the competent decision-making division of the 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 throughout 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 FCO leniency programme 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 that 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 that were involved in the infringement (section 53(5) of the 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 of 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 amount of 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 discount.

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 chair 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 for 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 of the 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 is 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?

In 2020, the Federal Cartel Office (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 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 that 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 their 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. One company was granted full immunity from fines.

Also in 2021, the FCO imposed fines amounting to approximately €6 million on two manufacturers of manhole covers and gully tops and their representatives for agreements on prices and rebates as well as an agreement to carve up two major contracts between themselves. According to the FCO's investigations, an agreement between the representatives of the two parties was in place, under which the special rebate for specific standard products (second rebate) and the net prices for specific concrete or iron manhole covers applicable to major customers were to be agreed between the companies. Based on this agreement, the conditions were readjusted several times.

In 2022, the FCO imposed fines totalling around €7.3 million on two manufacturers of modular expansion joints (expansion joint systems for road bridges) for engaging in an illegal quota cartel. The companies had agreed on a system of fixed market shares in the form of quotas to carve up the market between them. Compliance with the quotas was monitored by their sales staff who intervened in the case of a substantial deviation from the agreed quotas. To maintain these quotas, the companies also split important future contracts. To implement the cartel further, a uniform price calculation formula was agreed upon.

In recent years, companies that were involved in cartel infringements also had to face claims for damages by customers or suppliers (follow-on cartel damage proceedings). Recently, such proceedings have concerned various sectors such as sugar, trucks, rails, bathroom fixtures, electronic cash, chipboards, detergents, picture tubes, packaging, cement, steel blasting agents, wallpaper, gas-insulated sound systems, pharmacy articles, flour, confectionery, sausage, beer and spark plugs. The conditions for follow-on cartel damage proceedings were further improved on the plaintiff's side by the recent amendments to the German Act Against Restraints of Competition (the 9th and 10th amendments). In addition, in several leading decisions on the *Rail and Truck* cartel, the Federal Court of Justice has now specified the conditions for assessing damages and thus created a higher degree of legal certainty for plaintiffs. In view of this, it is to be expected that actions for damages will continue to play a significant role in the coming years.

Regime reviews and modifications

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

The FCO published new Guidelines on the Setting of Fines in Cartel Cases in 2021 that apply a refined approach to the calculation of fines.

In addition, the competition register started operations in 2021 and the query from this has been mandatory for public sector purchasers

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since mid-2022. It keeps records regarding 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 are set out in FCO guidelines and its practical guide to assist relevant companies and contribute to a quick review of the process of self-cleaning by the FCO.

At the end of September 2022, the Federal Ministry for Economic Affairs and Climate Action (BMWK) submitted a draft bill for the 11th amendment to the German Act Against Restraints of Competition (GWB) focusing on the introduction of new intervention instruments for the FCO in the context of sector enquiries, the facilitation of the skimming of benefits from cartel infringements, and the modification of the GWB's procedural provisions to facilitate public and private enforcement of the Digital Markets Act. It remains to be seen to what extent the BMWK proposals will result in a government bill and be adopted by the German parliament.

Greece

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Law No. 3959/2011 on the Protection of Free Competition (the Competition Act), as in force, constitutes the Greek competition regime. The Competition Act is fully aligned with EU competition law provisions. In particular, articles 1 and 2 of the Competition Act (ie, the national equivalent of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) are almost identical to EU provisions. These articles are applicable to national cases, whereas articles 101 and 102 of the TFEU are directly applicable in the national jurisdiction in cases with an EU dimension. In August 2021, the Minister of Development and Investments launched a public consultation with proposed changes to Greek competition and merger review legislation. Proposed changes are quite extensive and cover, inter alia, both procedural and substantive elements of the Competition Act. The public consultation has been completed and the draft law is expected to be submitted to Parliament shortly.

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 by the Hellenic Competition Commission (HCC) through its Directorate General for Competition (ie, the HCC body that conducts the investigations) and sanctioned through HCC's Board (ie, the HCC body that takes decisions). Pursuant to article 12(1) of the Competition Act, the HCC constitutes an independent administrative authority with legal personality as well as administrative and financial independence, which is supervised by the Minister of Development and Investments. Its members enjoy personal and functional independence. The HCC, as the national competition authority (NCA), has the exclusive competence to implement the Competition Act and articles 101 and 102 of the TFEU. With regard to the electronic communications and postal services sector, however, competition rules are enforced by the national regulatory authority, namely the National Telecommunications and Posts Commission, which supervises and regulates the electronic communications and postal services sector, pursuant to article 12 of Law No. 4070/2012 on electronic communications.

Pursuant to article 30(1) of the Competition Act, HCC decisions are subject to an appeal filed before the Athens Administrative Court of Appeal. The Athens Administrative Court of Appeal effects a full review on the merits of the case. According to article 32 of the Competition Act, a petition for annulment before the Council of State against the decision of the Athens Administrative Court of Appeal can be filed, limited only to points of law.

Changes

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

An amendment of the Competition Act in the context of the transposition of Directive (EU) 2019/1 (the ECN+ Directive), which empowers national competition authorities, is anticipated. The draft bill is, in general, aligned with ECN+ Directive provisions, but it also tends to the adoption of certain either stricter or new competition rules. The draft bill has not been introduced to Parliament for adoption as at 5 December 2021.

It includes, inter alia, a provision (article 4 of the draft bill introducing article 2a to the Competition Act) concerning the abuse of a dominant position in an ecosystem of structural importance for competition in Greek territory. This purported provision aims to address the specificities of multi-sided markets, asymmetries of power and market tipping, and to complement the Digital Markets Act (DMA) framework. The new purported provision will not apply if the concern falls under the scope of the DMA. The purported sanctions are primarily behavioural measures.

Further, recently, the HCC changed its organisation structure through Decision 719/2020. The new organisation structure provides for the setting of new sectoral directorates and horizontal units for economic documentation, digital evidence detection and forensics, and a chief legal officer directorate.

Moreover, further to an amendment to the Competition Act (article 67(1) of Law No. 4714/2020), the HCC Legal Service Office started its operation in early October 2020, aiming to represent the HCC in judicial proceedings for HCC cases.

Substantive law

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

Article 1 of the Competition Act, which is almost identical to article 101 of the TFEU, provides that all agreements and concerted practices between undertakings – and all decisions by associations of undertakings – that have as their object or effect the prevention, restriction or distortion of competition within Greece are prohibited. This applies, in particular, to those that:

- directly or indirectly fix purchase or selling prices, or any other trading conditions;
- limit or control production, distribution, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent trading transactions, especially the unjustified refusal to sell, buy or otherwise trade, thereby hindering the functioning of competition; and
- make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations that, by their nature or

according to commercial use, have no connection with the subject of such contracts.

Article 1(2) of the Competition Act provides that 'any agreements and decisions by associations of undertakings which come under paragraph 1 and to which paragraph 3 does not apply shall be automatically void'.

However, there is an exemption under article 1, paragraph 3 of the Competition Act, similar to that of article 101, paragraph 3 of the TFEU, stating that:

> *Agreements, decisions and concerted practices which come under paragraph 1 shall not be prohibited, provided that they cumulatively satisfy the following preconditions:*
> - *they contribute to improving the production or distribution of goods or to promoting of technical or economic progress;*
> - *at the same time, they allow consumers a fair share of the resulting benefit;*
> - *they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and*
> - *they do not afford the possibility of eliminating competition or eliminating competition in respect of a substantial part of the relevant market.*

The above provisions cover price-fixing, market or customer allocation, group boycotts, output agreements, bid rigging and other types of competitor agreements. Provided that they refer to agreements between horizontal competitors, they are per se illegal (not subject to a competitive effects test). Thus, cartels are deemed 'by object' restrictions of competition, as they lead to 'such a degree of harm to competition that there is no need to examine their actual or potential effect' (European Commission, 2014a; page 3).

In particular, the HCC follows the legal principles of EU legislation and sources of law, and the interpretation of the EU courts. Cartel conduct may constitute an infringement regardless and without the NCA having to prove whether it had an anticompetitive effect on the market (see European Commission's guidance on restrictions of competition by object for the purpose of defining which agreements may benefit from the De Minimis Notice, 2014). In the case of horizontal agreements, the types of restrictions that are considered to constitute restrictions by object include, in particular, price-fixing, output limitation, and sharing of markets and customers. Regarding vertical agreements, the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions that limit sales into particular territories or to particular customer groups.

Joint ventures and strategic alliances

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

Joint ventures can be assessed under article 1 of the Competition Act or article 101 of the TFEU, or both, provided that they are not qualified as a 'concentration' within the meaning of the EU Merger Regulation. This will be the case for full-function joint ventures (ie, joint ventures performing on a lasting basis all the functions of an autonomous economic entity), which have cooperative elements, as well as the case for non-full-function joint ventures.

In short, cooperative elements between continuing competitors (eg, parents) may give rise to cartel issues, whereas the presence of structural elements may give rise to dominance and merger control issues.

As far as strategic alliances are concerned, while they usually have pro-competitive effects, they can be potentially 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?

Article 1 of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act) prohibits agreements between undertakings. Under EU case law, the concept of 'undertaking' has been defined very broadly as 'any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed'. Accordingly, it encompasses any legal or natural person engaged in economic activity (ie, the sale of goods or the provision of services). To that end, individuals can be subject to competition law provisions if they are engaged in economic activity, thus constituting an 'undertaking'. Moreover, under article 44 of the Competition Act, criminal sanctions for competition law infringement can be imposed only on individuals participating in cartel 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?

Pursuant to article 46 of the Competition Act (scope of the application of the law), the Competition Act applies to all restrictions of competition that affect or might affect Greece, even if these are due to:
- agreements between undertakings;
- decisions by associations of undertakings;
- concerted practices between undertakings or associations of undertakings; or
- concentrations of undertakings implemented or taken outside Greece, or to undertakings or associations of undertakings that have no establishment in Greece.

Consequently, the regime applies to conduct that takes place outside the jurisdiction if the particular conduct affects or might affect Greece.

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 the Competition Act. However, export cartels may not be covered by the Competition Act if they do not affect the Greek market, directly or indirectly.

Industry-specific provisions

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

Under the Greek competition regime, there are no industry-specific infringements or exemptions.

Government-approved conduct

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

There is no such defence or exemption. The Competition Act applies to publicly owned enterprises.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Initiation of a procedure

Pursuant to article 25 in conjunction with article 36 of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act), a cartel investigation may be initiated:

- on the initiative of the Hellenic Competition Commission (HCC);
- following a complaint filed by any natural or legal person with a legitimate interest (complaints may also be filed electronically);
- upon a request by the Minister of Economy, Competitiveness and Shipping; and
- upon a leniency application.

There is also a whistle-blowing programme.

Upon such a complaint or ex officio, if the HCC decides to take action, it shall firstly undertake an investigation (fact-finding exercise) on the basis of its extensive powers to obtain information.

In particular, in the case of alleged cartel conduct, the HCC exercises its investigative powers (ie, requests of information from the undertakings concerned, effects on-site inspections at their premises (dawn raids)) to establish an infringement of the relative articles of the Competition Act.

There is no specific time frame in the law concerning the investigative phase.

Prioritisation and assignment to a commissioner-rapporteur

After the case has been investigated and comes to a mature state, according to article 15 of the Competition Act, the president of the HCC brings before the HCC cases that fulfil the criteria for priority consideration (article 14(2), (xiv)(aa) and (xv) of the Competition Act, and HCC Decision 696/2019 on the determination and quantification of the criteria for case prioritisation and the setting of its strategic priorities upon the basis of a point system). Then, as soon as the preliminary decision concerning the priority consideration of the case has been issued, the case is assigned by lot, by the HCC plenum, to one of the HCC rapporteurs.

Statement of objections

The HCC is required to provide the parties with written details of the objections to which they are subject according to the statement of objections of the rapporteur (the HCC member assigned to the particular case), with the relevant facts, supporting evidence and any legal conclusions based upon these facts, and with the rapporteur's proposal for the HCC to impose a fine, if this is the case (the duration and gravity of the alleged infringement, and any aggravating or mitigating circumstances, will be stated).

The statement of objections allows the parties concerned to know the case against them, giving them the opportunity to respond and provide the HCC with the information that they believe should be taken into consideration.

The statement of objections is properly notified to the parties concerned. After the issuance of the statement of objections, the defence has the right to see the HCC's file on its investigation (access to file). In this stage, the parties are granted access to the non-confidential information on the HCC's file to exercise their rights of defence.

Regarding the above stage, following the assignment of the case to the rapporteur, the latter shall submit the statement of objections to the plenary or the corresponding division, as appropriate, within 120 days of the assignment. This time limit may be extended up to 60 days following a request from the rapporteur.

Oral hearings and written submissions

An oral hearing may take place for the defendants to respond to the statement of objections, to be heard and to make known their views on the elements of the statement of objections. Third parties who have shown sufficient interest may also be heard.

The hearing will normally involve presentations from the various parties and the hearing of witnesses.

HCC decision

After considering the parties' submissions, the HCC issues an infringement decision, a commitments decision or a decision abstaining from finding an infringement if the evidentiary threshold is not attained, or a settlement or leniency decision.

In particular, after having duly heard the parties, the HCC makes a final infringement decision under articles 1 or 2 of the Competition Act, or articles 101 or 102 of the Treaty on the Functioning of the European Union, as the case may be. In this case, the HCC has the power to:

- require the termination of infringements;
- impose behavioural or structural remedies proportionate to the infringement committed and necessary to bring the infringement effectively to an end; or
- reach settlement or commitment decisions (as the case may be – commitments will normally not be found appropriate for cartel cases, however, whereas the settlement procedure is designed for cartel cases).

Any decision of the HCC on the case must be published in the Official Journal (redacted, without business secrets).

The HCC shall issue a decision on the relevant case within the 12-month period commencing from the assignment of the case to the rapporteur. This time limit may be extended by up to two months in exceptional circumstances or when the case requires further investigation.

Regarding the limitation period, according to article 42 of the Competition Act, the HCC's power to impose penalties is subject to a five-year limitation period, commencing on the date on which the infringement was committed or, in cases of continuing or repeated infringements, from the date on which the infringement ceased. The aforementioned limitation period shall be interrupted by any action taken by the HCC, the European Commission or any other competent competition authority of an EU member state for the purpose of the investigation or proceedings in connection with the specific infringement. The limitation period recommences following each interruption.

Investigative powers of the authorities

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

Articles 38 and 39 of the Competition Act stipulate the investigative powers of the HCC, which in general mirror the investigative powers of the European Commission under Regulation (EU) 1/2003. In more detail, according to article 38 of the Competition Act, the HCC may request, in writing, information from undertakings, associations of undertakings, other natural or legal persons, or public or other authorities. The request for information must quote the provisions of the law on which it is based, the purpose of the request, the deadline by which information must be provided and the penalties provided for in the event of failure to comply with the duty of information. The addressees of the request for information must provide the information requested accurately, fully and immediately.

Moreover, pursuant to article 39 of the Competition Act, the officials of the Directorate-General for Competition are vested with the investigative powers of tax auditors. In particular, they are authorised to:

- inspect all categories of books, records and other documents of the undertaking or association of undertakings, including the business emails of the undertaking, the directors, the persons entrusted with administration or management in general and the staff of the undertaking or association of undertakings, regardless of how and where they are stored, and to take copies or extracts of them;
- seize books, documents and other records, including electronic means of storage containing professional information;
- inspect and collect information and data from mobile terminals and portable devices and their servers, on or off the premises of the undertaking;
- carry out inspections in the offices and other premises and means of transport of the undertaking or association of undertakings;
- seal any professional premises, books or documents for the period of and to the extent necessary for the inspection;
- carry out inspections in the residencies of the businesspeople, directors and persons entrusted with management or administration in general, and of the staff of the undertaking or association of undertakings, where there is reasonable cause to suspect that they are keeping books or other documents pertaining to the undertaking and the purpose of the inspection; and
- take sworn or unsworn witness statements and ask any representative or member of staff of the undertaking or association of undertakings for explanations of facts or documents relating to the subject matter of the investigation.

A court warrant is not required for the conduct of an inspection of business premises, but it must be obtained if the subject of the investigations refuses to accept the investigation. Furthermore, in all cases of inspections of non-business premises, a judge or public prosecutor should be present. Finally, the HCC may address compulsory requests for information (also to public or other authorities) and the latter have a duty of cooperation.

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?

Pursuant to article 28 of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act), the Hellenic Competition Commission (HCC) is responsible for cooperation:

- with the competition authorities of the European Commission and for providing its designated bodies with the necessary assistance to undertake the investigations provided for under European law; and
- with the competition authorities of other countries.

At the European level, the HCC cooperates with the European Commission and participates actively in European Competition Network (ECN) work. The HCC acted as a coordinator of the ECN group on sustainable development in 2021. On an international level, Greece is a member of the International Competition Network as well as of the Organisation for Economic Co-operation and Development (OECD), aiming at the promotion of policy convergence through dialogue and exchange of views on broader policy and enforcement issues. Within the context of the long-standing cooperation between the HCC and the OECD, information exchange meetings took place in March and April 2021 between the HCC and OECD Regulatory Policy Division officials, wherein the HCC presented, inter alia, its ongoing work on the digital transformation of the authority, as well as the reform of its organisational structure. The president of the HCC was elected in 2021 as a regular member of the Bureau of the OECD Competition Committee.

Furthermore, according to article 24 of the Competition Act, the HCC cooperates with regulatory or other authorities that monitor particular sectors of the national economy and assists such authorities, upon request, on matters of application of articles 1 and 2 of the Competition Act and articles 101 and 102 of the Treaty on the Functioning of the European Union in the relevant sectors. Thus, the HCC cooperates with sector- and industry-specific regulators. In this context, on September 2020, the HCC signed a memorandum of understanding (MOU) with the Regulatory Authority for Energy aiming to foster cooperation between the two authorities on issues of common interest. Moreover, on 2 April 2021, the HCC signed an MOU with the Regulatory Authority for Ports with a view to consolidating and enhancing the cooperation between the two authorities.

Aspiring to foster cooperation with other national competition authorities (NCAs), in March 2021, the HCC signed a memorandum of partnership with the Commission of the Protection of Competition of Cyprus. In the same direction, on 7 September 2021, a memorandum of partnership was signed between the HCC and the Albanian Competition Authority. Similarly, on 29 September 2021, the HCC signed a memorandum of partnership with the Commission for Protection of Competition of North Macedonia.

The HCC was also recently awarded the Morocco Twinning Programme as leader of a consortium consisting also of the competition authorities of Poland and Italy, aiming at strengthening the institutional capacity and operation of the Competition Council of Morocco while supporting the process of regulatory convergence on the basis of the European Union's acquis and implementation of international best practices.

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?

Within the framework of article 11 of Regulation (EC) 1/2003, the 2004 Commission Notice on cooperation within the network of competition authorities and article 28 of the Competition Act, the most significant interplay of HCC with other jurisdictions in cross-border cases is with the European Commission and other NCAs. In particular, there is a significant interplay between the HCC and other NCAs within the framework of the ECN, especially regarding the exchange of information about cases and decisions taken by the competition authorities in the network, mutual assistance with investigations and exchange of evidence or other information. Furthermore, the HCC accepts summary applications in Type 1A and Type 1B immunity applications in accordance with the ECN Model Leniency Programme.

The HCC has established its Directorate of International Relations and Communication with a view to enhancing the strategic cooperation with the European Commission and NCAs, as well as with international organisations and agencies of other countries with the competence to support HCC relations with EU agencies, international organisations, networks of competition authorities, NCAs and agencies of other countries.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Hellenic Competition Commission (HCC) both investigates (through its Directorate General) and adjudicates (the final decision is taken by its Board, sitting in chamber or plenary formation) on cartel matters. In

particular, under article 15(3) of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act), cases concerning, inter alia, the implementation of article 1 (unless otherwise stated in the Competition Act) are brought before a chamber consisting of four members, including the commissioner-rapporteur, except for cases of major significance, which are brought before the plenary at the HCC's decision. In other instances, cases shall be brought directly before the HCC's plenary. The plenary session of the HCC convenes at least once a month.

Burden of proof

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

In cartel proceedings, the burden of proof generally rests with the HCC. The HCC shall substantiate to the required extent, with sufficient evidence, the participation of an undertaking in an infringement of competition law and its duration. According to article 4 of the Competition Act, each party shall bear the burden of proof for their claims during proceedings before the HCC for the purposes of articles 1 and 2 of the Competition Act. The undertaking under investigation claiming the benefit of article 1(3) shall bear the burden that the conditions of this article are fulfilled. The HCC largely follows the legal principles of EU legislation and pertinent EU case law. The HCC, as a matter of principle, decides the action on the basis of its members' beliefs, as formed based on the evidence adduced by its Directorate General and by the parties, and in general follows the principle of free consideration of evidence.

Circumstantial evidence

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

In general and taking into account the principle of procedural autonomy of EU member states, HCC's decisional practice follows the European Commission's practice and established EU case law on the basis also of the settled principle of the effectiveness of EU law. In this vein, given the secretive nature of cartels and the ensuing difficulty of gathering evidence, and also that the standard of proof must not render the implementation of EU competition rules impossible or excessively difficult, the HCC may also rely on a body of converging evidence. Circumstantial evidence may be accepted in appropriate cases, in the sense of evidence consisting of a number of coincidences and indicia that, taken together and in the absence of another plausible explanation, may constitute evidence of an antitrust infringement. Thus, the infringement may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent (Court of Justice of the European Union Case No. C-74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, paragraph 37).

Appeal process

18 | What is the appeal process?

Pursuant to article 30(1) of the Competition Act, HCC decisions are subject to appeal before the Athens Administrative Court of Appeal within a period of 60 days as of their notification.

The appeal can be filed by:

- the undertakings or associations of undertakings against which the decision was issued;
- the complainant;
- the Minister of Economic Affairs, Competitiveness and Shipping; or
- any third party with a legitimate interest.

The court reviews both the legality and the substance of the case. HCC decisions can be upheld or annulled in total or part, or the court may uphold the decision in substance and reduce the amount of the fine imposed or refer the case back to the HCC.

The deadline for filing appeals and the filing of appeals shall not suspend the execution of the HCC decision, unless the court issues a relevant order (if an appeal is filed against a decision by the HCC imposing a fine, the Athens Administrative Court of Appeal may, by a reasoned judgment, order the suspension of a part of the fine, which cannot exceed 80 per cent).

Article 32 of the Competition Act provides that an application for annulment before the Council of State against the decision of the Athens Administrative Court of Appeal can be filed by the parties within 60 days of the issuance of the decision of the Athens Administrative Court of Appeal. The application for annulment can be also filed by the General State Commissioner within three months of the publication of the decision of the Athens Administrative Court of Appeal.

SANCTIONS

Criminal sanctions

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

Article 44(1) of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act) provides that any person who executes an agreement, takes a decision or applies a concerted practice in breach of article 1 or article 101 of the Treaty on the Functioning of the European Union (TFEU) shall be punished by a fine of between €15,000 and €150,000. If such an act pertains to undertakings that are in actual or potential competition with each other, a term of imprisonment of at least two years and a fine of between €100,000 and €1 million shall be handed down. Criminal sanctions are imposed by the criminal courts, not the Hellenic Competition Commission (HCC). It should be highlighted that, according to article 44, paragraph 3(b) of the Competition Act (as amended by Laws 4389/2016 and 4635/2019 and in force), criminal liability is waived (except in the case of repeated infringement or recidivism):

- in the case of leniency or settlement, provided that the fines are paid in full; or
- in case of a facilitated partial fine payment, for as long as the arrangement is in force and the party complies with its terms.

In practice, criminal sanctions are very rare.

Civil and administrative sanctions

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

Article 25 of the Competition Act provides for administrative sanctions against cartel activity. More specific, the HCC may decide, either alternatively or cumulatively, to:

- address recommendations;
- require the undertakings to bring the infringement to an end and refrain from it in the future;
- impose behavioural or structural remedies, necessary and appropriate for cessation of the infringement and proportionate to its nature and gravity (structural remedies shall be allowed only where no equally effective behavioural remedies exist or where any equally effective behavioural remedies are liable to be more burdensome than structural remedies);
- impose a fine;
- threaten a fine, where the infringement is continued or repeated; and
- impose the threatened fine when it is confirmed by its decision that the infringement is continued or repeated, or that the concerned undertakings fail to fulfil a commitment.

Moreover, per paragraph 5 of the same article, the HCC has the exclusive competence to take interim measures, on its own initiative or following a request by the Minister of Economy, Competitiveness and Shipping, where an infringement of articles 1, 2 and 11 of the Competition Act or articles 101 and 102 of the TFEU is suspected, and there is an urgent need to prevent an imminent risk of irreparable harm to the public interest. The HCC may also order an undertaking or association of undertakings that infringed the Competition Act to publish the decision issued under article 25 in a newspaper with a national or local circulation, depending on the scope of the market, stating the infringement, its gravity and its effects (article 27(2) of the Competition Act).

The Competition Act does not provide for any specific civil actions. Civil actions before Greek civil courts are provided under the provisions of Law No. 4529/2018, transposing Directive 2014/104/EU (the Damages Directive), the Civil Code and the Code of Civil Procedure.

Throughout the past decade, the HCC has sought to maintain a consistent level of antitrust enforcement regarding cartels, whereas on the basis of its prioritisation system, it focuses on cases with increased systemic effect.

Cartel damages actions have been adjudicated by the courts in Greece in several cases. The Damages Directive was transposed into Greek national law by Law No. 4529/2018 on the transposition into Greek law of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union and other provisions. To quantify damages, courts have estimated a rate or an amount of overcharge.

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 25(2.a) of the Competition Act, the fine for cartels (and, in general, for infringements of articles 1, 2 and 11 of the Competition Act or articles 101 and 102 of the TFEU) may be up to 10 per cent of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until the issuance of the decision, the year preceding the issuance of the decision. In the case of a group of companies, calculation of the fine shall take account of the total turnover of the group. In determining the level of the fine, account must be taken of the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and its economic benefit derived therefrom. Where it is possible to calculate the level of economic benefit to the undertaking from the infringement, the fine shall be no less than that, even if it exceeds the percentage stated above.

On 12 May 2006, the HCC issued guidelines on the method of setting fines, aligned with the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation (EU) 1/2003. In particular, the HCC follows a two-step methodology when determining the fine to be imposed. First, it determines a basic amount for each undertaking or association of undertakings with reference to the gravity and the duration of the infringement. Second, it may adjust the basic amount upwards or downward taking into account aggravating and mitigating factors, respectively. With regard to aggravating factors, the HCC may take into account factors such as undertaking's recidivism, refusal to cooperate with or obstruction of the HCC in carrying out its investigations, and the role of leader in, or instigator of, the infringement. The HCC will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

Regarding mitigating factors, the HCC may reduce the basic amount in the case of the existence of mitigating factors such as:

- where the undertaking provides evidence that the infringement has been committed as a result of negligence;
- where the undertaking concerned provides evidence that it terminated the infringement as soon as the first intervention of the Directorate General (eg, following the first dawn raid);
- where the undertaking provides evidence that its involvement in the infringement is substantially limited; and
- where the undertaking concerned has effectively cooperated with the HCC outside the scope of the leniency notice and beyond its legal obligation to do so.

