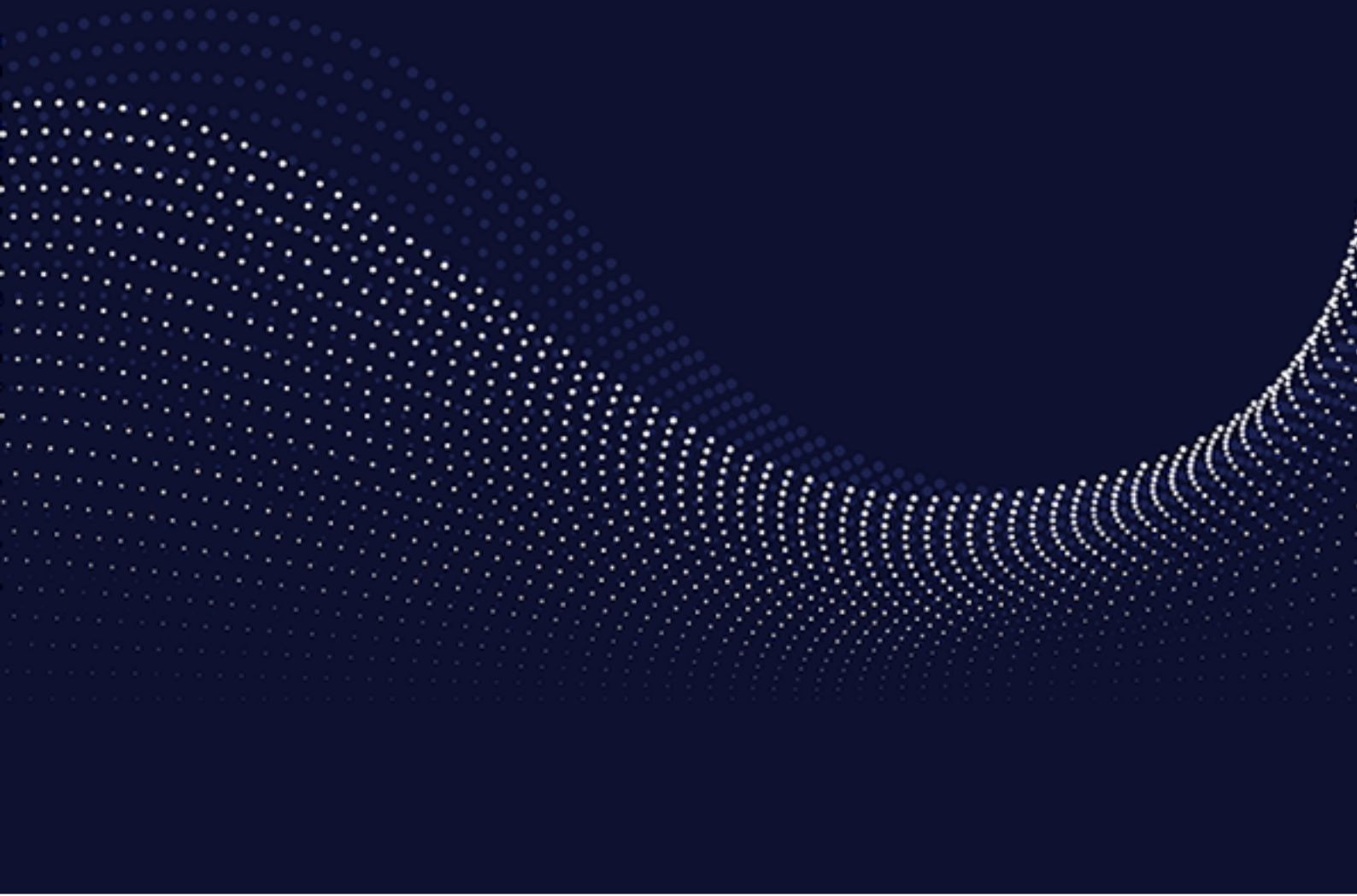
LEXOLOGY
Getting The Deal Through

CARTEL REGULATION 2024

Contributing Editor

Neil Campbell

McMillan LLP



Cartel Regulation 2024

Contributing Editor

Neil Campbell

McMillan LLP

Quick reference guide enabling side-by-side comparison of local insights, including relevant law and institutions; application of the law and jurisdictional reach; international cooperation; specifics of investigations and cartel proceedings; criminal, civil and administrative sanctions; private damage claims and class actions; treatment of cooperating parties; defending a case; getting any fine down; and recent trends.

Generated on: November 17, 2023

LEXOLOGY
Getting The Deal Through

Contents

Denmark

Frederik André Bork, **Søren Zinck**, **Olaf Koktvedgaard**
Bruun & Hjejle

European Union

Hendrik Viaene, **Stéphane Dionnet**
McDermott Will & Emery

Finland

Mikael Wahlbeck , **Antti Järvinen**, **Niko Hukkinen**, **Amanda Pekkala**, **Susanna Kyllöinen**
Frontia Attorneys Ltd

Germany

Markus M Wirtz, **Silke Möller**
Glade Michel Wirtz

Greece

Victoria Mertikopoulou, **Ifigeneia Argyri**
KYRIAKIDES GEORGOPOULOS Law Firm

India

Harman Singh Sandhu, **Manika Brar**, **Yaman Verma**, **Nitika Dwivedi**
Shardul Amarchand Mangaldas & Co

Japan

Kaoru Hattori, **Yoshitoshi Imoto**, **Ryohei Tanaka**
Nagashima Ohno & Tsunematsu

Malaysia

Nadarashnaraj Sargunaraj, **Nurul Syahirah Azman**