Compliance programmes

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

The Competition Act does not provide that sanctions are reduced if the organisation had a compliance programme in place at the time of the infringement.

Director disqualification

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

Contrary to other jurisdictions, director disqualification is not provided for in Greece.

Debarment

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

Pursuant to article 73(4)(c) of Law No. 4412/2016 (transposing Directives 2014/24/EU and 2014/25/EU), as amended by Law No. 4782/2021 and in force (known as the Public Procurement Code), debarment from government procurement procedures is available as a discretionary exclusion ground. The article provides that a contracting authority may exclude an economic operator from a tender procedure 'where it has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition'. Article 73, paragraph 10 of the same law sets out that, where the period of exclusion has not been set by final judgment, that period shall not exceed three years from the date of issuance of the act confirming the relevant event. It is worth mentioning that, according to article 44(3)(b) of the Competition Act, exclusion from public tenders or concession contracts is waived (except in the case of repeated infringement or recidivism) in cases of leniency or settlement, provided that the fines are paid in full or, in the case of a facilitated partial fine payment, for as long as the arrangement is in force and the party complies with its terms.

The contracting authorities may, at their discretion, include this ground for exclusion in the procurement documents, taking into consideration the particular characteristics of the contract to be awarded – for example, estimated value or special circumstances.

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?

Even though administrative and criminal sanctions can be pursued in parallel with respect to the same conduct, article 44(5) of the Competition Act provides that, if the act referred to in paragraphs 1 and 2 of article 44 of the Competition Act is being investigated in any manner by the HCC or any other competent authority, the Public Prosecutor shall stay any further action following the preliminary investigation, pending a decision by the HCC, with the assent of the prosecutor to the courts of appeal, in which case the time limit in article 113(3)(a) of the Penal Code shall not apply.

However, to date, Greek jurisprudence has not addressed the matter of cumulative imposition of criminal and administrative sanctions in the context of violations of free competition law, as the subjects of the criminal sanctions imposed for cartel activities are natural persons, whereas the subjects of administrative sanctions are in most cases undertakings. To that end, it has been held (see Council of State Judgement 175/2018) that in cases where, in addition to the administrative sanction imposed on the legal person, a criminal sanction has also been imposed on a natural person for the same infringement, there is no violation of the *ne bis in idem* principle, as the requirement of identity of the person is absent.

Last but not least, with regard to the administrative sanctions being imposed by the HCC and the civil sanctions being imposed by the civil courts, it is worth stressing that public enforcement and private enforcement of competition law are two different procedures that are completely complementary to each other.

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 for cartel infringements are available in the Greek jurisdiction and are governed by Law No. 4529/2018 transposing Directive 2014/104/EU. Under article 3(1) of Law No. 4529/2018, any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm. This compensation covers actual damage, loss of profit and interest from the time when the harm occurred until the time when compensation is paid. However, punitive damages are not available under this law. With regard to the quantification of harm, article 14 of Law No. 4529/2018 provides that the requisite standard of proof is a reduced standard of probability. The national courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available (article 14(1) of Law No. 4529/2018). There is a presumption that cartel infringements cause harm, but the infringer has the right to rebut that presumption.

Article 11(1) of Law No. 4529/2018 specifies that compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer. The indirect purchasers shall prove that passing on to them occurred in accordance with the provisions of article 11(2-6). Umbrella purchaser claims, in line with Case No. C-557/12 *Kone*, may be also brought (article 10(7) of Law No. 4529/2018).

Article 11(2) of Law No. 4529/2018 provides that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law (passing-on defence). The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties. With respect to quantifying the overcharge in the context of the passing-on defence, probability also applies.

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?

Law No. 4529/2018 regulating private actions for cartel infringements does not contain any provisions concerning class actions.

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?

Based on the delegating provision of article 25(8) of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act), the Hellenic Competition Commission (HCC) Decision 526/VI/2011 sets out the national legal framework under which exemption from the payment of fines or fine reduction shall be granted to undertakings and natural persons who cooperate with the HCC in detecting and terminating cartels. The national leniency programme is, in general, modelled after the European Union's and the European Competition Network's respective leniency programmes. It is only applicable to horizontal cartels laid down by article 1 of the Competition Act and article 101 of the Treaty on the Functioning of the European Union (TFEU), and to specific legal and natural persons involved in cartels, which are liable to a fine under articles 25(1)(d) and (2)(c) of the Competition Act.

Under the national leniency programme, there are two types of immunity: full or partial.

Full immunity from fines refers to Type 1A and Type 1B applications. Regarding full immunity of Type 1A, full immunity from fines and any administrative penalty shall be granted to the applicant who is the first to submit evidence enabling the HCC to initiate a targeted inspection concerning a suspected cartel, provided that the HCC did not already have in its possession at the time of the application sufficient evidence that would allow the initiation of the investigation procedure in relation to this cartel. Full immunity from fines and administrative penalties of Type 1B, shall be granted to the applicant who will be the first to submit the evidence that enables the HCC to establish an infringement of article 1 of the Competition Act or article 101 of the TFEU, or both, provided that the evidence in relation to the cartel that the HCC already had in its possession at the time the application was submitted was not sufficient to prove such an infringement. Note that, pursuant to article 44(3b) as in force, if the undertaking is granted full immunity, no criminal sanctions will be imposed on natural persons who were involved in the cartel.

In March 2021, the HCC introduced a whistle-blowing mechanism, (ie, a secure digital environment for the reporting or submission of anonymous information), following the standards of the whistle-blowing mechanisms used by the European Commission, as well as other national competition authorities (NCAs) in the European Union.

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 national leniency programme provides partial immunity (Type 2 immunity: reduction in fines) for subsequent applicants in the case of applications that do not fulfil the conditions for granting immunity from fines. In this case, a reduction in the fine that would otherwise have been imposed may be granted to the applicant (undertaking or natural person) who provides the HCC with evidence of the alleged cartel, representing significant added value with respect to the evidence already in the HCC's possession. With regard to the extent of the reduction, significant added value for Type 2 applications shall not be rewarded with a reduction in any fine of more than 50 per cent. Furthermore, partial immunity is regarded as a mitigating circumstance, resulting in the imposition of a reduced sanction pursuant to article 83 of the Penal Code.

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 the leniency programme, there is no immunity plus or amnesty plus.

Approaching the authorities

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

In general, there are no specific deadlines for initiating or completing an application for immunity. The applicants may also contact the HCC prior to the formal submission of an application to discuss the possibility of the application of the leniency programme to the case at hand by presenting the required information on a hypothetical basis.

The national leniency programme provides for the request of a marker by the applicant before the submission of a leniency application. The HCC enjoys full discretion in granting a marker. The granting of a marker protects the applicant's place in the queue for a given period of time, thus allowing him or her to gather, within that period, the information and evidence necessary to meet the relevant evidential threshold for immunity. In particular, the applicant must justify his or her marker application and provide the HCC, simultaneously with the application, with his or her name and address as well as information on:

- the members of the suspected cartel;
- the affected product or products;
- the affected geographical territory;
- the duration of the alleged cartel;
- the nature and operation of the alleged cartel; and
- any information on already submitted or possible future leniency applications submitted to other competition authorities, either inside or outside the European Union, related to the alleged cartel.

If the applicant completes his or her application within the set period, the information and evidence provided shall be deemed to have been submitted on the date of the marker was issued.

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 granted full immunity, leniency applicants should fulfil the cumulative conditions, as stipulated in paragraph 19 of the national leniency programme. In particular, the undertaking or natural person must comply with the following:

- The applicant must cooperate with the HCC genuinely, fully, continuously and expeditiously throughout the administrative procedure. This includes:
  - providing the HCC promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;
  - remaining at the HCC's disposal to answer promptly to any request that may contribute to the establishment of the facts;
  - making current (and, if possible, former) employees and directors available for interviews with the HCC;
  - not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
  - not disclosing the fact or any of the content of its application before the HCC has issued a statement of objections in the case, unless otherwise agreed (this does not prohibit disclosure to the European Commission and other NCAs).
- The applicant must have ended its involvement in the alleged cartel immediately following its application, except for what would, in the HCC's view, be reasonably necessary to preserve the integrity of the inspections.
- When contemplating making its application to the HCC, the applicant must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

These general requirements applicable to full immunity are also applicable to partial immunity.

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?

Regarding the confidentiality protection afforded to the immunity applicant, it is noted that any information disclosed within the framework of the leniency programme is kept confidential and should not be disclosed or used for purposes other than those related to the application of article 1 of the Competition Act. Moreover, no access to any recording of the leniency applicant's oral statements before the notification of the rapporteur's statement of objections is granted. The right to access the file is granted to the addressees of the statement of objections and is exercised after the notification of the statement of objections at the offices of the HCC.

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 settlement procedure is foreseen in article 25a of the Competition Act and HCC Decision 628/2016 as supplemented and codified by HCC Decision 704/2020. In brief, the settlement procedure concerns cases where undertakings or associations of undertakings make a clear and unequivocal acknowledgement of participation and liability in relation to their participation in horizontal agreements (cartels), and the subsequent breach of article 1 of the Competition Act or article 101 of the TFEU, or both. In exchange for the cooperation with the HCC, the undertaking or undertakings that submitted for a settlement can obtain a 15 per cent fine reduction, provided that certain conditions are fulfilled. The settlement procedure is essentially modelled after the EU equivalent procedure, and aims at simplifying and speeding up the handling of pending cases. The official settlement proposal submitted by the parties should include the following:

- an acknowledgement of the parties' participation and liability for the infringement;
- an acceptance of the maximum amount of the fine that may be imposed by the HCC;
- the parties' confirmation that they have been informed of the HCC's finding of an infringement and that they have been given the opportunity to make their views known to the authority;
- a waiver of their right to obtain full access to the HCC's file or to be heard in an oral hearing; and
- a waiver of the right to challenge HCC's jurisdiction and the validity of the procedure followed.

Settlement procedures commence on the parties' initiative at any stage of the investigation and a court approval is not required.

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 leniency application filed by a corporate defendant automatically covers all natural persons that would otherwise also be liable for fines. Regarding natural persons, the granting of full immunity remits them from criminal liability, while the granting of a fine reduction is qualified as a mitigating circumstance resulting in the imposition of a reduced sanction according to article 83 of the Penal Code.

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?

Regarding the procedure governing the submission of a leniency application, the application form must be submitted together with a statement (ie, a corporate statement submitted by duly authorised representatives) and the evidence for the alleged cartel provided for in paragraph 8 of HCC Decision 526/VI/2011. In particular, the statement should include:

- the name and address of the applicant, and the identity of the other parties of the alleged cartel;
- a detailed description of the alleged cartel;
- any evidence of the alleged cartel being at the disposal or control of the applicant at the time of submission of the application; and
- any information on already submitted or possible future leniency applications submitted to other competition authorities in relation to the alleged cartel.

The application should be written and submitted to the HCC's president. However, upon request by the applicant, the HCC may allow an oral statement including the applicant's identification details as well as the aforementioned information on the alleged cartel. Before the submission of a formal application for immunity from the fines, the applicant may approach the HCC without revealing any identification details to request guidance on the applicability of the leniency programme to the particular case by presenting, on a hypothetical basis, the evidence at its disposal.

DEFENDING A CASE

Disclosure

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

The disclosure of evidence to the defendant (access to the case file) is made in accordance with the detailed provisions of article 15 of the Regulation on the Internal Operation and Management of the Hellenic Competition Commission (HCC) as well as by a separate HCC notice on the treatment of confidential information and on the submission of the non-confidential versions of documents (2015). In particular, undertakings concerned are provided with a written statement of objections, containing all factual and legal elements that may be used in the final decision, and are also granted access to the case file to be able to effectively exercise their rights of defence. In general, the right of access to the file depends on and is limited by the nature of the documents to which access is requested (no access is given to documents containing business secrets or confidential information, internal documents, etc), the time of the access requested (ie, before or after the notification to the relevant party), the extent of the applicant's right of access in accordance with the law and the existence of any requests for confidential treatment of the information submitted or presented to the HCC during the provision of information, or collected by the HCC in the context of an on-site inspection.

Representing employees

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

There is nothing expressly provided for in Law No. 3959/2011 on the Protection of Free Competition (the Competition Act) on this issue. Therefore, in general, counsel may represent employees under investigation in addition to the corporation, unless a conflict of interest arises.

Multiple corporate defendants

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

Counsel may represent multiple corporate defendants, unless a conflict of interest arises.

Payment of penalties and legal costs

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

This is not stipulated in the law and may be possible. However, it is a matter of arrangement between the corporation and its employees.

Taxes

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

Fees and penalties, including additional payments, are not recognised as deductible expenses.

Compensation arising out of contractual obligations between private parties, or awarded by court or arbitration judgments for breach of contractual obligations between private parties, are recognised as deductible expenses.

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, corporations and individuals sanctioned in a criminal proceeding in another jurisdiction cannot be sanctioned for the same action in a Greek criminal proceeding. The *ne bis in idem* principle is taken into account by the Council of State and the criminal courts – it constitutes a principle mainly concerned with due process. Furthermore, administrative sanctions imposed in non-EU member states' jurisdictions shall not be taken into account when determining cartel sanctions.

With respect to private damage claims, article 3(3) of Directive 2014/104/EU provides that full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages. Therefore, overlapping liability for damages in other jurisdictions shall be taken into account.

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 the leniency procedure, as full or partial immunity is granted to the parties. Moreover, under the settlement procedure, a reduction of the imposed fine of up to 15 per cent is available to the undertakings or associations of undertakings that make a clear and unequivocal acknowledgement of participation and liability in relation to their participation in cartels and the subsequent breach of competition law. The timing, extent or quality of cooperation, a pre-existing compliance programme and compliance initiatives undertaken after the investigation has commenced affect the nature or magnitude of the sanctions.

UPDATE AND TRENDS

Recent cases

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

Bid rigging cases seems to be an area of focus for the Regulation on the Internal Operation and Management of the Hellenic Competition Commission (HCC). In particular, on 10 July 2020, the HCC in plenum published Decision 715/2020, imposing a fine on seven contractors for participation into a horizontal concerted practice of bid rigging regarding a public tender for the 'Fifth Lyceum of Lamia' project. Moreover, on November 2020, the HCC, following the simplified settlement procedure, issued Decision 721/2020 concerning a cartel in the context of a public tender in the market of security services (bid rigging through price-fixing agreements). In 2021, the HCC plenary session issued, following the simplified settlement procedure, Decision 742/2021 regarding horizontal agreements of bid rigging through market allocation in the context of tenders for the installation, removal and cleaning of chemical toilets for public organisations and private bodies. The total fine imposed amounted to €199,491.

Statements of objections have been served to parties in the following cases.

On 20 January 2021, a statement of objections relating to alleged infringements of articles 1 and 2 of Law No. 3959/2011 on the Protection of Free Competition (the Competition Act) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in the Greek markets for the collection, treatment, disposal and remediation of waste lubricant oils was notified to the defendant following two complaints.

On 18 June 2021, the HCC convened to examine alleged infringements of article 1 of the Competition Act and article 101 of the TFEU following an ex officio investigation in the Greek market for cooling and heating systems or appliances.

On 27 September 2021, the HCC convened to examine, following an ex officio investigation, alleged infringements of article 1 of the Competition Act regarding concerted practices among competitors in the market of marble monuments and the Mytilene Charity Institutions in Mytilene (price-fixing and market allocation).

A statement of objections regarding the alleged violation of article 1 of the Competition Act and article 101 of the TFEU (bid rigging through cover bidding and the adoption of a compensation procedure) has also been served in a tender for the public infrastructure project 'North Road of Crete: Gournes Chersonisos Part'.

As far as the settlement procedure is concerned, it appears that it tends to be very successful, since it is used in most of the horizontal agreements cases although, often, the companies involved apply for settlement prior the issuance of the statement of objections.

Furthermore, the HCC has proceeded with several dawn raids for cases concerning article 1 of the Competition Act or article 101 of the TFEU in markets such as:

- information technology systems;
- cadastral consulting and supporting services;
- supply and retail trade of supermarket products;
- import, manufacturing, wholesale and retail trade of school bags, kids' lunch bags and pencil cases; and
- refining, wholesale and retail trade of petrol and diesel.

Last but not least, the HCC has recently used the tool of regulatory intervention in several sectors of the economy.

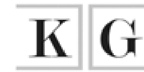
Regime reviews and modifications

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?

With regard to the existing legal regime, major legislative changes are anticipated in the near future. In particular, on 6 August 2021, the Ministry of Development and Investment published a draft bill amending the Competition Act, which has not yet been submitted for parliamentary review. The key objective of the draft is the incorporation of Directive (EU) 2019/1 (the ECN+ Directive), empowering the competition authorities of EU member states to be more effective enforcers. The key amendments to the existing legal framework may be summarised as follows:

- the introduction of article 2a concerning the abuse of dominance in an 'ecosystem of structural importance for competition', including a notion of 'the ecosystem';
- the fines imposed may amount to 10 per cent of the total worldwide turnover of the company for the business year preceding the issuance of the decision, as opposed to the national turnover applied today (the HCC may consider compensation paid as a result of a consensual settlement as a mitigating factor when determining the amount of the fine to be imposed for the anticompetitive infringement (article 19 of the draft bill));
- the introduction of article 28a reflecting articles 24 and 27(7) of the ECN+ Directive aiming at the enhancement of the cooperation between national competition authorities (article 23 of the draft bill);
- with respect to settlement procedure, an extension of the said procedure to any infringement of articles 1 and 2 of the Competition Act or articles 101 and 102 of the TFEU, and not only horizontal cartels, is anticipated (article 28 of the draft bill); and
- regarding the leniency programme, the amendments regarding the general conditions, the form of the statements and the markers reflect articles 17, 18, 19 and 20 of the ECN+ Directive.

* *The content of this chapter was accurate as at 12 December 2021.*



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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 (the Commission) is responsible for investigating alleged contraventions (including cartel conduct) and initiating enforcement proceedings before the Competition Tribunal (the 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 understood to be 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 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. Such 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, in October 2020, the Hong Kong Seaport Alliance, a contractual joint venture between four port terminals, was the subject of an in-depth investigation relating to price alignment and capacity sharing. The Commission eventually accepted commitments from Hong Kong Seaport Alliance and ceased its investigation.

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 Competition Commission (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 Competition Tribunal (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 pecuniary penalties on individuals for the first time.

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, which expired in August 2022. In July 2022, the Commission decided to renew the block exemption order for vessel sharing agreements for a further four years until 8 August 2026.

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 (the 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 Competition Commission (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. The Commission may also collaborate with the Hong Kong Police Force when executing search warrants.

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 Competition Tribunal (the Tribunal) have referred to case law in other jurisdictions. In the Tribunal's judgments that have been handed down since 2019, it has demonstrated reliance on UK and EU case law.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Commission (the Commission) will initiate Competition Tribunal (the 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 concertation, alternative explanations of such parallel conduct should be addressed.

However, the Tribunal 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 (the Commission) or obstruction of an investigation may result in a criminal offence. The infringing persons may face imprisonment or financial penalties. The Commission previously referred obstruction of search to the Hong Kong Police Force for criminal investigation.

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 Competition Tribunal (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 or contraventions 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 for the Commission's penalty recommendations, including recommendations for cooperation discounts.

In its first pecuniary penalty decision against individuals, handed down in January 2021 (CTEA1/2019), 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 the prior implementation of a proportionate and ongoing compliance programme is a mitigating factor. The Tribunal, in its 2022 judgment *Competition Commission v Kam Kwong Engineering Company Ltd and Others* (CTEA1/2018), indicated that a competition compliance programme that exists both at the time of breach or introduced as a result of an investigation may be taken into account as a mitigating factor. However, if the competition compliance programme is only introduced after the Commission commences proceedings through the Tribunal, it may not be regarded as 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 anti-competitive 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 Tribunal, in its 2022 judgment *Competition Commission v Kam Kwong Engineering Company Ltd and Others* (CTEA1/2018), sought an undertaking from the contraveners that they will refrain from any anti-competitive conduct when engaging in government projects. 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 (the 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 Competition Tribunal's approach to direct and indirect purchasers, level of damages and cost awards will be.

The Ordinance does not allow for standalone private enforcement actions. However, competition law contraventions can be raised as a defence in civil proceedings. In the *Taching* case (CTA1/2018), the plaintiff initiated action for outstanding payments and the defendant, in turn, argued that the plaintiff was price-fixing with its competitor and sought damages from the plaintiff.

Class actions

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

Currently, there are no class action procedures for competition claims, or more general actions, in Hong Kong.

COOPERATING PARTIES

Immunity

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

The Competition Commission (the Commission) may make a leniency agreement with an undertaking that it will not bring or continue proceedings in the Competition Tribunal (the Tribunal) that could result in a pecuniary penalty, in exchange for an undertaking's cooperation.

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: the first leniency applicant received when the Commission is already assessing or investigating the alleged cartel.

For leniency applicants who are undertakings, Type 1 applicants are unlikely to be exposed to any follow-on damage risk in Hong Kong. Type 2 applicants, on the other hand, may be required by the Commission to subsequently admit to liability through an infringement notice to facilitate follow-on actions by victims of the cartel conduct.

The Commission published its Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy), which was revised in September 2022. Individuals (eg, directors or employees) may report cartel conduct to the Commission and seek immunity. Leniency will be available for the first individual who either discloses their involvement in cartel conduct of which the Commission has not commenced an initial assessment or investigation (Type 1), or provide substantial assistance to the Commission's investigation and subsequent enforcement action of cartel conduct which the Commission is already assessing or investigating (Type 2). 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'.

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 (the First Cartel) may find that it also has engaged in one or more separate cartels (the 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 disclosure 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 the 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 through 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 (CTEA1/2020). The extent and limits that may apply, particularly in a contested hearing, are currently unclear.

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 was 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 that 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 director disqualification proceedings under the Companies Ordinance and the 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, thereby enabling the expeditious disposal of proceedings and avoiding the substantial costs that would otherwise be incurred if there were to be a trial. Similar procedures were consistently applied by the Tribunal in its settlement decisions (eg, CTEA1/2017 and CTEA1/2020).

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:

- 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.
- The applicant is required to perfect the marker through a proffer process, either orally or in writing.
- The applicant enters into a leniency agreement with the Commission and is required to ensure ongoing compliance with the terms of the agreement.
- 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 that the undertaking fulfilled all conditions under the leniency agreement.

The key steps for a cooperating party are set out below:

- 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.
- An applicant is required to provide documents and information through a proffer process, either orally or in writing.
- 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.
- The applicant is required to ensure ongoing compliance with the terms of the cooperation agreement.
- 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 (the 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 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 director 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, provided that 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 prohibiting lawyers from representing multiple corporate defendants in the same cartel. In practice, lawyers may act for multiple corporate defendants provided that 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 by the payment of a pecuniary penalty and costs incurred in defending proceedings. However, funds can be provided to its employees to meet expenditures incurred by them in defending proceedings, provided that the employees repay such funds in the event that 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 involving multiple jurisdictions.

Getting the fine down

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

Mitigating factors that may lead to a 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 November 2021, the Competition Commission (the Commission) published a policy on commitments that sets out the Commission's practice and procedure in respect of commitments under section 60 of the Competition Ordinance (the Ordinance). It sets out information relating to the appropriateness of a section 60 commitment as an enforcement outcome, the content of a section 60 commitment, the section 60 commitment process and consequences where parties fail to comply with the commitments.

In November 2021, the Commission commenced proceedings before the Competition Tribunal (the Tribunal) against three undertakings for their alleged participation in cartel conduct regarding the sale of inserters in Hong Kong. All parties cooperated with the Commission, and this will be the first case to be fully resolved under the Commission's cooperation and settlement policy.

In December 2021, the Commission commenced proceedings against two cleaning service companies. The two companies exchanged competitively sensitive information in relation to 17 tenders submitted to the Hong Kong Housing Authority for the procurement of cleaning services for public housing estates and other buildings under the management of the Hong Kong Housing Authority. This is also the first case where the Commission referred the obstruction of the Commission's search to the Hong Kong Police Force for criminal investigation.

In January 2022, the Commission commenced proceedings before the Tribunal against four undertakings and one individual in the travel services sector. This followed the Commission's earlier enforcement actions against six hotel groups and tour counter operators in February 2021. It was alleged that two competing travel services providers agreed to fix the prices at which tourist attractions and transportation tickets were sold at the hotels and the hotels allegedly acted as facilitators of the cartel. The Tribunal granted the orders in July 2022 based on the joint applications by the Commission and settling respondents. Gray Line and Tak How were ordered to pay HK$4.177 million and HK$1.6 million respectively after receiving 25 per cent and 20 per cent discounts for their cooperation with the Commission.

In January 2022, the Commission announced that it is conducting an investigation into the conduct of two online food delivery platforms, Foodpanda and Deliveroo. In particular, the Commission is looking into whether the exclusivity requirements and most favoured nation clauses imposed by the online food delivery platforms on their partner restaurants may raise competition concerns. This is also the first time that the Commission has invited the restaurant industry to provide information in relation to its investigation through a public survey.

In March 2022, the Commission announced that it was conducting an investigation into agreements between certain manufacturers of passenger cars and their importers, distributors or authorised dealers in Hong Kong. Specifically, the Commission was concerned that certain distributors imposed warranty restrictions requiring maintenance or repair services, or both, to be carried out at authorised repair centres, regardless of whether the maintenance or repair item is covered by the warranty. The Commission had also asked the public to provide information in relation to its investigation through a public survey. In response to the Commission's investigation, the car distributors offered commitments not to enforce the existing warranty restrictions and not to include them in future new warranties. In August 2022, the Commission commenced a consultation on its proposal to accept these commitments.

In June 2022, the Court of Appeal handed down its judgment in relation to appeals lodged by the Commission against pecuniary penalties imposed by the Tribunal in its early decision against five decoration contractors. The Court of Appeal agreed with the Commission's case that the decoration contractors should not be given a lower pecuniary penalty solely based on the argument that it was their subcontractors who had entered into the cartel agreements and the decoration contractors had no direct participation in the cartel. The Court of Appeal considered that the main contractors and subcontractors form a single economic unit within the same undertaking, and should be jointly and severally liable for the infringement.

In June 2022, the Commission commenced proceedings against two providers of air conditioning services, their parent entities and three employees (including two senior engineers and one senior manager) for alleged price-fixing, market sharing and bid rigging. The alleged cartels took place from late 2015 to late 2019 and had allegedly impacted a range of works worth approximately HK$2 billion.

In July 2022, the Commission decided to renew the block exemption order for vessel sharing agreements in the liner shipping industry for a further four years until 8 August 2026. The Commission concluded that the relevant activities of the vessel sharing agreements between liner shipping companies continue to meet the requirements of the efficiency exclusion.

In August 2022, the Commission published an advisory bulletin to provide guidance on how the Ordinance may apply to the conduct of employers in the context of their joint negotiations with employee bodies on employment matters. In the bulletin, the Commission clarified that, generally, it is unlikely to raise competition concerns if the need for relevant employers to jointly negotiate with the employee bodies is justified given the industry characteristics and provided that:

- the purpose of the conduct is to improve relevant employment conditions; and
- an employee body is a genuine participant in the joint negotiation process.

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 understood to be 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.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Competition law is governed by the Competition Act 2002 (the Act), and related rules and regulations.

Relevant institutions

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

The Competition Commission of India (CCI) is the national competition law regulator. Upon direction from the CCI, the Office of the Director General (DG), the CCI's investigative wing, investigates cartel matters. The CCI then prosecutes and adjudicates these matters.

Appeals are heard by the National Company Law Appellate Tribunal (NCLAT) and a further appeal lies with the Supreme Court of India. In certain circumstances, the CCI's orders may also be challenged before the high courts under their writ jurisdiction.

Changes

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

The CCI recently amended the regulations pertaining to confidentiality. Pursuant to these amendments, the following applies:

- Parties may claim confidentiality over information and documents being filed with the DG or the CCI by self-certifying through an undertaking. A false undertaking can lead to penalties. Parties must support their claims for confidentiality with cogent reasons, and undertake that their claims are consistent with the requirements set out under the Act and applicable regulations. This includes certifying that public disclosure would result in:
    - the revelation of trade secrets;
    - the diminution of commercial value of any information; or
    - a reasonable expectation of causing serious injury.
- Materials and documents obtained through search and seizure – such as email dumps, call detail records, or any other document or material in the nature of personal information – shall be marked as confidential and separated from the public record.
- If the CCI considers it necessary or expedient, it may establish confidentiality rings, which will comprise of a limited group of authorised representatives of the parties who will have access to the entire case records in an un-redacted form.

Changes to the Act have also been proposed under the Competition (Amendment) Bill 2022 (the Amendment Bill). Key changes that will impact the cartel regime if the Amendment Bill is passed are:

- facilitators of cartels, including hub-and-spoke cartels, shall be presumed to be a part of an anticompetitive agreement and will be treated as infringing parties if they actively participate in the furtherance of the agreement;
- the introduction of a leniency plus regime, allowing an enterprise that files for leniency in relation to one cartel and also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartel;
- the introduction of provisions that disincentivise leniency applicants against any failure to cooperate, providing false evidence or making non-vital disclosures as this could lead to the rejection of the marker and levy of penalties;
- the introduction of the ability for applicants to withdraw their leniency applications after they are submitted; and
- guidelines by the CCI to calculate turnover and income for penalty assessment will be published.

Substantive law

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

Section 3 of the Act aims to prohibit agreements that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India. Such agreements include horizontal agreements between competitors, including cartels. The term 'cartel' is non-exhaustively defined as an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in, goods or provisions of services. Group boycotts and information exchanges between competitors are forms of cartelisation.

The Act prohibits horizontal agreements that:

- directly or indirectly determine purchase or sale prices;
- limit or control production, supply, markets, technical development, investment or the provision of services;
- allocate, among others, markets, customers, sources of production or goods; or
- directly or indirectly result in bid rigging or collusive bidding if such agreements cause or are likely to cause an AAEC.

Once a horizontal agreement has been established, it is presumed to cause an AAEC. This presumption is however rebuttable by the parties to the agreement. In determining whether an agreement causes an AAEC in India, the CCI is required to consider a number of negative and positive factors. The negative factors are:

- the creation of barriers to entry;
- driving existing competitors out of the market; and
- foreclosing competition by hindering entry into the market.

The positive factors are:
- accrual of benefits to customers;
- an improvement in production or distribution; and
- the promotion of technical, scientific and economic development.

The term 'agreement' is broadly defined. It can include any arrangement or understanding or action in concert, whether such agreement is:
- formal or in writing; or
- intended to be enforceable by legal proceedings.

Since the nature of penalties imposed is administrative rather than criminal, the CCI applies a lower standard of proof than that of beyond reasonable doubt as required in criminal cases. The CCI and the NCLAT's current position, reaffirmed by the Supreme Court, is that the standard of proof is a preponderance of probability. Knowledge or intention are not necessary elements to determine a contravention of the cartel provisions. Where the actions of the parties fall foul of the law and the conduct is held to cause or likely to cause an AAEC, the parties will be liable.

Joint ventures and strategic alliances

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

Joint ventures that increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services are not presumed to cause an AAEC. The onus to prove that the joint venture agreement is efficiency-enhancing lies with the parties to the agreement.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

The law applies to individuals, corporations, government departments and other entities. It does not apply to sovereign functions carried out by the government, which encompasses activities relating to atomic energy, space, currency and defence.

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 32 of the Competition Act 2022 (the Act) empowers the Competition Commission of India to inquire into an agreement under section 3 of the Act even where it has been entered into outside India, any party is outside India, or any other matter, practice or action arising out of an agreement that is outside India, provided that the agreement has, or is likely to have, an appreciable adverse effect on competition (AAEC) in India.

Export cartels

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

Export cartels are generally not subject to competition laws, except in certain circumstances where the conduct in question causes or is likely to cause an AAEC within India.

Industry-specific provisions

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

The Act applies universally to all sectors and there are presently no industry-specific infringements. However, the Act exempts the exercise of intellectual property rights conferred under the following pieces of Indian legislation:
- 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 Semiconductor Integrated Circuits Layout-Design Act 2000.

Government-approved conduct

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

Save for sovereign functions carried out by the government, and activities undertaken by the space, atomic energy, defence and currency departments of the central government, no other state action, government-approved activity or regulated conduct is expressly exempt from competition laws.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The Competition Commission of India (CCI) can initiate an investigation into any alleged anticompetitive conduct either:
- on its own motion;
- based on a complaint filed by any person; or
- following a reference from the government or a statutory body.

The CCI may also initiate investigations following a leniency application. In the early years, the CCI's detection of cartels was heavily reliant on complaints received from private parties or government references relating to bid rigging in public procurement. In the past three to four years, the CCI has successfully used leniency as the basis for detecting cartels.

Based on the available evidence, if the CCI is prima facie satisfied that there is a contravention of the Competition Act 2022 (the Act), it will direct the Office of the Director General (DG) to investigate. If a prima facie case has not been established, the CCI will close the case at the threshold stage itself.

Once the CCI passes an order for investigation, the DG must investigate in a time-bound manner and submit a report containing its findings on the allegations (the DG Report). The DG typically conducts an in-depth and invasive investigation, including, if necessary, issuing summons to individuals to record their statement on oath, and search and seizure operations. The Act provides for penalties for failure to comply with the directions of the DG and for not furnishing information.

If the DG Report recommends that there has been no violation, the CCI can forward it to the concerned parties with an invitation to provide their objections or suggestions. After considering the parties' objections, the CCI may either agree with the DG's recommendation and close the matter, or conclude that further investigation is required and direct the DG to do so or itself proceed with further inquiry.

If the DG Report recommends that there has been a violation of the Act and the CCI agrees, it shall forward a non-confidential version of the DG Report to the concerned parties and proceed with further inquiry involving oral hearings and passing orders, as required.

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 wide powers, equal to those of a civil court, including powers to:

- summon and enforce the attendance of any person, and examine them on oath;
- require the discovery and production of documents;
- receive evidence on affidavit;
- issue commissions for the examination of witnesses or documents; and
- requisition, subject to certain other legal requirements, any public record or document, or copy of such a record or document, from any office.

Additionally, the DG has the power to conduct search and seizure operations (dawn raids) upon obtaining a warrant from the Chief Metropolitan Magistrate in Delhi, and can seize the books and documents of the company, including electronic evidence such as emails, computer hard drives and removable storage devices.

The DG's investigation is circumscribed by the prima facie order of the CCI, which directs it to investigate a case. However, the CCI words its orders flexibly to enable the DG to conduct more thorough investigations. The DG can conduct investigations into the role of other companies (including those not initially identified) or extend time periods before arriving at a final recommendation.

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 Act 2022 (the Act) provides for cooperation between the Competition Commission of India (CCI) and foreign antitrust regulators. The CCI may enter into any memorandum or arrangement with any foreign agency with prior approval of the central government. The CCI has entered into memoranda of understanding with the following foreign agencies and regulators:

- the Competition Commission of Mauritius;
- the Japan Fair Trade Commission;
- the competition authorities of Brazil, Russia, India, China and South Africa (ie, the BRICS nations), including Russia's Federal Antimonopoly Service and Brazil's Administrative Council for Economic Defense;
- Canada's Competition Bureau;
- the European Union's Directorate-General for Competition;
- the Australian Competition and Consumer Commission; and
- the United States' Federal Trade Commission and Department of Justice.

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?

Engagement between the CCI and the regulators of other jurisdictions is not a matter of public record.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Commission of India (CCI) adjudicates cartel proceedings based on:

- the report from the Office of the Director General (DG) containing its findings on the allegations;
- the oral arguments made by the parties concerned; and
- the written submissions of the parties.

The CCI is actively considering conducting market surveys and studies, undertaken by third parties, to identify structural and behavioural screens to aid detection of cartels, which will help it to initiate ex officio or suo motu investigations. The use of screening has guided the CCI's decision-making process in a majority of its orders and the CCI has relied on this (such as the level of concentration in the market, the presence of trade associations, an abnormal increase in profits or evidence of information exchange) in nearly 80 per cent of its cartel cases.

Upon completion of the proceedings, the CCI can pass the following orders (other than imposing a penalty):

- requiring the parties to cease and desist the infringing conduct;
- modifying agreements to the extent necessary;
- requiring that parties comply with certain directions of the CCI; and
- any other order that it deems fit.

Burden of proof

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

The burden to prove the existence of an agreement among competitors to fix prices, limit output, share markets or rig bids rests upon the CCI. Subsequently, the evidentiary burden to disprove the presumption that the agreement has caused or is likely to cause an appreciable adverse effect on competition shifts onto the parties.

The standard of proof required to prove the existence of an agreement between competitors is one of a preponderance of probability.

Circumstantial evidence

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

Yes. In the absence of direct evidence, an investigation may be undertaken and infringement can be established based solely on circumstantial evidence. In the context of cartel cases, the Supreme Court has noted that such cases typically involve parties operating under a cloak of secrecy and, thus, obtaining direct evidence of cartel-like conduct is often difficult. The CCI can thus rely on circumstantial evidence.

Circumstantial evidence such as call records, meetings between competitors, the timing of filing bids or documentation while making bids has previously been relied upon by the CCI to infer and establish the existence of cartels, even when no direct evidence of an agreement was found.

Appeal process

18 | What is the appeal process?

The right to appeal against orders of the CCI is not available in all cases. The orders that are appealable under the Act include:
- orders where the CCI closes a case at the prima facie stage;
- orders where the CCI finds parties guilty of contravention of the Act and imposes penalties or other directions, or both;
- orders where the CCI finds no contravention of the Act;
- interim orders passed by the CCI; and
- rectification orders.

Any party aggrieved by the CCI's orders may appeal to the National Company Law Appellate Tribunal (NCLAT) within 60 days (the NCLAT has the discretion to condone any delay based on sufficient cause) of the date of receipt of a copy of such an order.

After examining the case, the NCLAT has wide powers to pass orders confirming, modifying or setting aside the impugned order, or remand the case to the CCI or the DG, as it deems fit. The Act does not prescribe any defined timelines for the disposal of appeals but does state that appeals must be dealt with expeditiously (ideally within six months of the date of appeal).

Further, any party aggrieved by an NCLAT direction, decision or order may make an appeal before the Supreme Court within 60 days of the receipt of a copy of such an order.

SANCTIONS

Criminal sanctions

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

There are no criminal sanctions for cartel activities under the Competition Act 2022 (the Act).

Civil and administrative sanctions

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

The Competition Commission of India (CCI) may impose civil sanctions by:
- requiring the parties to cease and desist the infringing conduct;
- modifying agreements to the extent necessary;
- requiring that parties comply with certain directions of the CCI; and
- passing any other order that it deems fit.

The CCI may also impose a monetary penalty of 10 per cent of the average turnover for the three preceding financial years upon each individual or enterprise that is a party to an anticompetitive agreement. Alternatively, in the case of cartels, the CCI may impose a penalty of up to three times the profit for each year of the continuance of such an agreement or 10 per cent of the turnover for each year of the continuance of such an agreement, whichever is higher. This is higher than the penalties for other anticompetitive conduct.

Generally, sizeable penalties are imposed for entering into anticompetitive agreements. The CCI has made a few exceptions by considering the covid-19 pandemic and its impact on business as a mitigating factor, thus reducing the amount of the penalty. It considers recidivism as an aggravating factor that justifies higher levels of penalty.

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 Act and its corresponding regulations do not contain any specific guidelines for the calculation of the penalty, the CCI applies the principle of proportionality when imposing penalties. Penalties are usually determined against the turnover of an enterprise that is relative to the market in which the cartel conduct took place, not the overall turnover of the enterprise. Penalties may extend to individuals or officials of an enterprise.

In *Excel Crop Care Limited v Competition Commission of India and Ors* (Civil Appeal No. 2480 of 2014), the Supreme Court laid down a non-exhaustive list of aggravating and mitigating factors that should be considered when determining penalty amounts, including:
- 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;
- any loss or damage suffered due to such contravention;
- the market circumstances in which the contravention occurred;
- the nature of the product;
- the market share of the entity;
- any entry barriers;
- the nature of involvement of the company;
- the bona fides of the company; and
- any profit derived from the contravention.

More clarity on the calculation of penalties is expected as the Competition (Amendment) Bill 2022 proposes a requirement to publish guidelines on the methodology of calculating turnover and income.

Compliance programmes

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

Yes, internal compliance programmes may be seen as a mitigating factor by the CCI. However, a reduction in penalty is at the discretion of the CCI and assessed on the basis of the facts of each case.

Director disqualification

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

Individuals involved in cartel activity are generally not subject to orders 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 may occur as a discretionary sanction or on the basis of the conditions set out by the government for specific tenders, but such debarment is not an automatic consequence of an infringement decision.

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 only contemplates civil penalties for cartel activities.

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 enterprise or person who has suffered loss or damage due to a contravention of the Competition Act 2022 (the Act), which has been proven before the Competition Commission of India or the National Company Law Appellate Tribunal (NCLAT) on appeal, may file a compensation claim before the NCLAT for compensation of such loss or damage suffered. The provisions relating to compensation have not, to date, been extensively used in India. Only four compensation claims relating to section 3 of the Act (anticompetitive agreements) are pending before the NCLAT and it is still too early to predict their outcome.

It is unclear whether damage claims are available to indirect purchasers. Similarly, there is no clarity on the ability of purchasers that acquired the affected product from non-cartel members to bring compensation claims based on alleged parallel increases in the prices paid by them. There is also no guidance on the level of damages and costs that may 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?

Subject to the NCLAT's permission, class action suits for compensation may be made by one person on behalf of other interested parties or numerous persons with the same interest. Subsequently, a notice regarding the institution of the compensation claim is served on all interested parties, allowing them to either opt in to or opt out of the proceedings with the NCLAT's prior permission.

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 2022 (the Act) and the Competition Commission of India (Lesser Penalty) Regulations 2009 (the Lesser Penalty Regulations) set out the leniency programme in India. The Lesser Penalty Regulations provide for a reduction of penalties for companies and individuals who have applied for it and have satisfied various stringent conditions. It requires that a leniency applicant make full, true and vital disclosures to the Competition Commission of India (CCI) regarding the cartel. The CCI generally requires parties to formally admit to participating in the cartel. The CCI has considerable discretion in deciding the level of reduction with no guarantee of full leniency to any applicant.

The first party to apply and make a vital disclosure to the CCI may benefit from a penalty reduction of up to 100 per cent if the applicant:

- made a vital disclosure that enabled the CCI to form a prima facie opinion regarding the existence of a cartel, where the CCI did not previously have the evidence to form such an opinion or establish a violation of the Act;
- ceased further participation in the cartel, unless otherwise directed by the CCI;
- extended genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- did not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

The second applicant may obtain a reduction of up to 50 per cent, and the third and any subsequent applicants may get a reduction of up to 30 per cent if the applicants provided evidence that enhanced the ability of the CCI or the Office of the Director General (DG) to establish the existence of a cartel (significant added value). The second and any subsequent applicants are also required to satisfy the last three conditions discussed above.

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, there is a formal programme for providing partial leniency to applicants coming forward after the first applicant. The second applicant may obtain a reduction in the penalty of up to 50 per cent, and the third and any subsequent applicants may get a reduction of up to 30 per cent if the applicants provided significant added value. Subsequent applicants will need to fulfil the following conditions:

- cease further participation in the cartel, unless otherwise directed by the CCI;
- extend genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

Going in second

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

There is a sliding scale of leniency under the Lesser Penalty Regulations. The second cooperating party may receive up to a 50 per cent reduction in penalty, and the third and subsequent applicants may receive up to a 30 per cent reduction. Subsequent applicants may have their fines reduced on submitting evidence that provides significant added value to the evidence already in the CCI's or DG's possession. Applicants must also continuously cooperate throughout the investigation. It should be noted that the CCI enjoys discretion in deciding the level of reduction and there is no guarantee of full, or any, leniency to any applicant.

There is no provision for immunity plus or amnesty plus under the Act or the Lesser Penalty Regulations. The Competition (Amendment) Bill 2022 seeks to introduce provisions in this regard.

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 application is only entertained until the report from the DG containing its findings on the allegations (the DG Report) is submitted to the CCI. Leniency applicants can contact the CCI's Secretary either orally or in writing to file a marker application. The CCI's Secretary must place the marker application before the CCI within five working days, after which the applicant is granted an appropriate priority status. Subsequently, the CCI's Secretary acknowledges and communicates the priority status to the applicant (without mentioning their rank). After receipt of the acknowledgement, the applicant has 15 days to file a detailed leniency application, containing all relevant information and evidence of the cartel's activities. Failure to file the detailed application within 15 days, or such additional time as granted by the CCI, leads to the applicant losing their priority status.

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 are required to extend genuine, full, continuous and expeditious cooperation throughout the investigation and other proceedings before the CCI. They must respond to all information requests by the CCI and the DG with complete information, offer relevant information during the investigation by way of voluntary submissions, and ensure that they fully comply and cooperate with the CCI or the DG. The first leniency applicant seeking up to 100 per cent reduction in penalty should ensure that they:

- make vital disclosure by submitting evidence enabling the CCI to form a prima facie opinion regarding the existence of a cartel, where the CCI did not have the evidence to form such an opinion, or establish a violation of the Act;
- cease further participation in the cartel, unless otherwise directed by the CCI;
- extend genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

Subsequent applicants must ensure that they satisfy the last three conditions discussed above. It may be noted that there are no differences in the requirements or expectations for subsequent cooperating parties that seek 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?

Confidentiality protection is accorded to the identity of the leniency applicants along with the information, documents and evidence provided by the applicants. Such confidentiality is not available if:

- disclosure is required by law;
- the applicant agrees to the disclosure in writing; or
- the applicant publicly discloses the information.

Subsequent leniency applicants are accorded the same level of confidentiality protection. During proceedings, all such information provided by leniency applicants will be confidential information.

On 8 April 2022, the CCI amended the Confidentiality Regime to introduce the concept of confidentiality rings. Under this, the CCI may set up confidentiality rings comprising of representatives of the parties to an investigation who are given access to all confidential information (including the confidential version of the DG Report, etc). Accordingly, it is possible that the information, documents and evidence submitted by a leniency applicant could be shared with other parties involved in the investigation as part of a confidentiality ring set up by the CCI.

No information is made public during the pendency of the proceedings. However, a third party may be allowed access to case documents or information if sufficient cause is demonstrated and the DG deems that disclosure is necessary for the investigation.

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 Act does not allow the CCI to enter into a plea bargain, settlement agreement, deferred prosecution agreement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity.

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 and directors will benefit from the leniency granted to an enterprise where they have been involved in the cartel on its behalf.

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 applicant seeking immunity must contact the CCI at the earliest possible time to make a full disclosure of the facts. Further, subsequent cooperating parties must genuinely, fully, continuously and expeditiously cooperate during the investigation and other CCI proceedings, irrespective of their marker status. Apart from responding to the information sought by the DG, the applicants should make voluntary submissions to provide additional and complete evidence to the DG.

DEFENDING A CASE

Disclosure

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

The Office of the Director General (DG) may disclose any information or evidence to a defendant if it is deemed necessary for the investigation, subject to confidentiality claims. If the information or evidence is confidential and the party that has provided such information is not willing to waive the confidentiality request, the DG may still make such a disclosure, only after recording reasons in writing and with the prior

approval of the Competition Commission of India (CCI). Parties to a case are given access to the non-confidential version of the report from the DG containing its findings on the allegations (the DG Report). Disclosure may also be made where:

- disclosure is required by law;
- the applicant agrees to the disclosure in writing; or
- the applicant publicly discloses the information.

Further, the CCI may set up confidentiality rings comprised of representatives of the parties to an investigation who are given access to all confidential information (including the confidential version of the DG Report). The parties involved in a confidentiality ring are required to submit an undertaking that their members will not disclose any confidential information outside the confidentiality ring. Accordingly, it is possible that certain pieces of confidential information and evidence could be disclosed to a defendant as part of a confidentiality ring set up by the CCI.

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 their employer corporation. However, obtaining independent legal advice or representation may be required in cases where there is a conflict between the submissions of the (past or present) employees and the submissions of the corporation. Thus, while a defendant may elect their counsel of choice, counsel could claim a conflict of interest if it believes that there is a risk that the employee–employer relationship will interfere with counsel's independent professional judgement during the investigation.

Multiple corporate defendants

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

There is no prohibition on counsel representing multiple corporate defendants, provided that there is no conflict or a conflict waiver has been granted by the corporate defendants in question.

Payment of penalties and legal costs

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

There is nothing in the Competition Act 2022 (the Act) to suggest a prohibition on this. Consequently, a corporation may pay the legal penalties imposed on its employees and their legal costs, subject to its internal policies, and directors' and officers' insurance.

Taxes

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

Fines and penalties imposed by the CCI are not tax-deductible. Similarly, private damages awarded would also not 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?

There is nothing in the Act or decisional practice suggesting that sanctions imposed on corporations or individuals should account for the penalties in other jurisdictions.

It is unclear whether overlapping liability for damages in other jurisdictions is considered as no case dealing with damages has been decided under the Act to date.

Getting the fine down

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

The optimal way to reduce the fine is to file a leniency application before the CCI. Apart from this, mitigating factors can be pleaded for a reduction in penalties including:

- an economic situation that arose due to the outbreak of the covid-19 pandemic, especially for those enterprises that have a small annual turnover or an unstable financial position;
- the cooperation of the company during the investigation and its admission of guilt;
- if the anticompetitive conduct was discontinued long ago and the parties do not indulge in such behaviour any more; and
- the implementation of a robust internal compliance programme and voluntary corrective measures.

UPDATE AND TRENDS

Recent cases

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

In Re: Anti-competitive conduct in the paper manufacturing industry (Suo Moto Case No. 5 of 2016)

The Competition Commission of India (CCI) found that several paper manufacturers and the Indian Agro & Recycled Paper Association (the Association) had engaged in cartelisation to fix the prices of writing and printing paper. They had participated in meetings of the Association where they discussed prices and the roadmap for coordinated increases, and monitored the decisions taken in these meetings. The CCI noted that 'mere attendance' in meetings where commercially sensitive information such as prices was discussed 'influences and takes away the independent decision-making ability of participant competitors', resulting in them no longer independently deciding price-related policies in the market. The CCI rejected arguments that there was no appreciable adverse effect on competition (AAEC) in the absence of implementation or uniform implementation of decisions taken in the meetings. It stated that section 3 of the Competition Act 2022 (the Act) also extended to prohibiting agreements likely to have an AAEC. Where competitors met and discussed prices, there was likely to be an AAEC, which was sufficient for a finding of breach.

In deciding the penalty, the CCI noted that, because of the covid-19 pandemic, businesses were operating virtually, which had impacted the paper business. As a significant penalty might render the manufacturers economically unviable, the CCI imposed symbolic penalties of 500,000 rupees on each of them and 250,000 rupees on the Association. One of the opposite parties, Trident Limited, had filed for leniency during the investigation by the Office of the Director General and received a 100 per cent reduction in penalty. The CCI found no infringement by several parties investigated. However, it stated that, if they found themselves in

meetings where activities prohibited by the Act had taken place, they were obliged to recuse themselves from such meetings and immediately bring the matter to the CCI's attention.

In Re: Cartelisation in the supply of Protective Tubes to Indian Railways (Suo Motu Case No. 6 of 2020)

The CCI passed an order against seven enterprises for cartelisation in the supply of protective tubes to the Indian railways. The CCI found there was an understanding between the vendors regarding pricing for tenders, actions by the vendors controlling supply and market sharing through the allocation of tenders. The CCI rejected arguments that the vendors had been forced to indulge in these activities due to the market structure and the monopsonist position of the Indian railways.

In view of the nature of the cartel arrangements, mitigating factors and the fact that some of the vendors were micro, small or medium enterprises (MSMEs), the CCI imposed on the vendors a penalty of 5 per cent of the average of their turnover in the relevant product for the three preceding financial years. The CCI imposed the same level of penalty on certain individuals of the companies. However, it decided not to impose penalties on several other individuals who had already been penalised in an earlier matter involving a different product, since the period covered was similar and they were associated with MSMEs. One of the vendors, Jai Polypan Pvt Ltd, had sought leniency at the start of the process and was granted a 100 per cent reduction in penalty.

In Re: Alleged Anti-competitive Conduct in the Beer Market in India (Suo Motu Case No. 6 of 2017)

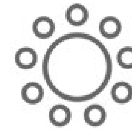
The CCI found that three beer companies – United Breweries Limited (UBL), Anheuser Busch InBev SA/NV (AB InBev) and Carlsberg India Private Limited (CIPL) – together with the All India Brewers Association (AIBA) were involved in cartelisation of the sale and supply of beer in various Indian states and union territories. The CCI held that the three companies engaged in:

- price coordination;
- collectively restricting the supply of beer; and
- market sharing.

It also found that UBL and AB InBev had coordinated in the purchase of second-hand bottles and the supply of beer to premium institutions. The CCI held that several individuals of UBL, CIPL, AB InBev and AIBA were also liable for anticompetitive conduct.

The CCI found that the cartel lasted from 2009 to at least October 2018, with CIPL joining the other two beer companies from 2012 and AIBA providing a platform for the cartel activity since 2013. In addition to a cease and desist order, the CCI, taking account of various mitigating factors, imposed on the three companies a penalty of 0.5 times their relevant profit or 2 per cent of their relevant turnover, whichever was higher, for each year of their participation in the cartel. AIBA, and various implicated employees of the companies and AIBA, were made liable to pay a penalty of 3 per cent of its average turnover or income for the three preceding financial years of the cartel.

The three beer companies had applied for leniency and the CCI granted them, and relevant individuals, certain reductions in penalty. As a result, the CCI imposed a total penalty of approximately 8.73 billion rupees on UBL, CIPL and AIBA and their respective individuals, which was later reduced to approximately 8.64 billion rupees after the CCI rectified its calculation of penalty for CIPL.



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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 government of India recently introduced the Competition (Amendment) Bill 2022 before the Lok Sabha (the lower house of Parliament). The key proposed changes relating to the framework regulating cartels include the following:

- facilitators of cartels, including hub-and-spoke cartels, shall be presumed to be a part of an anticompetitive agreement and will be treated as infringing parties if they actively participate in the furtherance of the agreement;
- the introduction of a leniency plus regime, allowing an enterprise that files for leniency in relation to one cartel and also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartel;
- the introduction of provisions that disincentivise leniency applicants against any failure to cooperate, providing false evidence or making non-vital disclosures as this could lead to the rejection of the marker and levy of penalties;
- the introduction of the ability for applicants to withdraw their leniency applications after they are submitted; and
- guidelines by the CCI to calculate turnover and income for penalty assessment will be published.

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Japan

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) is the piece of legislation that prohibits cartels. In addition to the prohibition of cartels and the administrative and criminal sanctions under the AMA, collusion in a public bid could also be subject to imprisonment or a 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 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 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, an amendment to the AMA (the 2019 Amendment) was enacted. It became fully effective on 25 December 2020.

The important changes under the 2019 Amendment are the increase in the amount of administrative surcharge that 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 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 the reduction rate, the JFTC has established something akin to a clawback 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 or 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 contractual 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 contractual 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?

Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) governs conduct by entrepreneurs, the definition of 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 it. However, there are certain guidelines that deal 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 sector-specific regulations governed by other ministries (eg, the joint operation of non-life insurance companies, airlines and maritime transport entities). 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 as well as 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 Law No. 54 of 1947 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, 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 or 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 Cooperation 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 alleged cartel conduct through a leniency application, the JFTC may ask the applicant to issue a waiver to allow the JFTC to operate an 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 exchanged with other competition authorities pursuant to international 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. Criminal sanctions under Law No. 54 of 1947 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 in 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 the 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 an 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 the 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. For individuals (such as officers, directors or employees who played a central role in a cartel), such conduct is subject to imprisonment with hard labour for up to five years or a fine of up to ¥5 million, or both.

Civil and administrative sanctions

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

Administrative sanctions

Cartel activities are subject to a cease-and-desist order and an administrative surcharge from the Japan Fair Trade Commission (JFTC).

Cease-and-desist order

The 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 an 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-sized 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-sized 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 Law No. 54 of 1947 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 the 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 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

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, and 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 damages 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 wilfulness 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 damages 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 in the same for the applicants that filed reports later.

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?

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 Law No. 54 of 1947 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 or 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, for the second and subsequent applicants to be eligible for leniency before the initiation of an investigation, they need to file an application as soon as possible and complete the application by submitting detailed information and related materials before the JFTC initiates its investigation (typically through a dawn raid). If the initiation of the investigation occurs before the completion of the application, such an 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 on which 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 relevant information must be disclosed and all evidence available to the immunity applicant must be produced for the JFTC). There is no difference in the required level of cooperation between the immunity applicant and the second or subsequent leniency applicants.

That said, the degree of cooperation has now become a significant factor for 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:

- specific and detailed;

- 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
- supported by evidence and materials submitted by them.

The JFTC will determine the discount rate depending on how many qualitative cooperation elements the list above that 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 Law 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 a 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, the JFTC discloses the expected rank. If that party 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 findings of fact 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 findings of fact (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 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 or employees, 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 a 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 conduct in violation of Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade.

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 judgments 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 the 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.

* *The content of this chapter was accurate as at 15 September 2021.*

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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.

The Competition Act applies to all markets, 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 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 has introduced general competition law that is applicable to the postal market. The Malaysian Aviation Commission Act 2015 introduces competition provisions applicable to aviation services.

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 Malaysia Competition Commission (MyCC) investigates competition law infringements under the Competition Act, including cartel matters. MyCC is a body corporate established under the Competition Commission Act 2010.

MyCC is 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, while the Energy Commission oversees competition in the energy and gas sectors. The Malaysian Aviation Commission oversees competition in the aviation service sector.

Changes

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

MyCC has proposed to amend the Competition Act to introduce a merger control regime and to enhance MyCC's investigation and enforcement powers. The proposed merger control provisions would apply to all sectors with several exclusions, including:

- mergers involving commercial or economic activities regulated under the Communications and Multimedia Act 1998, the Malaysian Aviation Commission Act 2015, the Gas Supply Act 1993, the Energy Commission Act 2001, the Postal Services Act 2012 and the Petroleum Development Act 1974 (for upstream activities only);
- mergers between enterprises regulated by the Central Bank, the Securities Commission, the Labuan Financial Services Authority and the Water Services Commission; and
- mergers that were engaged in to comply with a legislative requirement.

Substantive law

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

Cartel activities are prohibited under Chapter 1 of the Competition Act (the 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; or
  - 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 hardcore 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 hardcore 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 an agreement.

Joint ventures and strategic alliances

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

As at 3 October 2022, 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, the 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. In 2019, MyCC 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. The block exemption expired in July 2022.

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 prohibitions contained in Chapter 1 (the Chapter 1 Prohibition) (with respect to cartel activities) and Chapter 2 (the 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 it is engaged in 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 investigate 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 of Domestic Trade and Consumer Affairs 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.

On 8 January 2018, MyCC carried out a review of building materials in the construction industry. The specific objectives of the market review were:
- to determine the market structure, supply chain and profile of industry players that are involved in the manufacturing and distribution of selected key building materials;
- to identify the prices of selected key building materials at the manufacturing and wholesale levels;
- to assess competition in the manufacturing and distribution levels of selected key building materials;
- to identify anticompetitive practices among the industry players in the manufacturing and distribution levels of selected key building materials; and
- to determine the extent of market distortion and whether government intervention is necessary for curbing anticompetitive conduct in the selected key building materials' market.

In addition, MyCC has carried out market reviews of five selected subsectors of the food and services sectors. This included:
- a review of the domestic broiler market (1 March 2014);
- a market review of the food sector (6 August 2019);
- a market review of the pharmaceutical sector (8 January 2018);
- a review of selected transportation sectors in Malaysia (5 October 2021); and
- a market review of the service sector in Malaysia (wholesale and retail for selected products) (20 August 2020).

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 the 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 prohibition on cartel activities contained in Chapter 1 of the Competition Act.

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 its 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 investigative powers, and may direct a person to give MyCC access to 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, they must, to the best of their 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 they are 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.

The power to search and seize can also be exercised without a warrant, 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.

MyCC investigating officers also have police powers 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:

- the East Asia Top Level Officials' Meeting on Competition Policy;
- the Association of Southeast Asian Nations (ASEAN) Competition Action Plan 2016–2025;
- the Malaysia–Japan International Cooperation Agency: Economic Partnership Programme – Capacity Building for Competition Law;
- the ASEAN–Australia–New Zealand Free Trade Area Economic Cooperation Work Programme; and
- the MyCC Attachment Programme to the Australian Competition and Consumer Commission.

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's decisions are made to the Competition Appeal Tribunal (CAT), which has exclusive jurisdiction to review on appeal any findings of infringement or non-infringement made by MyCC. The president of 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 a MyCC decision may appeal to CAT by filing a notice of appeal to 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). The 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 decision is decided by a majority of its members, and is final and binding on the parties to the appeal. Nonetheless, the CAT decision may be subjected to judicial review by the High Court. In 2014, MyCC found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement that saw the two airlines sharing markets in the air transport services sector within Malaysia. MyCC's final decision was subsequently overturned on appeal by CAT and the fines imposed on the airlines were set aside. MyCC subsequently filed for an application to the High Court for judicial review against the CAT decision. The High Court allowed MyCC's application for judicial review and upheld the decision made by MyCC in the first instance.

In February 2022, the Federal Court dismissed MyCC's application for leave to appeal to the Federal Court, following the Court of Appeal's decision to set aside the fines imposed against AirAsia Bhd and Malaysia Airline System Bhd.

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 for up to five years, or both. For subsequent offences by individuals, a fine of up to 2 million ringgit and imprisonment of up to five years, or both, applies.

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 the 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.

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.

MyCC's decision was appealed to CAT and, in July 2022, CAT issued its decision to set aside the finding of infringement and the financial penalty imposed.

Although not all infringing enterprises have been given financial penalties, it appears from recent trends that MyCC is taking a stricter stance for deterrence.

The first cartel case in early 2012, investigated by MyCC, involved the Cameron Highlands Floriculturist Association (CHFA). In this case, MyCC found CHFA to be liable for fixing the price of flowers sold to distributors and wholesalers in Malaysia. MyCC, which had initially proposed a financial penalty of 20,000 ringgit on CHFA in its proposed decision, removed that sanction in its final decision stating that CHFA had followed up with consultations with MyCC soon after receiving the proposed decision and exhibited exemplary cooperation in complying with the Competition Act. The final decision from MyCC required CHFA to:

- cease and desist the infringing act of fixing prices of flowers;
- provide an undertaking that its members shall refrain from any anticompetitive practices in the relevant market; and
- issue a statement on the above-mentioned remedial actions in 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 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.

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, 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.

In March 2019, MyCC issued a proposed decision against eight companies proposing fines totalling 1.94 million ringgit in penalties for bid rigging through tenders offered by the National Academy of Arts, Culture and Heritage.

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 on 14 December 2014, 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 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 the 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 anticompetitive 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 prohibition on cartel activities contained in Chapter 1 (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 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 '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. The percentage of the reduction is expected to be commensurate with the additional information and assistance that such an 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 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 European Union. 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, 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 must comply with the terms of the undertaking accepted by MyCC. A breach of the High Court order may be punished as contempt of court.

Offering a suitable undertaking is particularly useful to avoid a finding of infringement. It may, however, 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 their 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) to the 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 they have 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?

The Competition Act does not impose personal liability for employees involved in a cartel.

Taxes

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

No.

International double jeopardy

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

No.

Getting the fine down

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

Based on recent cases, it is also particularly helpful for the enterprise to cooperate with MyCC in the investigation. MyCC's Guidelines on Financial Penalties state that MyCC may take into account the existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives that were undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is relatively new in Malaysia, MyCC is keen to encourage compliance and is likely to take into account genuine efforts to comply with the Competition Act.

UPDATE AND TRENDS

Recent cases

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

In July 2022, MyCC issued a decision against eight companies for their involvement in bid rigging involving government procurement contracts and imposed financial penalties totalling 1.54 million ringgit. The infringing companies formed two cartels to manipulate four information technology projects worth 1.92 million ringgit. The companies were colluding to defraud the government and manipulate tenders to win tenders and government procurement invoices.

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 June 2022, it was reported that the proposed amendments to the Competition Act 2010 are expected to be tabled in Parliament by the end of the year. The amendments include merger control provisions. If the proposed amendments come into effect, the Malaysia Competition Commission (MyCC) will have the power to review mergers over most companies, including public listed companies, except those excluded under the purview of sector-specific regulators. MyCC's chief executive officer stated that MyCC will focus on mergers that substantially lessen competition in a market resulting in concentration and monopoly that ultimately harm consumers.

MyCC had previously intended for the merger control legislation to come into full effect by the end of 2020. However, it was postponed due to a change in government and the covid-19 pandemic.

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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 the 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 LFCE 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 Programme 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 the 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 on 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 a 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 in bidding or coordinating 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 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 for 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 at 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 on 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 conditioning 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 for 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 the 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 that 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 for 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. COFECE can also subpoena any person 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 judicially binding specific criteria for competition and antitrust that suggest that requested or deponents' information may not be used to incriminate them. Notwithstanding this, 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, the 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 authorisation or a 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, perform dawn raids and 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 COFECE's final decision).

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, provided that such a presumption relies on facts that have been proved 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 of 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 19.2 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 17.3 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 a defence may only apply when the unenforceability of another type of 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 the 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 in antitrust matters; 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.

In August 2021, COFECE imposed this sanction against 10 individuals. The durations of the disqualifications were between six months and four years and three months.

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 this, if cartel conduct (most 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 of the LFCE, 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 the 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 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 COFECE. Also, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, regardless of 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 or applicants.

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, provided that the following criteria are met:

- there is 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 a 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 with the agreements entered into by competitors.
- A statement about the existence of hard copies of information exchange or agreements, if applicable.
- 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).

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, participation in the cartel;
- submitting useful new evidence;
- refraining from destroying, falsifying or hiding information; and
- cooperating during 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 this, sanctions for non-compliance with local legislation can coexist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

Getting the fine down

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 COFECE in the execution of its powers) is considered to be a mitigating factor 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 an indicium of intention when imposing a fine.

UPDATE AND TRENDS

Recent cases

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

In April 2019, a specialised federal court issued a decision ruling that two economic agents that belong to the same economic interest group, in the context of 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 economic agents that belong to the same economic interest group cannot be considered competitors among themselves, so they cannot collude in absolute monopolistic practices.

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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

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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 Law No. 19/2012 of 8 May 2012 (the Competition Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the Former Competition Act).

On 7 December 2021, the Competition Act was amended by Decree-Law No. 108/2021, which introduced changes to the regime of individual practices. Further, after a complex legislative process, the Competition Act was more recently amended by Law No. 17/2022 of 17 August 2022, which transposed Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (the ECN+ Directive) into Portuguese law. The ECN+ Directive is aimed at empowering the competition authorities of EU member states to be more effective enforcers and to ensure the proper functioning of the internal market. The amended version of the Competition Act entered into force on 16 September 2022.

The Competition Act largely follows the rules established at the 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 Competition Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules.

Decree-Law No. 125/2014 of 18 August adopted and approved the new statutes of the Competition Authority (AdC), superseding Decree-Law No. 10/2003 of 18 January 2003, which created the AdC and approved its former statutes. Law No. 17/2022 of 17 August 2022 also amended the AdC's 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 on 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all 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;
- Law No. 23/2018 of 5 June 2018 (the Private Damages Act), which implemented the EU Private Enforcement Directive and entered into force on 4 August 2018; and
- Law No. 93/2021 of 20 December 2021, which transposes Directive (EU) 2019/1937 of the European Parliament and of the Council on whistle-blowing.

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, EU institutions as well as 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 actions and the management of AdC services. The Board of Directors consists of a chair and up to three other members. A vice president may also be appointed provided that, in total, an odd number of members is maintained. The members are appointed by the Council of Ministers, taking into account the reasoned opinion of the competent parliamentary 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 fulfils an advisory role to the Board of Directors. The Sole Supervisor is a chartered accountant or a chartered accountancy firm appointed by a 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?

The Competition Act superseded the previous regime put in place by the Former Competition Act. Pursuant to the Competition 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 2014 has enacted the AdC's statutes, superseding Decree-Law No. 10/2003 of 18 January 2003.

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 Competition Act, notably regarding confidentiality and access to documents.

On 7 December 2021, the Competition Act was amended by Decree-Law No. 108/2021, which introduced changes to the regime of individual practices. The legislator intended to ensure that, within the scope of the supply of accommodation goods or services in tourist resorts or local accommodation establishments, an economic operator acting as an intermediary was prevented from imposing contractual clauses that oblige economic operators to guarantee that the intermediary offers the good or service at the best price.

The Competition Act was amended by Law No. 17/2022 of 17 August 2022, along with the transposition of the ECN+ Directive, which gave EU 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 transposing the ECN+ Directive into member states' national legislation was 4 February 2021 but, as the legislative process was lengthy and complex, the modified Act only entered into force on 16 September 2022.

Substantive law

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

Article 9 of the Competition Act, in line with article 101(1) of the Treaty on the Functioning of the European Union, prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, having as their object or effect the prevention, distortion or restriction of 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;
- 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; and
- establishing, within the scope of the supply of goods or accommodation services in tourist resorts or local accommodation establishments, that the other contracting party or any other entity cannot offer, through an electronic platform or in a physical establishment, prices or other sale conditions of the same good or service that are more advantageous than those practised by an intermediary who acts through an electronic platform.

Cartels are likely to correspond to one or more of these situations. Furthermore, acts not listed under article 9 of the Competition Act 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 Competition 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 No. 1/2011 regarding competition-restricting practices in the production, processing and marketing of flexible polyurethane foam).

Infringements of article 9 of the Competition 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 Competition 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 Competition 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 to 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 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 Law No. 19/2012 of 8 May 2012 (the Competition Act) is very broad and in line with EU case law. It covers any entity exercising an economic activity, 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 Competition Act applies to restrictive practices occurring in Portugal or that may have an effect within it. This is without prejudice to the rules on cooperation between national competition authorities in pursuing anticompetitive practices, which were developed within the last amendment to the Competition Act through Law No. 17/2022 of 17 August 2022.

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 Competition Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, provided that the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

Decree-Law No. 108/2021 of 7 December, added an industry-specific infringement to the Competition Act, establishing that within the scope of the supply of accommodation goods or services in tourist resorts or local accommodation establishments, an economic operator acting as an intermediary is prevented from imposing contractual clauses that oblige economic operators to guarantee that the intermediary offers the good or service at the best price.

According to article 10(1) of the Competition Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly to the provisions of article 101(3) of the Treaty on the Functioning of the European Union (TFEU), this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings invoking the above justification must prove that they meet these conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between EU 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 (AdC) if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Competition 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 Competition 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 Competition 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 Law No. 19/2012 of 8 May 2012 (the Competition Act), as well as infringements of article 101 of the Treaty on the Functioning of the European Union (TFEU) that the Competition Authority (AdC) initiates or in which it is called to intervene are governed by the Competition 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 Competition Act, the AdC may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Competition Act establishes 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, in particular, the competition policy priorities and the seriousness of the possible infringement, taking into account the elements of fact and law that are submitted to the AdC.

The AdC has adopted guidelines on priorities in exercising sanctioning powers, and on investigations in proceedings regarding competition-restricting 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, considering that the complaint has no priority, it shall inform the complainant and grant a delay of no less 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 handling competition, regulation and supervision matters established

by Law No. 46/2011 of 24 June 2011 (the Specialised Court). In the absence of the timely submission of observations, the complaint is considered withdrawn.

Scope

Within the framework of the inquiry, the AdC shall carry out all the investigative 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 on the concerned undertaking of no less than 10 working days to express in writing its intention to participate 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 such 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, the evidence supporting the application of a sanction and the range of the potentially applicable fine.

At the end of the discussions, the AdC notifies the concerned undertaking to submit a written settlement proposal within a deadline of no less than 10 working days. The AdC may either reject the proposal (a decision that cannot be appealed) or accept it. In the 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 less than 10 working days prescribed by the AdC, confirm the draft settlement document. 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.

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, within the deadline established by the AdC. Facts included in the decision can no longer be used in other infringement proceedings and the facts accepted by the concerned undertaking or that it has renounced to contest in the decision, as well as its legal qualification, cannot be rebutted in an appeal. Furthermore, a reduction to 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 less than 20 working days for submission of observations by interested third parties. The AdC may reopen a case closed with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the decision accepting commitments and imposing conditions was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months as of the decision to initiate proceedings. However, if such a deadline cannot be met, the Board of Directors 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 by 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 the adoption of a decision finding an infringement;
- close the case when the findings lead to the conclusion that there are no grounds for continuing the investigation, in particular because the investigation is deemed not to be a priority case or because there is no reasonable prospect of a decision finding an infringement;
- establish the existence of an infringement and impose sanctions in a settlement procedure; or
- close the file by accepting commitments and imposing conditions, 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 are no grounds for continuing the investigation, 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 at least 30 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, as well as, where appropriate, on the penalties incurred and also to request complementary evidence that 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 after the submission of the written observations by the concerned undertaking and its oral hearing. In the latter case, the AdC shall notify the concerned undertaking of the evidence gathered, fixing a deadline of at least 10 working days for the 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 Competition Act, the AdC has adopted guidelines on the investigations and procedural steps, including on access to the file and protection of confidentiality.

Settlement proceedings

Until the final decision, the concerned undertaking may also submit a settlement proposal. If such a settlement proposal is submitted during the time limit for replying to the statement of objections, the proceedings shall be suspended for a period established by the AdC that cannot exceed 30 working days. Without prejudice to the maximum suspension period, the AdC may also suspend the time limit for the statement of objections at a moment prior to the presentation of a settlement proposal. 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, if possible, within a maximum deadline of 12 months from the notification of the statement of objections. However, if such a deadline cannot be met, the Board of Directors of the AdC shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the AdC may:

- declare the existence of a restrictive practice even if it has ceased and, if applicable, consider such practice justified under article 10 of the Competition Act;
- close the case by accepting commitments and imposing conditions; or
- close the case without conditions.

The AdC may require the offender to effectively put an end to the infringement by imposing behavioural or structural measures proportionate to the infringement committed, which are indispensable to the cessation of the infringement or its effects. When choosing between two equally effective measures, the AdC must impose the less onerous, in line with the principle of proportionality. When the AdC finds an infringement, it may impose fines and other sanctions following a settlement procedure.

Interim measures

The AdC may, in compliance with the principle of proportionality and at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition or that are indispensable to the effectiveness of the final decision to be adopted, if the findings indicate a prima facie infringement and 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 or a final decision is adopted and for a period of up to 90 days, extendable 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 a 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. The AdC shall also inform the European Competition Network of the interim measures adopted in cases of investigation of infringements of articles 101 and 102 of the TFEU.

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 to close 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 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 Competition Act enhanced the extensive powers of investigation already granted to the AdC by Law No. 18/2003 of 11 June 2003. Under the Competition Act, in investigating restrictive practices, the AdC may summon to an enquiry and question any person, legal or natural, through a legal representative or in person, whose statements it deems relevant.

In the exercise of its sanctioning powers, the AdC, through its bodies or employees, may also:

- accede without prior notice at the premises, land means or transport, devices or equipment of the company or assigned to it;
- examine books and other records relating to the company, irrespective of the medium on which they are stored, having the right to accede any information accessible to the inspected entity;
- take, or obtain in any form, copies of or extracts from the examined documents and, whenever deemed appropriate, continue to carry out the search and selection of copies or extracts at the AdC's premises or any other designated premises;
- seal any premises, books or records concerning the company or allocated to it;
- request, from any representative or employee of the company, any clarification necessary for the above actions;
- question, recording the corresponding answers, any representative or employee of the company about facts or documents related to the object and purpose of the search; and
- request from any public administration services, including police authorities, assistance that may be necessary for the performance of the AdC's functions.

The first four measures listed above require a prior decision from the competent judicial authority, issued within 48 hours upon an AdC's substantiated application.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees of undertakings, evidence of infringements to articles 9, 11 and 12 of the Competition Act or to articles 101 or 102 of the 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 without prior notice 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 is deemed null and void. Searches in the office of an attorney-at-law, doctor or statutory auditor may only be carried out in the presence of a judge, who shall previously inform the chair of the regional or general Council of the Attorneys Bar or of the Doctors' Association, or of the Statutory Auditors' Association, as applicable, so that they, or a delegate thereof, may be present. These rules apply, mutatis mutandis, to other searches, including on vehicles of shareholders, board members or employees.

The seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. The 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 they are deemed null and void. The seizure of documents in a credit institution, which are subject to bank 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?

Law No. 19/2012 of 8 May 2012 regulates in detail the cooperation among national authorities in a number of domains, namely:

- cooperation between national competition authorities regarding competition-restricting practices;
- notification of preliminary objections and other documents at the request of a national competition authority;
- enforcement of decisions imposing fines or periodic penalty payments at the request of a national competition authority;
- general principles of cooperation with regard to the notification and enforcement of decisions imposing fines or periodic penalty payments on the request of a national competition authority; and
- disputes concerning the notification and enforcement of decisions imposing fines or periodic penalty payments in the context of cooperation between national 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?

Following the decentralisation carried out under Council Regulation No. 1/2003, the most prevalent cooperation takes place between national competition authorities, including the Competition Authority (AdC) and the European Commission in the framework of the European Competition Network.

Besides cooperating on enforcement, the AdC, on the international stage, was also responsible for organising European Competition Day, which is the central conference on competition policy.

According to the 2021 AdC report, made available in June 2021, the AdC maintains good relations – through bilateral, multilateral or other forms of cooperation – with other authorities, such as the French and Polish competition authorities, the latter of which had its first bilateral meeting with the AdC in 2021.

The AdC also attended the 7th Meeting of the Lusophone Competition Network, with the participation of eight Portuguese-speaking countries.

Furthermore, the AdC also emphasises its position as a permanent member of the Steering Group of the International Competition Network and as a member of the Organisation for Economic Co-operation and Development's Competition Bureau.

Finally, it is worth mentioning that the AdC is also a member of the European Competition Authorities Association, and that it cooperates with the United Nations Conference on Trade and Development.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Authority (AdC) both investigates and adjudicates cartel matters. After the investigation phase by the officials in the restrictive practices department, the final decision is taken by the Board of Directors 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 Law No. 19/2012 of 8 May 2012 (the Competition 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 Competition Act and 101 and 102 of the Treaty on the Functioning of the European Union, 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 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court) on 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 Competition 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 Competition Act.

Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions upon the defendant's request when the party concerned offers to provide a guarantee, within 20 days, in the amount of half of the fine imposed, the suspension being conditional on the lodging of the guarantee (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.

The Competition Act includes provisions governing the appeals of interim decisions, decisions of the AdC that impose interim measures and decisions adopted in the context of search and seizure actions.

An appeal of the AdC's final decision condemning the concerned undertaking must be lodged within a deadline of 60 days. The AdC has a non-extendable deadline of 60 days 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 a decision. The court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or 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, during the course of the judicial review procedure, participates in the proceedings as a party of the procedure and enjoys the respective rights, including in the hearing. In cases where the Specialised Court's ruling concerns an AdC decision that applied a fine or periodic penalty payment, the appeal of such a ruling must be lodged within 30 days.

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 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 related to cartel activity, under Law No. 19/2012 of 8 May 2012 (the Competition Act), fines can be imposed of up to 10 per cent of the total worldwide turnover achieved by any person comprising each of the offending undertakings or by the association of undertakings in the year immediately preceding that of the final decision adopted by the Competition Authority (AdC) in relation to:

- infringements of article 9 of the Competition Act or article 101 of the Treaty on the Functioning of the European Union (TFEU);
- non-compliance with the conditions attached to the decision of closing the case at the end of the inquiry or investigation phase;
- non-compliance with the behavioural or structural remedies imposed by the AdC; or
- non-compliance with a decision ordering interim measures.

If an infringement by an association of undertakings is related to the activities of the associated undertakings, the maximum amount of the fine applicable may not exceed 10 per cent of the total aggregate worldwide turnover of the group of persons comprising the associated undertakings operating in the market affected by the infringement, with the financial responsibility of each associated undertaking with regard to the payment of the fine not exceeding the maximum amount (up to 10 per cent of the total worldwide turnover). When or if the fine is related to the activities of the association of undertakings and associated undertakings, their turnover must not be considered when calculating the fine of the association of undertakings.

Moreover, the above-mentioned rules set out by the current Act may not result in a maximum value of the fine that is greater than that which would result with reference to the value corresponding to the economic year preceding that of the infringement.

In cases where any of these infringements are carried out by individuals held responsible under the Competition Act, the applicable fine cannot exceed 10 per cent of their gross annual earned income, including entrepreneurial and professional income, in the last full calendar year in which the infringement took place.

In addition, individuals held responsible under the Competition Act who refuse or delay to provide information; provide false, inaccurate or incomplete information; or do not cooperate with the AdC are subject to the applicable fines, which range from 10 to 50 account units (each account unit currently amounts to €102).

Furthermore, the absence of a complainant, a witness or an expert to a duly notified procedural act is punishable with a fine ranging from two to 10 account units.

The full amount of the fines must be paid at one time, but the AdC or the court, as applicable, may allow for payment in instalments whenever the economic situation of the undertaking responsible for the infringement may justify such measure. The last instalment must be paid no later than three years as of the final decision and, in the case of a failure to pay one instalment, the whole amount becomes immediately due. Within the limits initially established, payment plans may be amended if supervening reasons may justify it.

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;
    - concessions of public works or public services;
    - the lease or acquisition of goods or services by the state; or
    - 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 worldwide turnover in the year immediately preceding that of the final decision, per day of delay counted from the date established in the notification, to compel the undertaking to:

- comply with an AdC decision imposing a sanction or ordering the adoption of certain measures;
- provide complete and correct information, in response to a request to provide information;
- notify a concentration subject to prior notification under the Competition Act; or
- attend a hearing or submit to search, examination, collection and seizure 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 Competition Act.

The persons who were part of the same economic unit on the date of the infringement and who exercised decisive influence, directly or indirectly, over the person who committed the acts constituting the infringement may be exclusively or jointly liable, as applicable.

Legal persons and equivalent entities are liable when the acts are carried out:

- on their behalf and 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, extinction 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.

Associations of undertakings that are subject to a fine or a periodic penalty payment and are in a situation of insolvency must request contributions from the associated companies to ensure payment. The AdC shall fix a deadline for the provision of such contributions.

In the event that such contributions are not received in full by the AdC before the established deadline, 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, except where they can show that, prior to the initiation of the investigation, they were unaware of, or actively distanced themselves from, the infringement and did not implement the decision that constituted or resulted in the infringement.

Nonetheless, associated companies that were active in the market where the infringement was committed may be also jointly liable for the payment of a fine or a periodic penalty payment imposed on an association of companies, except when they demonstrate that, before the beginning of the investigation, they were unaware of, or actively distanced themselves from, the infringement and did not execute the decision that constituted the infringement or resulted from it.

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 Competition 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 Council Regulation No. 1/2003. The AdC's guidelines only apply to cases in which the inquiry phase was initiated after the Competition 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 Competition 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.

The seriousness and duration of the infringement must be assessed in conformity with EU law and the case law of the Court of Justice of the European Union. As regards records of previous infringements, in cases of infringements to articles 101 and 102 of the TFEU, previous definitive decisions of the European Commission or national competition authorities shall be taken into account.

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.

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 Competition 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 Law No. 23/2018 of 5 June 2018 (the Private Damages Act) on 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 (anticompetitive behaviour) and injury to the claimant, and a causal link between the two.

With the implementation of the EU Private Enforcement Directive through the Private 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 a 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 passing-on of the additional costs to an indirect customer, the latter has the burden of proof of the existence and scope of such repercussions. 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 commit unless proven otherwise. In addition, according to the Private 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 (AdC) shall assist the court, at the court'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 1995 and article 31 of the Code of Civil Procedure, being applicable to competition law injuries. The Private 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 Private Damages Act itself. In addition to the entities mentioned in Law No. 83/95 of 31 August 1995, 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 EU consumers, was created and, since then, a number of class actions have been submitted before the Competition, Regulation and Supervision Court, either as stand-alone actions or following condemning decisions for anticompetitive practices from the AdC or the European Commission (*Ius Omnibus v Super Bock*; *Ius Omnibus v ANT*; *Ius Omnibus v EDP*; *Ius Omnibus v Mastercard*; *Ius Omnibus v Google*; *Ius Omnibus v Apple*). Any consumer who does not wish to be represented in these actions may exercise the right to opt out by 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?

Law No. 19/2012 of 8 May 2012 (the Competition Act) establishes the leniency rules in article 75 et seq. In addition, the Competition Authority

(AdC) has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Competition 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 Competition 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.

The scope of the immunity or reduction applies to:

- undertakings within the meaning of the Competition Act at the time the application is submitted;
- members of the management body of legal persons and equivalent entities, as well as those responsible for the management or internal supervision of areas of activity in which the offence has been committed, which are responsible under the provisions of the Competition Act; or
- associations of undertakings that exercise an economic activity if they participate in the infraction on their own account and not on behalf of their members.

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 enables the AdC:

- to substantiate, on the date of reception of the application, a request for searches, inspections or seizure of data, provided that the AdC does not have sufficient elements to perform such acts or had not yet carried out such an inspection; or
- in the opinion of the AdC, to ascertain the existence of an infringement, provided that the AdC does not yet have sufficient evidence of the infringement and that no other undertaking has previously met the conditions.

The AdC shall grant immunity from the fine, provided that the undertaking complies, cumulatively, with the following conditions:

- cooperating fully and continuously with the AdC from the moment of the initial request until the AdC adopts a decision in relation to all concerned parties 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 render more difficult the investigation, such as practising acts of destruction, falsification or concealment of information or evidence related to the infringement;
  - not providing any information on the existence or contents of the submission or intention to submit, save with authorisation from the AdC; and
  - making the managers, board members and employees available to the AdC for interrogation, and taking reasonable efforts to make former managers, board members and employees available to the AdC for the same purposes;
- putting 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's effectiveness;
- not have coerced other undertakings to participate in the breach;
- not have adopted measures or practised acts of destruction, falsification or concealment of information or evidence related to the infringement; and
- not have disclosed the intention of presenting the request for exemption or the applicable content, except to the European Commission, another national competition authority or competition authorities of third countries.

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, duration and manner in which the breach was 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 Competition Act, the AdC can grant immunity from or a reduction in fines.

The AdC shall grant a reduction in fines to undertakings or associations of undertakings that, not being eligible for immunity, submit information and evidence that:

- adds significant value to that already in the possession of the AdC, provided that the conditions are met regarding cooperation with the AdC; and
- reveals their participation in an alleged agreement or concerted practice.

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?

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 or association of undertakings that provide information and evidence;
- a reduction from 20 to 30 per cent granted to the second undertaking or association of undertakings that provide information and evidence; or
- a reduction of up to 20 per cent granted to the subsequent undertakings or associations of 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.

If the applicant provides conclusive information and evidence that is used by the AdC to prove additional facts leading to the imposition of a fine higher than the fine that would have been imposed in its absence, the AdC shall not take into account the additional facts proved thereby in determining the extent of the fine to be imposed on the undertakings or associations of undertakings that provided that information and evidence.

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.

Moreover, to benefit from the position in the order of presentation provided for, the applicant must indicate in the application its name and address and information regarding the participants in the infringement, the product or service and territory covered, an estimate of the duration of the infringement and the nature of the conduct. The applicant must also indicate any requests for exemption or reduction of the fine that it has already submitted or intends to submit to other competition authorities in relation to the infringement and justify the request for a position in the order of presentation.

The AdC additionally may grant the applicant a period of time different from that stated above whenever justified by reasons arising from the protection of the investigation or cooperation with other European competition 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?

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. Cooperation obligations for subsequent cooperating parties differ slightly, but in any event, they must:

- reveal their participation in an alleged agreement or concerted practice;
- provide information and evidence that has a significant added value by reference to the information and evidence already in the possession of the AdC; and
- fulfil the following conditions:
  - cooperate with the AdC from the time of the submission of the application until the adoption of the AdC's decision with respect to all the concerned parties;
  - end the applicant's participation in the infringement, except as reasonably required, in the AdC's opinion, to preserve the investigation's effectiveness.
  - refrain from adopting measures or practise acts of destruction, falsification or concealment of information or evidence related to the infringement; and
  - not disclose its intention of presenting the request for leniency or the applicable content, except to the European Commission, another national competition authority or competition authorities of third countries.

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 or judicial challenges to the AdC's decision on the allocation of a fine imposed jointly and severally among the participants in a cartel or the appeal against a decision by which the AdC found an infringement to articles 101 or 102 of the TFEU or to national competition law provisions, 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.

The following categories of information obtained in the context of the application for partial reduction or full immunity of the fine may not be used before the courts until the AdC has closed the proceedings on the applications for leniency relating to all the persons concerned, in particular by adopting a decision imposing conditions or a final decision, in accordance with the Competition Act, namely:

- information prepared by other natural or legal persons specifically in connection with the application for immunity or reduction of the fine; and
- information prepared and sent by the AdC to the persons concerned in connection with the application for immunity or reduction in the fine.

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 Law No. 23/2018 of 5 June 2018 (the Private Damages Act). The Private Damages Act introduced amendments to the Competition 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.

Statements submitted for the purpose of immunity or reduction of fines are only exchanged between the AdC and other national competition authorities if, pursuant to article 12 of Council Regulation No. 1/2003 of 16 December 2002:

- with the consent of the applicant; or
- where the national competition authority receiving the statement has received an application for immunity or reduction in a fine in respect of the same infringement from the same applicant, provided that at the time the statement was transmitted it was not open to the applicant to withdraw the information it submitted to the national competition authority receiving the statement.

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 does not have the power to enter into arrangements such as plea bargains or similar agreements. Settlements are permitted 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 in fines if they fully and continuously cooperate with the AdC, even if they have not requested such benefits.

The natural persons who make an individual application shall benefit, with the necessary adaptations, from the provisions on immunity or reduction in fines applicable to legal persons.

Natural persons, without prejudice to the previously stated, shall benefit from the exemption of the application of any sanction of an administrative or quasi-criminal nature if they fulfil the following conditions:

- the request for exemption from the fine complies with the conditions set forth therein;
- they cooperate fully and continuously with the AdC for that purpose;
- the request for exemption from the fine is prior to the moment in which the natural persons in question were informed by the competent authorities of the opening of the procedure or investigation leading to the application of those sanctions;
- they fully and continuously cooperate with the competent authority for the instruction of the administrative, quasi-criminal or criminal procedure until the end of the applicable process; and
- in cases where the competent authority for the instruction of the procedure of a criminal nature is in the jurisdiction of another EU member state, the necessary contacts to guarantee the exemption of the application of the criminal sanction under the terms of the previous point are ensured by the AdC with the national competition authority of that jurisdiction.

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 Competition Act sets out the leniency administrative procedure.

Under the Competition Act, 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, and, if necessary, the current personal addresses);
- 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 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 to the AdC's head office by any means, including:

- 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;
- hand delivery; or
- an electronic form made available by the AdC that allows the applicant not to have in its possession, or under its custody or control, the application submitted.

Submission of a written application can be replaced by oral statements made at the AdC's head office. 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. Failure to comply with the duty of cooperation may be considered a breach of the duty of cooperation. 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 in the fine shall be deemed to have been made on the date and at the time of its receipt at the AdC's head office. The AdC shall, upon request, provide a document confirming receipt of the application and the date and hour of its submission. The submission of the request must be made in Portuguese or, exceptionally and subject to agreement between the applicant and the AdC, in another official language of the European Union.

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 European 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, or exceptionally in another official language of the European Union according to the Competition Act, or by oral statements.

To the end of carrying out a simplified leniency application, an interested party must give a brief description of each of the following elements, namely:

- the name or denomination and address of the applicant;
- the names or designations of other participants in the alleged secret cartel;
- the goods and territories affected;
- the duration and nature of the alleged cartel conduct;
- the EU member state or states where evidence of the alleged cartel is likely to be found; and
- information on any other leniency applications already made or likely to be made to any other European competition authority or competition authorities of third countries in relation to the alleged secret cartel.

If the European Commission informs the AdC that it will not proceed with the investigation of the applicable case, wholly or in part, the AdC may start the investigation of the infringement, requesting the applicant to complete the summary application. If it is required for the characterisation of the process or the attribution of the competence of investigation to the AdC, the AdC may request the applicant to complete the summary application before the European Commission and inform the AdC.

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 into 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 or a translation in another official language of the European Union that resulted from an agreement between the applicant and the AdC of the simplified application filed in English.

If the application is not completed or the Portuguese translation is not filed before the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and such immunity 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 before 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 in 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;
- the nature of the behaviour;
- 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 before 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 and the documents delivered in the meantime shall be returned to the applicant or considered as cooperation provided to the AdC.

The AdC shall inform, within 20 working days of the presentation of the request for immunity, the applicant whether the application fulfils the requirements provided for in the Competition Act, granting conditional exemption from the fine. However, should the AdC find immediately after examining the application that the immunity is not available due to the non-fulfilment of the conditions set forth in the Competition Act, it shall notify the applicant accordingly.

Following the above-mentioned 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 working days of such notification, withdraw the application or request the AdC that it is considered for the purposes of reduction in the fine.

As regards an application for reduction in 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 up until the decision to adopt the statement of objections, indicating the level of the applicable reduction. The rules governing the application for immunity or reduction of fine also 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 then notify the applicant in writing up until the decision to adopt the statement of objections, in which case the applicant 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 Competition 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 Competition Authority (AdC) may grant access to the file through consultation at the AdC premises, or by providing copies in electronic or paper form or a combination of both. The defendant can request the consultation of the case file and obtain, at their own expense, any copies, complete or partial, and certificates. Nevertheless, the AdC can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. Moreover, access to documents containing information classified as confidential, regardless of whether or not it is used as means of evidence, is permitted only to the lawyer or the external economic adviser of the concerned undertaking and strictly for the purposes of exercising the rights of defence or of appealing the AdC's decision. The AdC shall have due care for the legitimate interests of the undertakings or associations of undertakings, or of other entities, relating to the 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 in the fine, and to the documents and information submitted for the purpose of immunity or reduction, although 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 this 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 in the settlement proceedings may avoid the application, 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?

November 2021

In early November 2021, the Competition Authority (AdC) applied a fine of more than €92.8 million euros on four supermarket chains, two individuals and a common supplier for allegedly participating in a hub-and-spoke scheme that targeted several of the common supplier's products.

The AdC also issued a statement of objections against four supermarket chains and a supplier of food, home and personal care products for alleged price-fixing in supermarkets. The AdC concluded that the retailers used their commercial relation with the common supplier in a hub-and-spoke scheme to fix prices at the retail level to the detriment of the consumer. Following the adoption of the statement of objections, in June 2022, the AdC issued its final decision, in which it fined the parties involved in the hub-and-spoke scheme in the total amount of €132 million.

Finally, the AdC imposed a fine of €24.691 million on three supermarket chains as well as their common supplier for having participated in an alleged hub-and-spoke scheme to fix the retail prices of food.

December 2021

In December 2021, the AdC issued a statement of objections against the three largest pay TV operators in the Portuguese market and a consulting firm for restricting competition. The alleged aim of the agreement was to insert 30 seconds of advertising as a condition for their customers to have access to automatic recordings of the different TV channels, thus preserving the market structure from which the operators benefit, as it would minimise the offer of pay TV services – including in terms of price or other service terms – to the benefit of operators and to the detriment of consumers and other operators in the advertising space.

The AdC also adopted a final decision against five supermarket chains, as well as the common supplier and the retailer of alcoholic drinks and two managers (one from the supplier and another from a retailer) for having participated in a hub-and-spoke scheme of fixing retail prices. The overall sanction resulted in a total fine of €17.231 million.

March 2022

In March 2022, the AdC issued another statement of objections to three food distribution groups and the supplier of personal care products for an alleged hub-and-spoke scheme, in view of aligning consumer prices in supermarkets. In the same month, the AdC also sanctioned four supermarket chains, the common supplier of juices, nectars and soft drinks as well as two supplier managers a total amount of €79,928,700 for having participated in a scheme of fixing retail prices.

Between January and March 2022, the Portuguese Arbitration Association opened three investigations and carried out three unannounced inspections in the health sector linked to the covid-19 pandemic. During this time, the AdC received four leniency applications.

April 2022

Interestingly enough, in April 2022, the AdC adopted its first decision in a no-poach agreement. The case involved 31 sports companies that participated in the 2019–2020 edition of the First and Second Leagues and the Portuguese Professional Football League who allegedly entered into a competition-restriction agreement, whereby they would prevent the recruitment by First and Second League clubs of players who unilaterally terminated their employment contract invoking issues caused by the covid-19 pandemic.

May 2022

In May 2022, the AdC issued a sanctioning decision against two companies for allegedly entering a cartel related to the trade of business information. The behaviour in question refers to a particular product, the data of which is provided by one of the contracting parties. According to the AdC's investigation, not only did both parties have the right to sell the final product to customers under the joint name of both companies,

but there were also clauses specifically referring to the coordination of sales forces, coordinated pricing policies, revenue sharing and a non-compete clause whereby one party committed to discontinue a competing product. The resulting sanction was reduced because of the leniency application and, as such, one of the companies only paid €353,000, benefiting from its cooperation with the AdC. The other company, on the other hand, was granted full immunity as it was the first company to report the infringement and provide evidence of its participation in the cartel.

June 2022

In June 2022, the AdC sanctioned three supermarket chains as well as their common supplier of cosmetics and personal care products and one of its managers, which resulted in a total fine of €19,469,276 for having participated in a hub-and-spoke scheme for fixing retail prices.

The AdC also sanctioned nine entities in the health sector €190.995 million for an alleged concerted practice that resulted in a restriction of competition in the contracting of hospital health services by the public health subsystem, ADSE. According to the AdC, this behaviour's purpose was, during the course of the negotiations with ADSE, to fix the level of prices and other commercial conditions, as well as coordinating the suspension and threat of termination of the agreement concluded with ADSE.

July 2022

In July 2022, the AdC sanctioned seven surveillance and security entities for participating in a bid rigging cartel active in the provision of surveillance and security services in public tenders. Additionally, an ancillary sanction was issued excluding the very same companies from participating in public procurement.

September 2022

In September 2022, the AdC sanctioned three supermarket chains, the common supplier of alcoholic beverages and its manager for having participated in a hub-and-spoke scheme to fix retail prices. The total amount of the fine was €5,665,178.

The AdC also imposed on a company in the health sector a fine of €202,300, for participating in a cartel in the supply of teleradiology services to public hospitals and other public health centres in Portugal.

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 ongoing or anticipated reviews or proposed changes.

The AdC has established a new whistle-blower tool with anonymous and encrypted communications through which any person or company may report an anticompetitive practice detected in the course of their professional activity. This system of anonymous communications complies with the rules set out in Law No. 93/2021 of 20 December 2021, which transposes Directive (EU) 2019/1937 of the European Parliament and of the Council on whistle-blowing.

The third amendment to the new Competition Act, Law No. 19/2012 of 8 May 2012 with the publication of Law No. 17/2022 of 17 August 2022, transposing Directive (EU) 2019/1, is also noteworthy.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Competition law in Singapore is governed by the Competition Act 2004 (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 2 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 2003 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 General Division of 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 31 December 2021, the CCCS announced the completion of its review of a number of its guidelines. The following revised guidelines took effect from 1 February 2022:

- the CCCS Guidelines on Market Definition (the Market Definition Guidelines);
- the CCCS Guidelines on the Major Competition Provisions;
- the CCCS Guidelines on the Section 34 Prohibition (the Section 34 Guidelines);
- the CCCS Guidelines on the Section 47 Prohibition;
- the CCCS Guidelines on the Substantive Assessment of Mergers;
- the CCCS Guidelines on Merger Procedures;
- the CCCS Guidelines on Directions and Remedies (the Directions and Remedies Guidelines);
- the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases; and
- the CCCS Guidelines on the Treatment of Intellectual Property Rights.

The revised guidelines considered amendments made to the Act in 2018, recommendations from the CCCS's E-commerce Platforms Market Study, and the CCCS's experience in applying the Act and international best practices. Of relevance to cartels are the Market Definition Guidelines and the Directions and Remedies Guidelines.

The Market Definition Guidelines were revised to provide greater clarity on issues related to market definition that may be relevant in the digital era. Another key change is the replacement of the reference to the 'current price' with the 'price in the absence of the agreement' as a potential benchmark level in assessing whether an agreement is anticompetitive under the section 34 prohibition.

The Directions and Remedies Guidelines were revised to reflect the 2018 amendments to the Act, which permitted binding commitments to be accepted in respect of notifications and investigations under the section 34 prohibition and sets out a procedural framework for such commitments. Notably, the change makes clear that the CCCS is generally not inclined to accept commitments in cases involving restrictions of competition by object (eg, price-fixing or bid rigging) with no accompanying net economic benefit.

Separately, the CCCS also released the Business Collaboration Guidance Note (the Guidance Note) on 28 December 2021, which supplements the Section 34 Guidelines. It clarifies the CCCS's position on the common types of business collaborations and provides guidance on how it will assess such collaborations in view of the section 34 prohibition. The seven common types of business collaborations covered in the Guidance Note are:

- information sharing – the exchange of both price and non-price information among businesses;
- joint production – collaboration to jointly produce a product, share production capacity or subcontract production;
- joint commercialisation – collaboration in the selling, tendering, distribution or promotion of a product;
- joint purchasing – collaboration to jointly purchase from one or more suppliers;
- joint research and development (R&D) – collaboration on R&D activities, such as joint investment;
- standards development – the setting of industry or technical standards; and
- standard terms and conditions in contracts – usage of terms shared amongst competitors establishing conditions of sale and purchases of goods and services between them and their customers.

In particular, the Guidance Note sets out factors and conditions – such as the nature and extent of the collaborations – and indicative market shares, under which competition concerns are less likely to arise from the collaborations.

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' that 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 sale 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 specified in the 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 in 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 with 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 of the Competition Act 2004 (the Act) 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 the 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. The Minister for Trade and Industry granted its first extension until 2015 on 16 December 2010 and its second extension until 2020 on 25 November 2015. A further extension, granted on 26 August 2020, extended the BEO to 31 December 2021. Upon the recommendation of the CCCS and pursuant to the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2021, the BEO has been extended for another 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 recommendation, the CCCS explained that both types of agreements meet the net economic benefit criteria.

As at September 2022, the liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law.

Some other specific activities and industries are excluded from the application of the section 34 prohibition, as specified in paragraphs 5, 6 and 7 of the Third Schedule to the Act. In particular, the section 34 prohibition will not apply to:

- any agreement or conduct that relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law relating to competition, gives another regulatory authority jurisdiction in the matter;
- the supply of:
  - ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act 1999;
  - piped potable water;
  - waste water management services, including the collection, treatment and disposal of waste water;
  - bus services by a licensed bus operator under the Bus Services Industry Act 2015; and
  - rail services by any person licensed and regulated under the Rapid Transit Systems Act 1995;
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act 1996;
- 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 prohibition under section 34 of the Competition Act 2004 (the Act) 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 before 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 or 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 that 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 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:

- ordering the production of specific documents or information;
- carrying out compulsory interviews with individuals;
- carrying out unannounced searches of business premises, which requires authorisation by a court or another body independent of the competition authority;
- carrying out unannounced limited searches of residential premises, which requires authorisation by a court or another body independent of the competition authority; and
- the right to:
  - image computer hard drives using forensic computing tools;
  - retain original documents in certain circumstances;
  - require an explanation of documents or information supplied; and
  - 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 a document or piece of 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 their 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 preventing interference with it, 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 their 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 the Competition Act 2004 (the Act) and with the approval of the Minister for Trade and Industry, to enter into arrangements with any foreign competition body under which each party may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performing any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, the CCCS is required under section 88 of the Act to take certain precautions (including obtaining an undertaking from the relevant counterparty) relating to the subsequent disclosure of any information provided. To date, the CCCS has entered into a memorandum of understanding to facilitate cooperation on competition enforcement with Indonesia's Commission for the Supervision of Business Competition, 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 of Canada. More recently, the CCCS also signed memoranda of understanding with the Philippine Competition Commission and China's State Administration for Market Regulation. The CCCS has also joined multilateral frameworks that facilitate cooperation on competition cases, such as the Association of Southeast Asian Nations' 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 grants 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?

CCCS decisions thus far do not reveal 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 against 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 General Division of the High Court and then to 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 a prohibition contained in section 34 of the Competition Act 2004 (the Act) has been infringed), the evidential burden of proof is borne by the CCCS. However, in establishing the application of a statutorily provided exclusion, exemption or other defence (ie, that the arrangement in question gives rise to net economic benefit and thus should be excluded through the application of paragraph 9 of the Third Schedule to the Act), the onus would fall on the party seeking to apply the exclusion, exemption or defence.

The standard of proof is the balance of probabilities. However, the CCCS has consistently noted that the standard would depend on the facts and circumstances of the case. In *JJB Sports plc and Allsports Limited v OFT* ([2004] CAT 17), it stated that:

> *[Given] the hidden and secret nature of cartels where little or nothing may be committed in writing, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard.*

Circumstantial evidence

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

Yes.

Appeal process

18 | What is the appeal process?

Appeals of the CCCS's decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises not more than 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 (the 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 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 deems fit to determine the just, expeditious or economic conduct of the appeal proceedings.

Parties may appeal CAB decisions, in accordance with section 74(1) of the Act, to the General Division of 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 application and the procedure governing the appeal is set out in Order 18 of the Rules of Court 2021.

Parties may also appeal decisions of the General Division of the High Court to the Court of Appeal under section 74(4) 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 them 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 their duties.

An offence of a nature described above is punishable by a prison sentence not exceeding 12 months or 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 Competition Act 2004 (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 a 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 the turnover of the business of the undertaking in Singapore for each year of infringement for such a 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 an undertaking in such a manner as may be specified by the CCCS; and
- to provide a performance bond, guarantee or another form of security on such terms and conditions as the CCCS may determine.

In determining the amount of financial penalty to impose, the CCCS has stated in the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases (the Penalty Guidelines) 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; and
- adjustments:
  - for the duration of the infringement;
  - for other relevant factors (eg, deterrent value);
  - for aggravating or mitigating factors;
  - if the statutory maximum penalty is exceeded; and
  - for immunity, leniency reductions or fast-track procedure discounts.

The Penalty Guidelines were recently amended to clarify the list of mitigating factors in the calculation of financial penalties in the event of an infringement of the prohibition under section 34 of the Act. In particular, it is a mitigating factor where the 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 anticompetitive agreement by adopting competitive conduct in the market.

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 the 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 the calculation of the financial penalty.

Besides setting out the approach that it will adopt in the calculation of a penalty, the Penalty Guidelines also provide examples of aggravating and mitigating factors that are considered.

Aggravating factors 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 an 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.

Mitigating factors 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 quickly.

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 whether:

- there are appropriate compliance policies and procedures in place;
- the programme has been actively implemented;

- the programme has the support of and is observed by senior management;
- there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
- 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 an 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 Competition Act 2004 (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 (CCCS), and may only be brought within two years of the expiry of any applicable appeal periods. Third parties do not have the 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 available in Singapore is a representative proceeding under Order 4, Rule 6(1) of the Rules of Court 2021. Under Order 4, Rule 6(1), where numerous persons have a common interest in any proceedings, such persons may sue or be sued as a group with one or more of them representing the group. Under Order 4, Rule 6(4), where there is a class of persons and all or any member of the class cannot be ascertained or cannot be found, the court may appoint one or more persons to represent the entire class or part of the class and all the known members and the class must be included in a list attached to the order of court. Notwithstanding the fact that representative and class 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 (the 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 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 a 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 to which it has informed 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 a 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 to which it has informed 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 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 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 with an opportunity to perfect it and benefit from either full immunity or full leniency (where such a 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 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, 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 Competition Act 2004 (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 amount of 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 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 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 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 Leniency 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 the 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 Leniency Guidelines provide, in 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 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)(e) 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 CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases;
- 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; and
- 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 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.

On 14 December 2022, the CCCS applied the fast-track procedure for the first time in a bid rigging decision involving three water features maintenance businesses, in which two parties who indicated their willingness to participate in the fast-track procedure were granted a 10 per cent reduction in their financial penalties in addition to reductions already received under the leniency programme.

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 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 an 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 Leniency Guidelines indicate that it is possible for anonymous enquiries to 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 proposed infringement decision (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, which 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 the 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 Competition Act 2004 (the Act) nor the CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016 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 with 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 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 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?

The Competition and Consumer Commission of Singapore (CCCS) has not issued any new cartel infringement decisions during the 12 months preceding September 2022. That said, on 10 May 2022, the CCCS granted conditional approval to a proposed commercial cooperation between Singapore Airlines Limited and Malaysia Airlines after accepting a set of proposed commitments from the parties. The parties had entered into a commercial cooperation framework agreement that envisages a metal-neutral alliance in respect of services between Singapore and Malaysia as well as cooperation in other areas, including special prorate arrangements and expanded code-sharing to grow traffic between Malaysia and Singapore, and between Malaysia or Singapore and certain agreed markets such as Europe.

Separately, a proposed commercial cooperation between Singapore Airlines Limited and All Nippon Airways Co, Ltd, is pending the CCCS's consideration.

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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?

Currently, there are no specific proposed changes to the legal framework relating to cartels or the immunity and leniency programmes.

Slovenia

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Odvetniska druzba Zdolsek

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The relevant piece of legislation is the Act on Prevention of the Restriction of Competition (the Competition Act), published in the Official Journal 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 Criminal Code and the 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 and 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 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 Slovenia, in particular, the following non-exhaustive list of agreements:

- direct or indirect fixing of purchase or selling prices, or other trading conditions;
- limiting or controlling production, sales, technical progress or investments;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts; and
- sharing markets or sources of supply.

When an agreement may affect trade between EU member states, the provisions of article 101 of the Treaty on the Functioning of the European Union (TFEU) shall also apply.

Acting in contravention of the prohibition of restrictive agreements in article 6 of the Competition Act or article 101 of the TFEU may represent a minor offence pursuant to the Competition Act.

Cartels may also amount to a criminal offence pursuant to article 225 of the 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, carries out the following conduct shall be sentenced to imprisonment for not less than six months and not more than five years:

- violates the prohibition of restrictive agreements between companies;
- abuses the dominant position of one or more companies;
- 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 EU member states, which results in a large property benefit for such a company or companies, or a large degree of property damage for another company.

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 applicable 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 Act on Prevention of the Restriction of Competition (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 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 article 6(3) exemption, the de minimis exemption and the 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. However, even if these thresholds are not met, the de minimis exemption shall not apply to:

- horizontal agreements having as their object the fixing of prices, or the limiting of production or sales, or sharing of markets or sources of supply; and
- vertical agreements having as their object the 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 member states. The Slovenian Competition 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) of the 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 an 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 if 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 as well as 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 the 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 Act on Prevention of the Restriction of Competition (the Competition Act). The Agency is a member of the European Competition Network (ECN), the International Competition Network and the Competition Committee of the Organisation for Economic Co-operation and Development. 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 of the 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 of the TFEU is issued.

Where the European Commission initiates the procedure for the infringement of article 101 or 102 of the 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 of the 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 and minor offence procedures.

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 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 an 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 a 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) of the 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 that immunity shall also be granted in the criminal procedure.

A fine of at least €50,000 and up to 200 times the amount of the 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, 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 also be ordered pursuant to the 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 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. A fine of 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 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 a term of imprisonment of between six months and five years; or
- a misdemeanour, punishable by a fine in an amount between €5,000 and €10,000 or, in the case of an offence 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 Public Procurement Act, a contracting public authority shall exclude an undertaking from the public procurement procedure if the undertaking; 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 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 is 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;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- 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.

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 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 this act, collective actions may be used for claims based on infringements of article 6 and 9 of the Act on Prevention of the Restriction of Competition 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). 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 this date. As at October 2021, only two collective actions have been filed in Slovenia and neither 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 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 of Slovenia Nos. 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 in the fine provided that 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 a 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 in 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, by 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 that 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 internal Agency 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 Act on Prevention of the Restriction of Competition (the Competition Act), but certain tax and justification issues regarding such expenses may arise.

Taxes

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

In accordance with the Corporate Income Tax Act, all expenditures that are not in conformity with normal business practice, including penalties imposed by responsible authorities, represent non-recognised expenditures.

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 in 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 Slovenian Competition Agency (the Agency) issued one cartel decision. In 2021, the Agency 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.

* *The content of this chapter was accurate as at 12 October 2021.*

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 What is the relevant legislation?

The legislation that regulates cartels is the Monopoly Regulation and Fair Trade Act (MRFTA). The Enforcement Decree of the MRFTA details or supplements the MRFTA provisions and the Korea Fair Trade Commission (KFTC), the enforcement authority for the MRFTA, provides the following guidelines regarding cartel regulation:

- the Guidelines for Filing Applications for the Approval of Cartels and Competition-Restrictive Practices;
- the Guidelines for Cartel Review;
- the Guidelines on Examination of Cartels in Bidding;
- the Guidelines for Examination of Cartels Involving Administrative Guidance; and
- the Guidelines for Review of Cartels Involving Information Exchange between Business Entities.

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 KFTC is the government agency that enforces the MRFTA. A final decision of the KFTC on whether there was a violation of the MRFTA – based on evidence and testimonies gathered during its investigation and deliberations – may be appealed at the Seoul High Court, which has exclusive jurisdiction.

As for criminal prosecution, generally, the Prosecutors' Office is given prosecution authority for cartel matters only when the KFTC refers the matter to the Prosecutors' Office. Cartel matters not referred to the Prosecutors' Office by the KFTC may still be reinvestigated and referred for criminal prosecution at the request of certain other government agencies. For example, the Ministry of Small and Medium-sized Enterprises and Start-ups may refer cartel offenders to the Prosecutors' Office if the KFTC finds that the cartel activity at issue resulted in significant harm to such enterprises. The prosecutor general may also request that the KFTC file a criminal referral with the Prosecutors' Office if the conduct constitutes a serious violation of the MRFTA. For certain bid rigging conduct that violates the Korean Criminal Code or the Framework Act on the Construction Industry, the KFTC's referral is not necessary for the Prosecutors' Office to prosecute the case.

Changes

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

The MRFTA has recently undergone an overall amendment, which became effective on 30 December 2021. There have been a few notable changes that are relevant to cartels as follows:

- agreements to exchange information that restrain competition are prohibited as a type of illegal cartel;
- if there is an external conformity and information exchange – such as information regarding price, output, and business terms and conditions – that is necessary to create external conformity, an agreement is presumed by law if there is evidence of such an exchange of information;
- a leniency applicant that is later found to have provided false information or submitted discrepant information to the court would face revocation of immunity or leniency status;
- the maximum fine that may be imposed for participating in a cartel has been increased twofold from 10 per cent to 20 per cent of the relevant sales; and
- in cartel damages claims brought by victims of the cartel, the court may order the production of documents necessary to calculate the amount of damages.

Substantive law

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

Article 40 of the MRFTA prohibits forming an agreement to engage in certain conduct that would unreasonably restrain competition. The types of conduct listed in the provision include:

- price-fixing;
- setting terms and conditions, the price or payment terms for trade of goods or services;
- restricting production, shipment or transportation of goods, or trade of services;
- restricting territory or customers;
- interfering with or restricting the establishment or expansion of facilities or installation of equipment necessary to manufacture products or provide services;
- restricting the type or specification of the product or service being produced or provided;
- jointly conducting or managing, or establishing a corporation to conduct or manage, a key part of the business;
- deciding the successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by the Enforcement Decree of the MRFTA (the Presidential Decree) – such other matters are defined in the Presidential Decree as:
    - ratio of successful bidding or auctioning;
    - methods of design or construction; or

    - other matters that constitute competition factors in bidding or auction; and
- interfering with or restricting the business activities or business contents of others, or exchanging price, output or other information prescribed by the Presidential Decree that, in practice, restrains competition in a certain business area – such other information is defined in the Presidential Decree as:
    - cost of production;
    - output, inventory or sales volume; or
    - trade term or terms of payment of compensation.

The Korean competition law framework does not adopt the concept of per se illegality. Instead, a competitive effects test is used to determine whether an agreement to engage in the conduct above falls under an illegal cartel. Specifically, the conduct must unreasonably restrain competition in the relevant market to constitute a violation. For hardcore cartels, however, the burden of proof of anticompetitive effect (which lies with the KFTC) is eased.

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 that unreasonably restrain competition pursuant to the MRFTA are subject to regulation as cartels. While research and development joint ventures or strategic alliances for the development of new products or technology are likely to be found to have pro-competitive effects, manufacturing joint ventures will more likely be subject to scrutiny as it is much easier for manufacturing joint ventures to engage in anticompetitive conduct such as price-fixing. Factors such as the business purpose, scope and effects of the joint venture or strategic alliance will be considered by the KFTC to determine whether the joint venture or strategic alliance should be regulated.

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 individuals, corporations and other entities. The MRFTA regulates the conduct of business entities (ie, entities that engage in the manufacturing business, service business or any other type of business). Conduct of individuals acting for the benefit of a business entity may be deemed acts of the business entity when certain provisions regulating trade associations (associations of two or more business entities with common interests) apply. Individuals that engaged in a cartel may be subject to criminal referral according to 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?

Article 3 of the MRFTA explicitly provides that the MRFTA applies to conduct that takes place outside South Korea, provided that there is a nexus between the conduct and the Korean market. The Supreme Court of Korea held that the MRFTA's scope of application to overseas conduct should be limited to conduct that has a direct, substantial and reasonably foreseeable effect on the Korean market. The Supreme Court of Korea also emphasised the importance of comity with respect to competition law, holding that excessive extraterritorial application of the MRFTA would give rise to unfair consequences. Likewise, the Korea Fair Trade Commission has emphasised comity in areas involving competition law.

Export cartels

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

The law does not explicitly provide exemptions for conduct that only affects customers or other parties outside South Korea. The key to whether overseas conduct will be subject to regulation under the MRFTA is the effect on the Korean market. Overseas conduct that does not involve Korean nationals and has no effect on the Korean market will not be subject to the MRFTA. However, overseas conduct that impacts pricing and output in the Korean market, and agreements formed overseas that include the Korean market as a target, will fall within the reach of the MRFTA.

Industry-specific provisions

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

Bid rigging in a tender for a construction project is punishable with a term of imprisonment of five years or less, or a penalty of 200 million won, pursuant to the Framework Act on the Construction Industry.

Exemptions from the MRFTA are available for cartel activities in industries such as marine and air transportation, insurance, and small and medium-sized enterprises. Agreements among the industry participants on trade terms including pricing are allowed, provided that certain requirements are met, which generally include prior approval of the relevant government authority.

Government-approved conduct

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

Conduct of export companies that was engaged in with the purpose of complying with orders from the Minister of Trade, Industry and Energy to make adjustments to the price, volume, quality, other trade terms or the subject territory with respect to exported goods falls under government-approved activity that is exempt from the application of the MRFTA. The minister may order such adjustments:
- to comply with certain treaties, international law, or the laws of South Korea or the trading country;
- when there is a concern of hindrance to fair competition in the export market; or
- to prevent impairment of national reputation.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

Once the investigation starts, the Korea Fair Trade Commission (KFTC) typically conducts an on-site investigation at the place of business of the suspected offender, seizes or requests documents and interviews the employees. After the KFTC reviews the materials, it issues an examiner's report stating the allegations attached with the relevant evidence. The suspected offenders are provided four weeks (three weeks in cases handled by a subcommittee) to submit a written response to the examiner's report. An extension may be granted when the issues are complex or the respondent's parent company is located overseas. A hearing is held within 30 days from the date of receipt or, if a response is not submitted, the deadline for submission of the response. The case is

heard by KFTC commissioners at the hearing and a final decision is made. A written decision is issued within several weeks or sometimes several months after a final decision is made by the KFTC internally.

The statute of limitations for the KFTC to impose remedial orders or administrative fines is seven years from the end date of the alleged violation. However, for illegal cartels into which the KFTC commenced its investigation, a limitation period of five years from the date of the initial investigation applies.

Investigative powers of the authorities

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

The KFTC may initiate an investigation into an alleged cartel on its own or upon receiving a report of suspected cartel activity. Dawn raids are frequently conducted by the KFTC to investigate whether there has been any illegal activity. When necessary for the investigation, the KFTC's investigating official may obtain statements from the investigated company, interested persons and reference persons, and may order the submission of materials and hold them in custody. The KFTC may also investigate documents and evidence located in other jurisdictions.

Although the KFTC's investigation procedure is based on the consent of the investigated company, the Monopoly Regulation and Fair Trade Act has certain measures to enforce compliance. For example, interfering with the KFTC's investigation may be criminally punishable and a company that fails to attend an interview without justifiable cause may be subject to a fine of up to 100 million won. For employees or interested persons, the amount of this fine goes up to 10 million won.

Companies generally cooperate with the KFTC's investigation to the extent possible not only to avoid criminal punishment or fines for non-compliance, but also to reduce any surcharge imposed for cartel activity. Active cooperation with the KFTC's investigation may be a factor for the KFTC to consider when calculating the administrative fine imposed on the company.

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. For prosecutors to conduct investigations, including an arrest and search and seizure, a warrant must first be issued by the 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?

The Korea Fair Trade Commission (KFTC) actively cooperates with foreign enforcement agencies in investigations of international cartels. The degree of cooperation may vary from case to case, but the KFTC communicates with foreign enforcement agencies through various channels. South Korea has executed memoranda of understanding and cooperation agreements with other jurisdictions – such as the European Union, Brazil, China, Japan and the United States – to exchange information and cooperate with investigations. South Korea is also an active member of the Organisation of Economic Co-operation and Development's Competition Committee and the International Competition Network, and has attended the East Asia Top-level Officials' Meeting on Competition Policy every year since 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?

Investigations of international cartels by the competition authorities of the European Union and the United States will likely lead to an investigation in South Korea. The KFTC keeps a close watch on foreign competition authorities and how cases are penalised overseas. In some cases, the KFTC exchanges information on suspected violations and coordinates dawn raids with foreign competition authorities.

CARTEL PROCEEDINGS

Decisions

15 How is a cartel proceeding adjudicated or determined?

Once the Korea Fair Trade Commission (KFTC) examiner finishes investigating the case, an examiner's report will be issued stating the examiner's findings of fact, finding of a violation, grounds and proposed measures. The KFTC, which is composed of nine members including the chair and vice-chair, will review the examiner's report and hold hearings to listen to the opinions of the parties and interested persons. After examining the evidence, the KFTC will deliberate whether there has been a violation of the law and impose measures through a written decision.

Burden of proof

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

The KFTC bears the burden of proof for all the elements for establishing a cartel, such as the existence of an agreement prohibited by the Monopoly Regulation and Fair Trade Act (MRFTA) and anticompetitive effect. However, if there is circumstantial evidence of a cartel between business entities (ie, two or more business entities engaging in conduct that falls under a type of cartel), and there is a considerable probability that the business entities acted jointly, an agreement is presumed by law. If an agreement is presumed by law, the KFTC only needs to prove anticompetitive effect and the business entity must prove the absence of an agreement.

With the recent amendment of the MRFTA, the KFTC's burden of proof has been eased – an agreement is presumed to have been formed based only on the external conformity of increased prices and information exchange, meaning that the KFTC will be required to prove anticompetitive effect only. This provision in the amendment is not applicable to conduct that concluded before 30 December 2021.

Circumstantial evidence

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

An illegal cartel is established when an anticompetitive agreement exists. The existence of an agreement may be established by circumstantial evidence of the agreement when there is a substantial probability that the companies engaged in illegal cartel activity. If there is a matching appearance of a cartel between business entities and there is a considerable probability that the business entities acted jointly, an agreement is presumed by law. In such an event, the KFTC only needs to prove anticompetitive effect.

Examples of circumstantial evidence used to establish such a legal presumption of an agreement include:

- evidence of direct or indirect communication or exchange of information;
- difficulty of conforming conduct without an agreement due to the relevant industry structure;
- impossibility of explaining conformity of conduct as a consequence of the market status; and
- joint action as the sole mechanism that would serve the interests of the relevant companies.

Appeal process

18 | What is the appeal process?

A company sanctioned by the KFTC for participating in a cartel may appeal the decision by filing a lawsuit to cancel the KFTC's decision with the Seoul High Court within 30 days of the date of notification of the KFTC decision. After the KFTC submits an answer to the complaint, the court holds a series of hearings to examine the evidence. Hearings are set one or two months apart. Once the court determines that it has gathered enough evidence to find the facts, the court concludes the hearing and schedules a date to announce its decision. The parties are free to submit as many briefs and additional evidence as they wish until the conclusion of the hearing, unless otherwise instructed by the court. New arguments and evidence that were not presented or submitted at the KFTC stage may be presented at court.

An appeal of the Seoul High Court's decision may be filed with the Supreme Court within two weeks of receipt of the written decision. The Supreme Court only makes legal determinations and does not review the facts.

SANCTIONS

Criminal sanctions

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

The Monopoly Regulation and Fair Trade Act (MRFTA) provides that a person that engaged in cartel activity may be subject to a term of imprisonment of up to three years or a penalty of up to 200 million won, or both. Companies that engaged in cartel activity may also be subject to a penalty of up to 200 million won. If the company is a corporation, its representative and employees may be subject to criminal punishment.

A person that engages in bid rigging prohibited under the Korean Criminal Code may be punished by a term of imprisonment of two years or less, or a penalty of up to 7 million won. A person that engages in bid rigging prohibited under the Framework Act on the Construction Industry may be punished by a term of imprisonment of five years or less, or by a penalty of up to 200 million won. The sentences imposed by the court vary depending on the details of the case.

While courts tended to impose criminal punishment only on corporations that participated in illegal cartels in the past, recently there has been an increase in the number of cases where the employees or executives directly involved in the cartel were subject to criminal punishment.

Civil and administrative sanctions

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

Companies that participated in cartel activity may be subject to sanctions such as remedial orders and fines. In most cases, the Korea Fair Trade Commission (KFTC) imposes both a remedial order and a fine. The administrative fine may be up to 20 per cent of the relevant revenue and, if no revenue has been generated, a fine not exceeding 4 billion won. However, for conduct that ended before 30 December 2021, a fine not exceeding 10 per cent of the relevant revenue and, if no revenue has been generated, a fine not exceeding 2 billion won 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?

The Notification on Detailed Standards Regarding Imposition of Administrative Fines is a guideline that is binding on the KFTC. The administrative fine for illegal cartels is basically calculated by multiplying the imposition rate (ranging between 0.5 per cent and 20 per cent – the higher the rate, the more serious the violation) by the total revenue generated in relation to the product or service directly or indirectly affected by the cartel during the period of violation (ie, relevant sales).

Aggravating factors, which may result in an increase in the administrative fine, include the imposition of sanctions by the KFTC in the immediately preceding five years for the same conduct, the extensive period of the violation and retaliation against other companies that did not participate in the cartel. Mitigating factors, which may result in a reduction of the fine, include non-implementation of the cartel agreement, cooperation with the KFTC's investigation and voluntary correction of the violation that involves affirmative removal of any effect caused by the violation, not just simply discontinuing the violation.

The KFTC also has in place the Criminal Referral Guidelines that guide the KFTC in its determination of whether to refer a case to the Prosecutors' Office. Under these guidelines, penalty points are given to violations depending on the severity. The severity of the violation is determined based on factors such as the total market share of cartel participants, the geographic scope of the area affected by the cartel, the size of force imposed on companies to participate in the cartel and the period of the cartel. The KFTC is required to refer the offender for criminal prosecution if the total penalty points amount to 1.8 or greater.

Compliance programmes

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

According to the Rules on Operation of Fair Trade Compliance Programs, Offering of Incentives, Etc, an organisation that has a compliance programme in place and received a certain grade or higher from an agency designated by the Korea Fair Trade Mediation Agency or the KFTC may be exempt from the duty to officially announce the fact that it was ordered by the KFTC to remedy certain practices or such duties may be relaxed for such organisations.

Director disqualification

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

Individuals involved in cartel activity are not subject to orders prohibiting them from serving as corporate directors or officers. However, those who have been subject to criminal punishment for participating in cartel conduct will be disqualified from service as corporate directors or officers of companies such as financial institutions and public companies, the operation and establishment of which are strictly supervised.

Debarment

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

According to the Act on Contracts to Which the State is a Party, a company that led a cartel in relation to government procurement and that was the successful bidder may be restricted from participating in a tender held by the government or public institution for a period of up to two years. A company that led the cartel but was not the successful bidder may be restricted from participation for a period of one year and a company that simply participated in a cartel may be restricted from participation in government tenders for six months. The head of the relevant government agency or public institution has the authority to enforce such a rule.

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 and administrative sanctions may be pursued in respect of the same conduct. However, criminal prosecution can be initiated only when the KFTC refers the case to the Prosecutors' Office upon finding that the conduct so obviously and seriously violates the MRFTA so as to greatly restrain competition. The prosecutor general may also request the KFTC to file a criminal referral with the Prosecutors' Office if the conduct constitutes a serious violation of the MRFTA. For certain bid rigging conduct that violates the Korean Criminal Code or the Framework Act on the Construction Industry, the KFTC's referral is not necessary for the Prosecutors' Office to prosecute the case.

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?

Indirect purchasers and purchasers that acquired the affected product from non-cartel members may file private damage claims. However, indirect purchasers may have difficulty establishing causation and the amount of damages. A plaintiff in a tort action must successfully prove unlawful conduct based on the intent or negligence of the offender, the damages suffered by the plaintiff, and causation between the unlawful conduct and the damages suffered. If the private damage claim is brought after the decision of the Korea Fair Trade Commission (KFTC) that the conduct at issue constitutes an illegal cartel, the first element will be deemed satisfied and the plaintiff will only need to show damages and causation.

When the amount of damages is difficult to prove with concrete evidence, the court may award an amount estimated based on the overall evidence presented throughout the proceeding. The Monopoly Regulation and Fair Trade Act also provides that a court may order defendants to submit certain materials that would help prove damage and the amount of damages. Defendants are required to comply with such an order and submit the materials even if they contain trade secrets. A cartelist may be held liable for up to treble the actual damages. However, a leniency applicant may be liable for only up to the actual damages.

While the pass-on defence will not be accepted, courts may take into account any passing-on that may have actually occurred when calculating the amount of damages awarded to the plaintiff. In a cartel case involving flour purchasers' claim for damages against eight flour manufacturers that fixed the price of flour, the Supreme Court denied the defendants' argument that the plaintiffs transferred all or part of the increased price of flour to the final consumers. However, the passing-on that may have actually occurred was reflected when the Supreme Court calculated the final amount of damages, based on the principle of fairness.

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 Korean legal system does not allow class or collective actions in antitrust litigation. However, victims can jointly file a private lawsuit for antitrust damages. The outcome of the damages lawsuit will only be legally binding on the plaintiffs, although courts will take into account the outcome of a previous lawsuit based on the same facts in subsequent damages lawsuits filed by other victims of the same conduct.

Recently, there have been discussions on the introduction of class actions. A legislative bill to allow class actions was announced by the Ministry of Justice in September 2020. However, the Ministry of Government Legislation stopped reviewing the bill in September 2021. There is still a possibility that the bill could be taken back into consideration in the future.

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 Monopoly Regulation and Fair Trade Act (MRFTA) provides for a leniency programme. A first-priority leniency applicant is granted full immunity from the administrative fine and remedial orders, but the Korea Fair Trade Commission (KFTC) has the discretion to decide whether to grant full immunity from criminal referral. In practice, however, first-priority applicants are generally granted immunity from criminal referral as well. To obtain first-priority leniency status, an applicant must satisfy all of the following requirements:

- the applicant must be the first person to exclusively provide the evidence necessary to prove the existence of a cartel;
- at the time of the leniency application, the KFTC must not have obtained information about the cartel or have obtained insufficient evidence to prove the existence of the cartel;
- the applicant must cooperate in good faith until the end of the KFTC review process by stating all facts related to the cartel and submitting related information;
- the applicant must stop its participation in the cartel; and
- the applicant must not have coerced another enterprise to participate in the cartel, nor committed illegal cartel conduct during a certain period.

There is also the amnesty plus programme under which a first-priority leniency applicant (Cartel A) may be subject to immunity from the administrative fine or remedial order or reduction of the fine for other cartel conduct (Cartel B). The amount of reduction is determined by

comparing the size of Cartel B with Cartel A. If Cartel B is smaller than, or of the same size as, Cartel A, a reduction of up to 20 per cent may be granted. If the size of Cartel B is at least four times greater than that of Cartel A, the entire amount of the fine is waived.

Subsequent cooperating parties

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

A second-priority leniency applicant is provided partial leniency. To obtain second-priority leniency status, an applicant must satisfy the following:

- the applicant must cooperate in good faith until the end of the KFTC review process by stating all facts related to the cartel and submitting related information;
- the applicant must stop its participation in the cartel;
- the applicant must not have coerced another enterprise to participate in the cartel, nor committed illegal cartel conduct during a certain period; and
- the applicant must be the second person to exclusively provide the evidence necessary to prove the existence of the cartel, provided that the application is filed within two years of the date of the first applicant's leniency filing.

If there are only two companies that participated in the cartel, it is not possible for a company to obtain second-priority leniency status. The KFTC is required to grant the second-priority applicant a 50 per cent reduction of the administrative fine, and may or may not decide to grant full immunity from remedial measures and immunity from criminal referral. However, in practice, the KFTC generally provides full immunity from criminal referrals to second-priority leniency 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?

In the event that the KFTC revokes leniency status from a first-ranking leniency applicant, the second-ranking applicant must meet the requirements for first-priority leniency status to succeed with first-priority leniency status. For instance, if the first-ranking applicant is revoked its first-priority status and the KFTC had already secured sufficient evidence at the time on which the second-ranking applicant was able to move up to first-priority leniency status, the second-ranking applicant will not be able to succeed the status because it would not be able to satisfy all of the requirements for first-priority leniency status.

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 statutory deadline for initiating or completing an application for immunity, but a second-priority leniency applicant must submit its application within two years of the KFTC's receipt of the application from the first-ranking leniency applicant or the date when the first-ranking applicant started cooperating with the KFTC. In practice, applications submitted after the issuance of the examiner's report are not accepted by the KFTC.

Markers (ie, simplified applications) are available. An applicant that submits its identity and a brief overview of the cartel will be deemed to have filed its application on that date. The applicant is initially provided a 15-day period within which to supplement its application and an extra 60 days may be provided if a valid reason for the extension is presented. An extension of more than 60 days may be granted if the KFTC finds that additional time would be needed to collect relevant evidence and obtain statements (eg, international cartel cases). A full application is expected to be submitted by the end of the period for supplementation.

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 and subsequent cooperating parties are required to cooperate in good faith with the KFTC until the investigation is concluded to be granted first- or second-priority status. This is determined by the KFTC by taking into consideration, comprehensively:

- whether the applicant provided related information to the best of their knowledge without delay;
- whether all related materials in possession of the applicant or that the applicant could obtain were submitted promptly;
- whether the applicant promptly responded to the KFTC's requests for information and cooperated with its requests;
- whether the applicant used its best efforts to have its employees cooperate with the KFTC's investigation in good faith; and
- whether there was any evidence that was destroyed, damaged, forged or concealed by the applicant.

A leniency applicant that discloses the fact that it applied for leniency to third parties, including participants of the cartel, before the conclusion of the KFTC's deliberation and without the KFTC's approval, will be deemed to have failed to meet the good-faith cooperation requirement. Also, a leniency applicant that later provides a statement at court that is different from that provided to the KFTC during the investigation process, or provides false information, will have its leniency status revoked.

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 MRFTA prescribes that the identity of a leniency applicant or subsequent cooperating parties must not be revealed by the KFTC to third parties. The identity of a leniency applicant is kept confidential throughout the investigation, the hearings and the KFTC decision. Information revealing the identity of the applicant must be redacted in the evidence used by the KFTC to find that there was illegal cartel activity before sending it out to other cartel participants together with the examiner's report. The same degree of confidentiality protection is applicable to subsequent leniency applicants.

An exception to the KFTC's duty of confidentiality applies when the KFTC is ordered by the court to submit documents that may contain information revealing the applicant's identity or when the applicant consents to the disclosure of its identity. In an administrative lawsuit or a civil lawsuit for compensation of damages, the court may order the submission of materials related to the leniency application. In such a case, the KFTC must disclose the relevant 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?

Plea bargains, settlements or other binding resolutions with a party to resolve liability and penalty for alleged cartel activity are not available for cartels. The consent decree procedure is also unavailable to participants of cartels.

Corporate defendant and employees

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

When leniency is granted to a corporate defendant, its current and former employees as well as the corporate defendant will not be referred to the Prosecutors' Office for criminal prosecution.

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?

Given that full or partial immunity is granted to first- and second-ranking applicants only, submitting the application as soon as possible is critical. Applications may be submitted in writing or orally to the Cartel Regulation Policy Division of the KFTC by a company, its executives or employees with the right of representation, or an attorney. After the application is submitted, applicants must continue to cooperate with the KFTC's investigation by promptly submitting requested information or providing as much relevant information as possible until the KFTC concludes the investigation. Only at the final hearing, after the KFTC's deliberations, will the KFTC decide the applicant's leniency rank and the details of how leniency will be granted.

DEFENDING A CASE

Disclosure

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

All information and evidence included in or attached to the Korea Fair Trade Commission (KFTC) examiner's report are disclosed to a defendant with the exception of information containing trade secrets, personal information, materials related to a leniency application and materials protected as confidential information pursuant to 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?

Unless there is a conflict of interest, counsel may 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?

Representing multiple corporate defendants, whether or not they are affiliated, is not recommended and may sometimes be impossible due to issues such as conflicts of interest that may arise in relation to 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?

Corporations are prohibited from paying the legal penalties imposed on their employees for participating in cartels and their legal costs. Paying the fine or legal fees on behalf of an employee may subject a corporation to criminal punishment.

Taxes

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

Administrative fines and private damages payments 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?

Generally, penalties imposed in other jurisdictions are not taken into account by the KFTC when imposing sanctions on corporations or individuals and overlapping liability for damages in other jurisdictions are not taken into account in private damage claims. With respect to criminal proceedings, however, when criminal sanctions have been imposed on a corporation or individual in another jurisdiction, criminal sanctions for the same conduct may not be imposed or reduced in South Korea, pursuant to the Korean Criminal Code.

Getting the fine down

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

Being the first to apply for leniency and cooperating with the KFTC's investigation will exempt companies from administrative and criminal sanctions. Non-leniency applicants may reduce fines by cooperating in good faith throughout the KFTC's investigation process by promptly providing the requested information.

UPDATE AND TRENDS

Recent cases

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

In January 2022, the Korea Fair Trade Commission (KFTC) found that, between December 2003 and December 2018, 23 container shipping companies had a total of 541 meetings and communications, and reached and implemented a total of 120 agreements on ocean transport service freight rates (base rates, surcharges, bidding prices for large shippers, etc) in connection with South Korea–south-east Asia routes. The container shipping companies were imposed a total surcharge of 96.2 billion won.

The key issue of the case was whether the joint conduct of container shipping companies was exempted from the application of antitrust law. The Marine Transportation Act permits joint conduct of container shipping companies and, thus, such conduct is exempt from the application of the Monopoly Regulation and Fair Trade Act (MRFTA). However, for such an exemption to apply, the joint conduct must be notified to the Ministry of Oceans and Fisheries and shippers' organisations must be consulted. The KFTC claimed that the container shipping companies did not comply with these requirements, and held that the conduct in question was not a legitimate act under the Marine Transportation Act and, thus, should be regulated according to the MRFTA.

In March 2022, the KFTC found that 16 poultry processing companies colluded to fix the prices of chickens on 45 occasions between November 2005 and July 2017. The KFTC imposed a total surcharge of 176 billion won on the poultry processing companies and filed a referral to the Prosecutors' Office against five companies. The poultry processing companies' defence was that an exemption applied because their conduct was in compliance with a government supply control policy. The KFTC found that the government had not issued an order to adjust the production and shipment of chickens in connection with this case and that, even if there were such government guidance in place, there was no legal basis for such guidance and, therefore, the MRFTA should apply to the case. The KFTC found that the companies had a total of 77 per cent market share and the companies' 12-year-long price-fixing agreement led to the increase in the price of chickens. The KFTC announced that it would strictly monitor and regulate collusion in sectors closely related to consumers' livelihood and that have a direct impact on inflation, such as food and everyday goods.

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 KFTC reported its future work plan to the President on 16 August 2022. According to the work plan, the KFTC will increase the predictability and transparency of its investigations and case-handling procedures by implementing the following:

- providing clear notification of the subject and detailed scope of the investigation to companies at the start of an investigation;
- establishing a process that enables the companies under investigation to raise objections with respect to the investigation process and submit their opinion before the KFTC commences deliberation; and
- clarifying in the decision the reasons when it decides not to refer companies to the Prosecutors' Office for criminal prosecution.

Furthermore, according to the KFTC's work plan of 16 August 2022, the KFTC plans to reform the current system and practices that facilitate bid rigging. Details of the reform and when the reform will come into force are expected to be announced by the KFTC in the near future.

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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 (the Commission).

Relevant institutions

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

The federal authorities investigating cartel matters are the Commission and its Secretariat, 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: a chamber for partial decisions and a chamber for merger control clearance. The chamber for partial decisions was introduced in particular to close 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. The resources and logistics division deals with internal administrative matters only. Each division is headed by a vice director. In addition to these divisions, a number of cross-functional competence centres support the Secretariat's work. 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 Vertical Agreements Communication to adapt it 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 through online forms. Other than these electronic markers, leniency markers may only be submitted in writing, by email or in person.

There is also an important proposal pending for change to the regime. The Federal Council has approved a consultation on a preliminary draft for a partial revision of the Cartel Act. The consultation ran until 11 March 2022. It is now up to the State Secretariat for Economic Affairs and the Federal Council to take the consultation answers into consideration and to submit to the Swiss parliament a concrete draft for deliberation, respectively.

The draft revision focuses on (among other things) cartel matters, as the preliminary draft incorporates a motion by Olivier Français (18.4282), adopted by the Swiss parliament on 1 June 2021. The objective of this motion is to reintroduce a quantitative test to all agreements that affect competition. If adopted, this motion would essentially reverse the case law of the Swiss Federal Supreme Court, according to which agreements that affect 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 remains to be seen whether the revision of the Cartel Act will actually be successful, as earlier attempts have failed.

In addition, the Commission is currently revising its Vertical Agreements Communication. The main aims of this revision are harmonising the Swiss regime with the revised EU Block Exemption Regulation No. 2022/720 and the related Guidelines on Vertical Restraints applicable in the European Union since 1 June 2022 and updating the Commission's Vertical Agreements Communication to the recent practice of the Swiss competition courts, in particular the Swiss Federal Supreme Court.

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 hardcore restraints:

- horizontal agreements that:
  - directly or indirectly fix prices;
  - restrict quantities of goods or services to be produced, purchased or supplied; or
  - allocate markets geographically or according to trading partners; and
- vertical agreements that:
  - set minimum or fixed prices (resale price maintenance); or
  - allocate territories to the extent that (passive) sales by other distributors into those territories are not permitted (absolute territorial protection).

Such a presumption may be rebutted if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. If competition is not eliminated, it 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 hardcore restraints. The Swiss Federal Supreme Court decided that the vertical and horizontal hardcore restraints listed above, in principle, significantly restrict competition. The significance of the competition restraints is assumed for hardcore restraints owing to their quality without the need to examine quantitative effects such as market shares. According to the Swiss Federal Supreme Court, already a small degree of restriction of competition suffices to constitute significance. Horizontal and vertical hardcore restraints must therefore be justified on the grounds of economic efficiency to be permissible.

Economic efficiencies justifying otherwise unlawful anticompetitive agreements include:

- a reduction of production or distribution costs;
- the improvement of products or production processes;
- the promotion of research into or the dissemination of technical or professional know-how; and
- a more rational exploitation of resources.

In addition to these benefits, to successfully justify anticompetitive behaviour by claiming that 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 *BMW* decision (regarding car sales into Switzerland) of 24 October 2017 (2C_63/2016) and its *Altimum* decision (regarding mountaineering equipment) of 18 May 2018 (2C_101/2016). In the latter 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 hardcore restraints.

Joint ventures and strategic alliances

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

As any formal or informal agreement that restricts competition by object or effect, joint ventures and strategic alliances – such as marketing alliances and purchasing pools – are, in principle, subject to Swiss cartel regulation. Exceptions may be possible in a merger control context. In this context, 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 applicable 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 because 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)–(1-bis) of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), any public or private undertaking 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 (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 caught as such. 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 Swiss 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 Swiss Competition Commission (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 (EEA). As Switzerland is not part of the EEA (and was, as a result, affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. This, in general, is in line with the Commission's past practice to interpret effects in Switzerland broadly in the 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 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) with regard to Gaba and Gebro, respectively, 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 type of 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 antitrust 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 (SMEs), 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). In addition, the Commission issued, for the first time, explanatory notes as an interpreting aid on 12 June 2017, as amended on 9 April 2018. The explanatory notes 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 EU Block Exemption Regulation No. 2022/720 and the related Guidelines on Vertical Restraints applicable in the European Union while taking the economic and legal specificities of Switzerland into account. The Commission is currently revising its Vertical Agreements Communication to provide for alignment with the revised EU Block Exemption Regulation No. 2022/720 and the related Guidelines on Vertical Restraints as applicable in the European Union since 1 June 2022.

On 19 December 2005, the Commission adopted the Communication on Agreements of Minor Importance (de minimis), specifically targeting agreements between SMEs to improve their competitiveness, provided that the agreements do not contain hardcore restraints and only have a limited effect on the market.

On 1 November 2002, the Commission enacted the Motor Vehicle Communication and a brief explanatory note regarding its application. The aims of the Motor Vehicle Communication were:

- to allow the parallel importation of motor vehicles from the European Union and EEA to Switzerland;
- to suppress the link between retail and after-sales servicing;
- to facilitate the sale and 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 the lawful use of cost-calculation aids from illegal horizontal price-fixing. To qualify as a lawful cost-calculation aid, the following requirements must be met:

- the aid may only set out the basis for the cost calculation, but may not stipulate any flat costs;
- know-how may be exchanged to allow the cost calculation, but information on how prices are set must not be disclosed;
- the parties must be free to set prices and conditions, and to determine discounts in whatever form; and
- price elements, discounts or consumer prices shall not be proposed.

Communications of the Commission are not binding upon Swiss courts.

Finally, upon specific request by the parties and 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)–(1-bis) of the Cartel Act makes clear that any undertaking, public or private, engaged in an economic process that offers or acquires goods or services is an 'undertaking' within the meaning of the Cartel Act and that neither the organisation nor the legal form of an undertaking is relevant.

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 (the 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, professional customers or 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 an 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, suggest witness statements, and have the rights to be heard and 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 the 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 the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, 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 documents were created (ie, before or after an investigation was launched) and of where such documents are 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 with a protected document in custody.

The Commission published a note on the decision 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 EU member states) and the Swiss competition authorities. It significantly facilitates 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 (the Commission) and the European Commission on a formal legal basis.

Moreover, on an informal basis, the Commission and its Secretariat cooperate with various national competition authorities in Europe, such as the German 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 Swiss Competition Commission (the Commission) is the authority 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 and 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 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 of *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 Swiss 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 establishment 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 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 in 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 intentionally 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 hardcore horizontal cartel, according to article 5(3) of the Cartel Act (ie, agreements on prices, quantities or territories between competitors);
- participate in hardcore vertical restraints pursuant to article 5(4) of the Cartel Act (ie, resale price maintenance or absolute territorial protection in distribution matters); or
- abuse a dominant position, pursuant to article 7 of the Cartel Act.

The maximum administrative sanction is a fine of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative). The Ordinance on Sanctions lays down the method of calculation of the fines.

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Swiss Competition Commission (the Commission) or a judgment of the appellate courts can be fined up to 10 per cent of the undertaking's consolidated net turnover in Switzerland during the past three financial years (cumulative). In calculating the fine amount, the presumed profit arising from such unlawful 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 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 the 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 the second step, the base amount is increased based on the duration of the infringement.

In the 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 programmes aimed at preventing anti-competitive conduct in the first place through information and training employees. As, in this case, the illegal conduct did not involve employees at lower levels of responsibility but 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 to reduce 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. The preliminary draft for a partial revision of the Cartel Act published in November 2021 also does not provide for a compliance defence. It remains to be seen whether such a provision will be taken into account in the current legislative process, but this seems rather unlikely.

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 a 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 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. 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 *Construction Works in the Canton of Grisons* of August 2019, a bid rigging case, the Swiss Competition Commission (the 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. 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.

In December 2021, the Swiss Federal Council sent a dispatch to the Swiss parliament on the enforcement of civil legal claims through instruments of collective redress. This is intended to expand the existing action by associations and, in future, also make it possible to assert claims for compensation. The parliamentary consultations on this amendment to the Federal Act on Civil Procedure are currently 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?

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 (the Commission) in view of the discovery and the elimination of a restraint of competition may benefit from full or partial immunity. Only the first applicant may enjoy full immunity and rather high thresholds apply.

The leniency programme particularly applies to (horizontal and vertical) hardcore restraints. The Commission may grant full immunity from a fine if an undertaking is the first to either:

- provide information enabling the Commission to open an investigation and the Commission itself did not have, at the time of the leniency filing, sufficient information to open a preliminary investigation or an in-depth investigation; or
- submit evidence enabling the Commission to prove a hardcore restraint, provided that no other undertaking must already be considered 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 through an online form (electronic markers).

The Cartel Act does not expressly regulate the possibility for the Commission to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example, if facts are discovered that justify such a withdrawal or amendment of a final decision. There is

no cartel-specific case law in that regard. However, the bar for immunity revocation has to be set very high.

In addition, no fine will be imposed if undertakings notify a possible hardcore restraint before it produces any effects (notification procedure). For that purpose, the Commission has published specific filing forms. In contrast, a sanction may be imposed if the Commission communicates to the notifying undertakings the opening of a preliminary investigation or the opening of an in-depth investigation within a period of five months following the notification and the undertakings continue to implement the notified restriction.

Subsequent cooperating parties

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

Pursuant to the Ordinance on Sanctions and the notice on leniency, full immunity is limited to the first in. Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50 per cent of the fine amount is available at any time in the proceeding to undertakings that do not qualify for full immunity.

Further, the fine amount can be reduced by up to 80 per cent if an undertaking provides information to the Commission about other hardcore restraints that were unknown to the Commission at the time of their submission (leniency plus). This reduction is without prejudice to any possible full immunity or partial reduction of a fine for the newly disclosed infringements.

Continuous cooperation with the Commission throughout the investigation without restrictions or delay is an indispensable requirement for receiving a fine reduction. The decisive factor for determining the reduction percentage is the importance of the undertaking's contribution to the success of the proceedings (the position in the queue is not per se relevant).

Going in second

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

Being the second or third or subsequent cooperating party will not allow for full, but only partial, immunity of up to 50 per cent of the fine amount. However, as the decisive factor for determining the leniency bonus is the contribution to the success of the proceedings, being second alone does not guarantee a better bonus than the one for the subsequent cooperating parties.

In addition, there is a leniency plus option with a fine reduction of up to 80 per cent if an undertaking provides information to the Commission about other hardcore restraints that were unknown to the Commission at the time of their submission.

Approaching the authorities

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

There are no statutory deadlines for submitting leniency applications or for perfecting a leniency marker. However, pursuant to the Cartel Act, full immunity is limited to the first in but also possible for cooperation that enables the Commission to prove a Cartel Act infringement, and therefore available 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 neither possible to submit a leniency marker via telephone nor, 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 have 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 option 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 its 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 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 for 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 or to cease to commit certain illegal conduct. However, the fine amounts to be imposed for illegal conduct in the past cannot be agreed on. Swiss competition law contemplates 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 an agreement and does not exceed the framework of a possible fine set out therein. This 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 on the amicable settlement.

Amicable settlements are binding upon the parties and the Commission, and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties. Amicable settlements do not hinder the Commission from imposing fines on the parties if they have committed illegal hardcore infringements in the past. However, 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 heavily into account. In a recent settlement case, the Commission only reduced the fine by 3 per cent and indicated that it would no longer reduce the fines 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 ongoing 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 the 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 Swiss Competition Commission (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.

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 the reasonability of sanctions, it may consider administrative sanctions imposed outside Switzerland. However, there is no statutory obligation in this respect and, to date, 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 hardcore infringement. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition may enjoy full or partial immunity of

up to 50 per cent. Moreover, an amicable settlement with the authority may also result in an additional reduction of the potential fine of up to 20 per cent.

Further, it is more important than ever for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law for their agreements and practices. It is often advisable for undertakings active in Swiss markets to implement an effective 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 Swiss Competition Commission (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, showing a focus of the Commission's cartel enforcement in the construction sector and against bid rigging.

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 the Grisons that several companies in the rather remote Moesa region in the south of the canton had 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 were 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 had sanctioned several information technology (IT) suppliers that participated in bid rigging concerning the Swiss National Bank as the 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 10 May 2021, the Commission sanctioned several electrical installation and services companies active in the Geneva region for the inadmissible coordination of bids with competitors and the exchange of competitively sensitive information with regard to prices and customers.

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, therefore, issued a separate sanctioning decision (sequential hybrid procedure).

On 20 January 2022, the Commission opened an investigation into possible anticompetitive agreements on road renovations. It conducted dawn raids at the premises of several undertakings in various cantons in western Switzerland that allegedly coordinated offers and prices for public procurement.

On 22 February 2022, the Commission fined a joint venture active in the pavement supply in the canton of Berne for abusing its market dominance and 11 of its shareholders that agreed on a non-compete undertaking for the benefit of the joint venture that the Commission had deemed an anticompetitive agreement in violation of the Cartel Act.

Finally, on 30 June 2022, the Commission fined seven dealers of Volkswagen Group-branded motor vehicles in the canton of Ticino that formed an illegal cartel that was aimed at restricting competition between themselves, thus keeping prices high for new cars sold to private and public customers. One dealer applied for leniency and a total of five dealers reached an amicable settlement with the Commission, all leading to fine reductions for the dealers, but not to full immunity.

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?

Planned revision of the Cartel Act

In February 2020, the Swiss Federal Council instructed the Swiss 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). In November 2021, the Federal Council approved the preliminary draft and submitted it to interested parties for consultation.

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 a decision of the Swiss parliament of 5 March 2018, two requests from a motion by Jean-René Fournier (16.4094, 'Improvement of the situation of small and medium-sized enterprises in competition law proceedings') were also included in the preliminary draft. On the one hand, regulatory time limits shall be introduced for the Commission and the appellate courts to speed up their 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).

Importantly, as regards cartel matters, the preliminary draft also incorporated a motion by Olivier Français (18.4282) as adopted by the Swiss parliament on 1 June 2021. 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.

The consultation ran until 11 March 2022 and it is now up to the State Secretariat for Economic Affairs and the Federal Council to take the consultation answers into consideration and to submit to the Swiss parliament a concrete draft for deliberation, respectively. It remains to be seen whether the revision of the Cartel Act will be successful, as earlier attempts have failed.

Revision of the Vertical Agreements Communication

The Commission is currently revising its Vertical Agreements Communication. The main aims of this revision are harmonising the Swiss regime with the revised EU Block Exemption Regulation No. 2022/720 and the related Guidelines on Vertical Restraints applicable in the European Union since 1 June 2022 as well as updating the Commission's Vertical Agreements Communication to the recent practice of the Swiss competition courts, in particular the Swiss Federal Supreme Court.

Motion by Gerhard Pfister

A motion by Gerhard Pfister of 27 September 2018 (18.3898, 'Effective enforcement of the Cartel Act in the motor vehicle sector), requires the Federal Council to issue an ordinance to protect consumers and small and medium-sized enterprises from practices that distort competition in the motor vehicle sector. The motion has been adopted by the Swiss parliament. Hence, it is up to the Federal Council to prepare a preliminary draft for consultation as well as a draft act with a corresponding dispatch for deliberation in the Swiss parliament.

Motion by Hans Wicki

A motion by Hans Wicki of 30 September 2021 (21.4189, 'Preserving the principle of investigation – no reversal of the burden of proof in the Cartel Act'), is directed to strengthen the principle of investigation in the Cartel Act, so that the constitutional presumption of innocence is fully upheld in competition proceedings. The motion was accepted by the Council of States in December 2021 and is expected to be dealt with by the National Council in 2022.

Motion by Pirmin Bischof

A motion by Pirmin Bischof of 30 September 2016 (16.3902, 'Prohibition of adhesion contracts of online booking platforms against the hotel industry'), called 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.

The motion has been adopted by the Swiss parliament. On 17 November 2021, the Federal Council adopted the draft act and a corresponding dispatch on the amendment of the Federal Act against Unfair Competition. By qualifying price parity clauses as abusive general terms and conditions – and, thus, as void – price-fixing clauses in contracts between online booking platforms and accommodation providers shall be prohibited.

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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 at 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 parliament and entered into force on 24 June 2020 as Law No. 31165 (the Amendment Law), which was published in Official Gazette on 23 June 2020. According to the recital of the Amendment Proposal, these amendments add the experience of the Competition Authority (the Authority) 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 Authority. The Authority has administrative and financial autonomy, and consists of the Competition Board (the Board), the presidency and service departments. Six divisions with sector-specific work distribution handle enforcement of the Competition Law through approximately 190 case handlers as at 1 January 2022. Assisting the six technical divisions and the presidency are:

- an economic analysis and research department;
- a decisions unit;
- an information management unit;
- an external relations unit;
- a training and competition advocacy department;
- a regulation and budget department;
- a management services unit;
- a cartel and on-site inspections support unit; and
- a strategy development unit.

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 an instance of 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.

The Authority's administrative enforcement is also supplemented with private lawsuits. In the case of private suits, cartel members are adjudicated before the courts. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigation has increasingly made its presence felt in the cartel enforcement arena. Most courts wait for the Authority's decision and build their own decision on that of the Board.

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 hardcore 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)). The De Minimis Communiqué serves to grant the Board the opportunity to focus on more significant competition law matters as well as bringing Turkish competition law closer to the standards of 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. There is also the amended Guidelines on Vertical Agreements, 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 at September 2022. 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:

- the Communiqué on the Increase of the Lower Threshold for Administrative Fines specified in paragraph 1, article 16 of the Competition Law (to be valid until 31 December 2022);
- the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition (Communiqué No: 2021/3);
- the Communiqué on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position (Communiqué No. 2021/2);
- the Communiqué on the Payments to be Made by Joint-Stock and Limited Companies pursuant to the Competition Law (Communiqué No: 2017/4);
- the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3);
- the Block Exemption Communiqué on R&D Agreements (Communiqué No. 2016/5);
- the Block Exemption Communiqué on Specialization Agreements (Communiqué No. 2013/3);
- the Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2);
- the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, enacted in 2022;
- the Guidelines on the Assessment of Horizontal Mergers and Acquisitions, enacted in 2022;
- the Guidelines on Examination of Digital Data during On-Site Inspections, enacted on 8 October 2020;
- the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control, enacted on 5 April 2018;
- the Guidelines on Vertical Agreements, enacted on 29 March 2018;
- the Guidelines Explaining the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3), enacted on 7 March 2017;
- the Competition Assessment Guidelines, enacted on 20 August 2014;
- the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position, enacted on 29 January 2014;
- the Guidelines on the General Principles of Exemption, enacted on 28 November 2013;
- the Guidelines on Horizontal Cooperation Agreements, enacted on 30 April 2013; and
- the Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels, enacted on 17 April 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 Treaty establishing the European Community). 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 offer a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Similar to the TFEU, the Amendment Law introduced the de minimis principle, whereby the Board will be able to decide to not launch full-fledged investigations into agreements, concerted practices and decisions of association of undertakings that do not exceed the 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 the 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, 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) of the 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 Communiqués are:

- No. 2002/2 on Vertical Agreements;
- No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- No. 2008/3 for the Insurance Sector;
- No. 2008/2 on Technology Transfer Agreements;
- No. 2013/3 on Specialisation Agreements; and
- No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the European Union. 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 of the Competition Law.

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 the 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 a merger control regime under article 7 of the Competition Law if the applicable turnover thresholds are met. However, if the joint venture is considered not to be full function, it would be subject to a test under article 4 of the Competition Law 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 that act as 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?

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, provided that 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; *Güneș 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 shortfalls (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?

It is fair to say that export cartels do not fall within the scope of the jurisdiction of the Competition Authority (the Authority), 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 (the 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 Șöförler 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 Competition Authority (the Authority) experts will be submitted to the Board within 30 days of when 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. 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 approximately 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 currently 47,409 Turkish lira (Communiqué on the Increase of the Lower Threshold for Administrative Fines specified in paragraph 1, article 16 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) (Communiqué No. 2022/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations and dawn raids. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). It may also lead to the imposition of a fine of 0.05 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision for each day of the violation (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

The Competition Law provides vast authority to the Authority on dawn raids. Judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Competition Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer provided that there is a quickly 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 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 amendments to the Competition Law that passed through parliament and entered into force on 24 June 2020 as Law No. 31165 also include 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 proposed amendment to the Competition Law'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 (ie, 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 European Union–Turkey Association Council 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 European Union 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, South Korea, Bulgaria, Portugal, Bosnia and Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Authority also has close ties with the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the 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?

It is fair to say that the interplay between jurisdictions does not, in practice, materially affect the Board's handling of cartel investigations, including cross-border cases. The principle of comity does not constitute an explicit provision in Turkish competition law. A cartel's conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on Turkish markets.

CARTEL PROCEEDINGS

Decisions

15 | How is a cartel proceeding adjudicated or determined?

The Competition Board (the Board) can initiate an inspection into an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. 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 litigation increasingly makes its 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 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 European Union, 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 (the 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 on 5 July 2012, the 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 administrative acts and, thus, legal actions against them shall be pursued in accordance with the Administrative

Procedure Law No. 2577. The judicial review comprises both procedural and substantive reviews.

As per article 27 of the Administrative Procedure Law No. 2577, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff, the court, by providing its justifications, may decide on a stay of execution if executing the decision is likely to cause serious and irreparable damages and the decision is highly likely to be against the law (ie, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes approximately 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 both on 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 No. 2577. 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 which 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 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 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 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 to the state that it was in 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 if there is a possibility of serious and irreparable damages.

Civil actions

Civil actions are still rare, but are increasing in frequency. 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 therefore supplements administrative enforcement with private lawsuits. Articles 57 et seq of the Competition Law entitle any legal or natural 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 (among others) the

level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, and compliance with their commitments 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 levels. 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 of this regulation 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. 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 onefold 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 is 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 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 undertaking's 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 (the 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 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 undertaking's business in relation to its annual gross revenue.

Regarding mitigating factors, there have been several cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12–42/1258–410; *Efes*, 12–38/1084–343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13–49/711–300; *Industrial Gas*, 13–49/710–297).

In *Industrial Gas*, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's *Mey İçki* decision (17–07/84–34, 16 February 2017) 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 (16–37/628–279, 7 November 2016), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts since the undertaking amended its contracts before the final decision of the Board.

Director disqualification

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

The sanctions specified in terms of undertakings themselves may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as an infringing entity's employees, or board or executive committee

members, if such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific to 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 of 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 their 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 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 frequency. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations. Civil damage claims have usually been settled by the parties involved prior to the court rendering its judgment.

Indirect purchaser claims have not yet been tested before the courts. However, there is no regulation that prevents potential umbrella purchaser claims as well since article 58 of the Competition Law focuses on the existence of damage by stating that:

> *Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited.*

Class actions

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

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. While article 73 of Law No. 6502 on the Protection of Consumers allows class actions by consumer organisations, these actions are limited to violations of this law 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 to 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 a 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, and 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 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 the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the 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, the duration of the cartel and the 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 a 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* (12–46/1409–461, 27 September 2012), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

In 2015, the Board slightly eased the tensions and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the Board's reasoned decision of an investigation of fresh yeast producers was released (14–42/783–346). The decision was the first of its kind, where the Board granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was granted to a submission made after the initiation of a preliminary investigation and dawn raids were executed. It served as a landmark case in that it was the first example of

the Board granting immunity after dawn raids. The Board justified this unprecedented action by claiming that substantive evidence and added value were brought in through the leniency application. In parallel, in the *Mechanical Engineering* decision (17-41/640–279, 14 December 2017), 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 roll-on, roll-off transportation sector (19–16/229–101, 18 April 2019), the Board decided that the administrative fine for an undertaking that applied for leniency during the investigation should be halved if the information that it provides significantly contributed to the investigation. The Board further noted that relevant contributions included providing evidence that the violation's starting point was earlier than what was detected during the on-site inspection, and evidence illustrating that price information was exchanged by the violating undertakings and further details on how the price exchange was conducted. The case is therefore expected to result in an increase in 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 applicable to subsequent cooperating parties as well. While the Board can also evaluate the information or documents ex officio, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request, in writing, confidentiality from the Board and justify the confidential nature of the information or documents that they are requesting be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Board has decided on the case.

Settlements

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

The amendments to the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) that passed through parliament and entered into force on 24 June 2020 as Law No. 31165 introduced two new mechanisms inspired by EU law that 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 Competition Law, which prohibit restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide to not launch a full-fledged investigation following the preliminary investigation or to end an 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, the Competition Law 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 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 pieces of evidence that constitute a basis for the allegations;
- the potential reduction rate to be applied in case of settlement; and
- the range of the potential administrative monetary fine that might be imposed against the settling party.

Following the settlement negotiations, the Board would adopt an interim decision, which would include (among other factors) the nature and scope of the alleged violation, the maximum rate for the administrative monetary fine in accordance with 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 that shall include (among other things) 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 when:

- there is a substantial change in any aspect of the basis of the decision;
- the relevant undertakings does not comply 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 from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such a manager or employee. The

reduction rates and conditions for immunity or reduction are the same as those designated for 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?

Since 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, provided that 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 (the Authority) or trade secrets of other firms or trade associations.

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?

Provided that 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 that bind 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 Corporate Tax Law No. 5520, any administrative monetary fine is not considered 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 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 an 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 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 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, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

Following amendments in 2008, the new version of Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

- the level of fault and amount of possible damage in the relevant market;
- the market power of the undertakings within the relevant market;
- the duration and recurrence of the infringement;
- the cooperation or driving role of the undertakings in the infringement;

- the financial power of the undertakings; and
- compliance with commitments.

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343).

However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13–49/711–300; *Industrial Gas*, 13–49/710–297).

In *Industrial Gas*, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's *Mey İçki* decision (17–07/84–34, 16 February 2017) 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 (16–37/628–279, 7 November 2016), the Board applied a 60 per cent reduction to an undertaking due to its compliance efforts since the undertaking amended its contracts before the final decision of the Board.

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UPDATE AND TRENDS

Recent cases

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

According to the annual report of the Competition Authority (the Authority) for 2021, the Competition Board (the Board) decided on 460 cases, of which 74 were related to competition law violations. Of that 74, 51 were related to article 4 of the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law) and 33 of 51 cases related to horizontal agreements.

In terms of cartel enforcement activity, the Board recently issued a reasoned decision that concludes imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier for their cartel arrangement (28 October 2021, 21-53/747-360). The Board found that five chain markets – directly or indirectly through their suppliers – and their supplier:

- coordinated their prices or price transitions;
- shared competition-sensitive information;
- colluded on and heightened prices through retailers against the good of consumers; and
- observed and maintained said collusion by using sanction strategies.

Thus, the Board decided that the defendants had violated article 4 of the Competition Law. It imposed an administrative monetary fine of over 2.6 billion Turkish lira in total.

Furthermore, the Board decided that Novartis Sağlık Gıda ve Tarım Ür San ve Tic AŞ (Novartis) and Roche Müstahzarları San AŞ (Roche) violated article 4 of the Competition Law in relation to the drugs Lucentis and Altuzan, both of which are used for the treatment of age-related macular degeneration eye diseases (21 January 2021, 21-04/52-21). The Board determined that Novartis and Roche had agreed to shift market demand towards Lucentis in intraocular treatment and discourage the use of Altuzan by providing misleading information to administrative and judicial authorities, highlighting Altuzan's side effects and the risk of endophthalmitis. Ultimately, the Board determined that Novartis and Roche had been engaged in cartel activity and acquiring unlawful profits by seeking to shift demand towards the more expensive medication, Lucentis. The Board concluded that the actions of Novartis and Roche constituted a violation of article 4 of the Competition Law and it imposed an administrative fine of 165,464,716.48 Turkish lira on Novartis and 112,972,552.65 Turkish lira on Roche.

In one of its recent decisions, the Board considered a unilateral exchange of information sufficient for the existence of coordination and concerted practice (4 March 2021, 21-11/155-64). The Authority examined whether 74 undertakings that carry out container transportation to and from the ports in the centre and surrounding districts of Izmir or from these ports, or both, violated article 4 of the Competition Law by price determination and customer sharing. The Board determined that the relevant undertakings had entered into a price-fixing agreement. In addition, the Board decided that the relevant undertakings had engaged in a customer sharing agreement with each other relating to information about which customers were requesting offers and the offers made to customers. The Board concluded that these agreements or concerted practices, or both, which are in the nature of a cartel, violate article 4 of the Competition Law. The Board decided that 72 of the 74 undertakings that are parties to the investigation violated article 4 of the Competition Law by price-fixing and customer sharing, and imposed administrative monetary fines on the 72 undertakings.

Also, in the *MDF* decision, the Board concluded that 11 producers of medium-density fibreboards (MDF) and chipboards were involved in a cartel agreement to fix the price increase timing and the percentages regarding MDF and chipboard products (1 April 2021, 21-18/229-96). In the relevant case, although the violation occurred in two different time periods (2014 and 2016–2017), the Board determined that a single base fine for both time periods should be applied with respect to the violation.

The investigations that have been initiated by the Authority to date 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 the parliament. They entered into force on 24 June 2020. According to the recital of the proposed amendment to the Competition Law, these amendments add the Authority's experience of more than 20 years of enforcement to the Competition Law and bring it closer to EU law. There are no further reviews or changes expected at this stage.

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 United States 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 (the FTC Act) prohibits 'unfair methods of competition' and 'unfair or deceptive acts or practices' (15 USC section 45(a)(1)). 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. Hardcore agreements among competitors to fix prices (or any component of pricing), restrict output, rig bids, or allocate customers or geographic territories are considered 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, speech, 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 of the Sherman Act if it 'holds the promise of increasing a firm's efficiency and enabling it to compete more effectively' (*Copperweld Corp v Independence Tube Corp*, 467 US 752, 768 (1984)). Importantly, not every joint venture agreement raises competitive issues (eg, if the participants are not competitors) and a legitimate collaboration can violate US 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 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 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 (15 USC section 6a) (FTAIA). 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' (15 USC section 6a(1)(A)). 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 US 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' (15 USC section 1013(b)). The courts have also created various industry-specific exemptions, including the well-known baseball exemption.

Other exemptions and immunities apply more broadly but generally share the characteristic that they seek to avoid disruption of an existing regulatory scheme. The filed-rate doctrine – or *Keogh* doctrine – for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161-65 (1922)). Similarly, the political question doctrine removes from federal judicial jurisdiction cases

raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Government-approved conduct

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

A series of court decisions beginning with *Parker v Brown*, 317 US 341 (1943) have exempted state governments from antitrust liability for conduct that, if engaged in by a private actor, would certainly be considered anticompetitive. This state action doctrine – or *Parker* doctrine – may also extend to private actors in certain limited circumstances, when their conduct is taken in furtherance of an express regulatory scheme under state policy and is subject to state supervision.

Other exemptions and immunities seek to avoid disruption of an existing regulatory scheme. The filed-rate doctrine – or *Keogh* doctrine – for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161-65 (1922)). Similarly, the political question doctrine removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Internationally, the foreign sovereign compulsion doctrine may provide a defendant with antitrust immunity if it can establish that it was compelled to violate US antitrust law because it was impossible to comply with both US antitrust law and the law of a foreign jurisdiction simultaneously.

INVESTIGATIONS

Steps in an investigation

11 | What are the typical steps in an investigation?

The existence of a cartel typically comes to light when a participant applies for leniency and provides evidence of criminal activity. Many leniency applications are now triggered as a result of corporate compliance programmes. Other common sources of information for the enforcement agencies include existing investigations or litigation in related industries, whistle-blowers, tips from customers or competitors, or even publicly available evidence of suspicious market behaviour. Evidence of cartel behaviour has also been uncovered during merger control investigations conducted under the Hart–Scott–Rodino Act.

In a criminal investigation, the Department of Justice (DOJ) presents evidence to a grand jury, the purpose of which 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 that 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 at 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 195 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 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 litigation is resolved by way of a dispositive motion or 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, permits 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. For criminal defendants, the deadline is 14 days from the date of entry of the 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 of 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 footnote 4 (NDCA 18 July 2011)). In that case, the judge imposed a fine of US$500 million. In 2019, total criminal penalties of US$365 million were assessed, rising to US$529 million in 2020 and declining to US$151 million in 2021.

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 2019, and 15 months between 2020 and 2021.

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 through 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 such as 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, 226–227 (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 on 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 they 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?

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, provide for disqualification of, among others, corporate directors or officers upon conviction of any felony or misdemeanour in connection with the purchase or sale of any security, which may be read to include antitrust violations tied to the purchase or sale of securities (Rule 262(a)(1), Rule 503(a)(1) of Regulation CF and Rule 506(d)(1) (i)). Equally significantly, in selecting directors and senior-level officers, corporations generally look for candidates with a strength of character, inquiring minds, and a reputation for good judgement and wisdom. It is difficult to conceive of how a corporation could continue to rely on a director or officer who is subject to an order in a cartel case – that is, someone who had participated in cartel activities and either been convicted or is a cooperating witness – without exposing the corporation to liability or increased criticism from activist investors or corporate gadflies.

Debarment

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

Debarment of federal contractors from government procurement procedures is available as a discretionary sanction in response to cartel infringements. The Federal Acquisition Regulation System governs the process through which government agencies procure goods and services. The agency head or their 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). In this case, 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 (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 *In re VisaCheck/MasterMoney* case, included a US$3.4 billion cash settlement and injunctive relief valued at upwards of US$87 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 leniency programme provided by the Department of Justice (DOJ). 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 provided that 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 the 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 of whether to plead guilty or to take its risks at trial. As with the decision of whether to seek amnesty, the decision of 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 that define 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 through plea agreements 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 2022, the DOJ indicted 12 individuals – including seven owners or co-owners of companies, two chief executive officers, two managers and one upper-level employee – for bid rigging, price-fixing and other violations under section 1 of the Sherman 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?

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 or 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 their desire. Ultimately, the decision whether separate counsel is necessary belongs to the lawyer and their clients, not the DOJ.

Multiple corporate defendants

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

It is generally inadvisable for the same counsel to represent multiple corporate defendants in a single civil case when those defendants are not part of a single corporate family. While it is common for counsel to represent both a parent and subsidiary company in a single instance of 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 to agree prospectively 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 in certain circumstances considers enforcement actions taken by other jurisdictions when recommending fines or other sanctions. For example, the DOJ has recommended, in some plea agreements, that time served in a 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 in which 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 (FTC) 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 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 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?

Introduced in the House of Representatives

The Transportation Fuel Market Transparency Act (HR 7800) proposes to create the Transportation Fuel Monitoring and Enforcement Unit within the FTC for the purpose of 'support[ing] transparent and competitive market prices [for crude oil and transportation fuel]; [and] identify[ing] any market manipulation, reporting of false information, use of market power to disadvantage consumers, or other unfair method of competition' (section 3(a)(2)(A)(i)–(ii)).

The Reduced Costs and Continued Cures Act (HR 5260) proposes to empower the FTC to 'initiate proceedings against parties to settlements of patent infringement claims that have anticompetitive effects with respect to drugs or biologics' (section 27(b)).

The Meat and Poultry Special Investigator Act (HR 4103) proposes to create the Office of the Special Investigator for Competition Matters to investigate violations of the Packers and Stockyard Act and to liaise 'with the Department of Justice and Federal Trade Commission with respect to competition and trade practices in the food and agricultural sector' (section 416(b)–(c)).

The FTC Autonomy Act (HR 4488) proposes to empower the FTC to bring its own actions to recover certain penalties for certain violations.

The Open App Markets Act (HR 5017) empowers the FTC to enforce as an unfair method of competition any self-preferencing non-interoperability use of non-public business information and interference with legitimate business communications by certain app companies.

The One Agency Act (HR 2926) proposes to transfer antitrust enforcement actions from the FTC to the Department of Justice (DOJ) to streamline antitrust enforcement and prevent antitrust overlap.

The Preserve Access to Affordable Generics and Biosimilars Act (HR 2891) authorises the FTC to initiate proceedings against parties to an agreement or settlement regarding a drug or biological product, especially when the filer of the generic drug or biosimilar application receives anything of value in exchange for foregoing research, development, manufacturing, marketing or sales of the generic or biosimilar drug.

The Stop Stalling Access to Affordable Medications Act (HR 2883) allows the FTC to sue on the basis of engaging in an unfair method of competition any individual or entity that brings any objectively baseless petition to the Food and Drug Administration to interfere with a competitor's application for market approval of a drug.

The Affordable Prescriptions for Patients through Promoting Competition Act of 2021 (HR 2873) authorises the FTC to enforce a ban on product-hopping (ie, when a drug manufacturer with an expiring patent switches to a follow-on product covered by a later-expiring patent).

The Clarifying Legality and Enforcement Action Reasoning Act (HR 2690) requires FTC to publish an annual report containing information about the number of investigations into unfair or deceptive practices, including the number and disposition of such investigations.

The No Oil Producing and Exporting Cartels Act of 2021 (HR 2393) penalises foreign states for cartelising in a way that impacts the market, supply, price or distribution of oil, natural gas or any other petroleum product in the United States, and eliminates the sovereign immunity and state action doctrine as defences to this bill.

The Workforce Mobility Act of 2021 (HR 1367) prohibits the use of no-compete agreements in the context of commercial enterprises and grants enforcement power to the FTC.

Passed the House of Representatives

The Consumer Fuel Price Gouging Prevention Act (HR 7688) proposes to equip FTC and state attorneys general with enforcement powers against unconscionable pricing of consumer fuel, at wholesale or retail, during a period where the President issues an energy emergency proclamation. This act passed on 19 May 2022.

The Consumer Safety Technology Act (HR 3723) requires the FTC to study and issue a report on its efforts to prevent unfair or deceptive acts or practices relating to digital tokens as well as future recommendations to further protect consumers. This act passed on 24 June 2021.

The Consumer Protection and Recovery Act (HR 2668) permits the FTC to seek monetary relief in federal court, undoing the Supreme Court's holding in *AMG Capital Management, LLC v Federal Trade Commission*. This act passed on 20 July 2021.

Introduced in Senate

The Oversight to Lower Oil Prices Act (S 4049) requires the FTC to investigate for evidence of market manipulation or false reporting in the oil, gas, petroleum and petroleum product industries.

The American Innovation and Choice Online Act (S 2992) authorises the FTC and DOJ to enforce against online platforms certain types of anticompetitive conduct, including self-preferencing, limiting interoperability and using non-public data anticompetitively.

The Tougher Enforcement Against Monopolies Act (S 2039) proposes to create the Antitrust Consumer Damages Fund from which the assistant attorney general may pay certain consumers who have suffered antitrust injuries under the Sherman Act.

The Competition in Professional Baseball Act proposes to remove the antitrust exemption for professional baseball clubs and subjects the clubs to enforcement under the Clayton Act and section 5 of the Federal Tort Claims Act.

The Journalism Competition and Preservation Act of 2021 (S 673) creates a four-year safe harbour from antitrust scrutiny for publishers of online content to collectively negotiate with dominant online platforms about the terms of online content distribution.

The Senate Resolution about Anticompetitive Conduct in Beef Packing Industry (S J Res 47) directs the FTC to investigate and report on price-fixing and other types of anticompetitive conduct in the beef packing industry.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Australia	
Is the regime criminal, civil or administrative?	The Australian competition law regime prohibits cartels under civil law and makes it a criminal offence for corporations and individuals to participate in a cartel (or attempt to do so).
What is the maximum sanction?	For corporations: • A$50 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, 30 per cent of the corporation's adjusted turnover during the breach period of the offence. For individuals: • up to 10 years in jail or fines of up to A$440,000 per criminal cartel offence, or both; or • a pecuniary penalty of up to A$2.5 million per civil contravention.
Are there immunity or leniency programmes?	Yes. The Australian Competition and Consumer Commission (ACCC) Immunity and Cooperation Policy sets out the policies of the 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 Competition and Consumer Act 2010 (Cth) if:
	• it is carried on by:
	  • companies incorporated or 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 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 2005 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 the Austrian jurisdiction if the conduct affects Austria.

Belgium	
Is the regime criminal, civil or administrative?	The regime is of an 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 (including criminal immunity for individuals in cases of bid rigging of public procurement).
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). However, any sanction imposed by another competition authority will be taken into account by the Belgian Competition Authority when determining its own sanction.

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.

Brazil	
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 (chief executive officers, 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 programme entitles the applicants to full criminal immunity and full or partial immunity regarding administrative fines. The leniency agreement does not grant immunity for civil damages recovery lawsuits.
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 or administrative provisions
What is the maximum sanction?	A price-fixing, customer or market allocation, output restriction or bid rigging conviction carries penalties of up to 14 years in prison and fines in amounts that are at the discretion of the court (five years and C$10 million for pre-2010 conduct, and 14 years and C$25 million for conduct between 2010 and 2022). The civil or administrative provisions permit a prohibition order only.
Are there immunity or leniency programmes?	An immunity programme has been in place since 2000. It is accompanied by a formal leniency programme for subsequent cooperating parties.
Does the regime extend to conduct outside the jurisdiction?	International conspiracies that affect Canadian markets fall within the jurisdictional scope of the federal Competition Act (the Act). However, conspiracies that relate only to the export of products from Canada are expressly exempted.
Remarks	Amendments to the Act 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. A new criminal offence that applies to employer wage-fixing and no-poach agreements will come into force in 2023.

Cyprus	
Is the regime criminal, civil or administrative?	The regime is administrative, containing certain provisions concerning criminal offences mainly in relation to non-compliance with the information requests and decisions of the Commission for the Protection of Competition.
What is the maximum sanction?	The maximum sanction that may be imposed for a cartel infringement is 10 per cent of the turnover achieved by the undertaking in the preceding year or up to the sum of 10 per cent of the total annual turnover of every undertaking that is a member of the infringing association of undertakings.
Are there immunity or leniency programmes?	A leniency programme is in place, providing for both immunity and reduction from administrative fines in cartel cases.
Does the regime extend to conduct outside the jurisdiction?	The regime applies to conduct occurring outside the jurisdiction insofar as the conduct prevents, restricts or distorts competition in Cyprus by either object or effect.

Denmark	
Is the regime criminal, civil or administrative?	The regime for sanctions on undertakings for cartel activity is civil, while the regime for individuals is criminal. Private damages claims are possible in accordance with the Competition Damages Act through the civil 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 to up to six years in the 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 Danish Competition Act (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 European Commission (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 of 16 December 2002 on the implementation of the rules of competition, 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 EC's jurisdiction extends to conduct outside of the European Union, provided that such conduct has an effect in the European Union. In the context of a cartel with a global scope, the EC may decide to include in its calculation of the value of sales and sales made outside the European Economic Area (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 EU 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. For the calculation of the amount of the fine proposal, the relevant turnover is the turnover of the financial year preceding the Finnish Competition and Consumer Authority's proposal to the Market Court. The Market Court and the Supreme Administrative Court must base the maximum amount of the fine on the turnover of the financial year preceding the decision of the Market Court or the Supreme Administrative Court.
Are there immunity or leniency programmes?	Yes, there are immunity and leniency programmes largely harmonised with those of the European Commission and the European Competition Network.
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 group's 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 German Act Against Restraints of Competition 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 Competition Commission (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 provided that it has an impact in Hong Kong.
Remarks	Cartel conduct has been the traditional focus of the Commission's enforcement efforts and represents nearly all of the cases taken to the Competition Tribunal to date.

India	
Is the regime criminal, civil or administrative?	Civil.
What is the maximum sanction?	The Competition Commission of India (CCI) can impose a penalty of up to 10 per cent of the turnover of the enterprise for each year of continuance of the cartel or of up to three times its profits for each year of the continuance of the cartel, whichever is higher.
Are there immunity or leniency programmes?	The Competition Act 2022 (the Act), together with the Competition Commission of India (Lesser Penalty) Regulations 2009, provides for reduction of penalties on enterprises and individuals who apply for a lesser penalty and satisfy the stringent conditions. The regime gives the CCI considerable discretion in granting the level of reduction. The first applicant is eligible for up to 100 per cent reduction in penalty, the second applicant can obtain a reduction of up to 50 per cent, and the third and any subsequent applicant can obtain a reduction of up to 30 per cent.
Does the regime extend to conduct outside the jurisdiction?	The Act empowers the CCI to inquire into an agreement under section 3 of the Act even where it has been entered into outside India, any party is outside India, or any other matter or practice or action arising out of an agreement that is outside India, provided that the agreement has, or is likely to have, an appreciable adverse effect on competition in India.

Malaysia	
Is the regime criminal, civil or administrative?	Civil. However, obstructing the Malaysia Competition Commission's investigation may lead to criminal sanctions.
What is the maximum sanction?	Ten 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 Mexican 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, 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 COFECE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by COFECE as indicia of the extensive effects of the practice in Mexico's national territory.
Remarks	In June 2013, the Constitution was amended to transform the competition commission into an autonomous constitutional entity and to increase the effectiveness of competition policy and law enforcement. On 7 July 2014, a new Competition Law and modifications to the Federal Criminal Code came into force. In November 2014, COFECE issued new regulations to the Federal Law of Economic Competition (LFCE). In January 2015, the Federal Telecommunications Institute (IFT) issued new regulations to the LFCE regarding broadcasting and telecommunications industries. In June 2015, COFECE issued new guidelines regarding the amnesty programme and the initiation of investigations. In December 2015, COFECE 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 Law No. 23/2018 of 5 June 2018 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 (AdC). 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 2012 (the Competition Act) put in place the new competition regime, thereby superseding Law No. 18/2003 of 11 June 2003. The Competition Act considerably enhanced the powers of investigation granted to the AdC, notably in respect of the 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 under the Competition Act 2004 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 has signed enforcement cooperation agreements with the competition authorities of Canada, China, Indonesia, Japan and the Philippines.

South Korea	
Is the regime criminal, civil or administrative?	Administrative, criminal. Civil damages actions possible.
What is the maximum sanction?	A remedial order (an administrative fine of 10 per cent of relevant sales for cartels that ended before 30 December 2021 and 20 per cent of relevant sales for all other cartels) and a criminal penalty of 200 million won for corporations and individuals, and a term of imprisonment of three years for individuals.
Are there immunity or leniency programmes?	Yes, there is a leniency programme.
Does the regime extend to conduct outside the jurisdiction?	Yes, if the conduct affects the Korean market.
Remarks	Being the first to apply for leniency and cooperating diligently and in good faith throughout the KFTC's investigation will exempt companies from sanctions.

Switzerland	
Is the regime criminal, civil or administrative?	For undertakings, the regime is civil and administrative. However, fines for hardcore restraints also qualify as criminal sanctions in the meaning of the European Convention of Human Rights and investigations should, in principle, respect the applicable 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 intentionally 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 prior 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, provided that 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.

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, 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 damages 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 that 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.

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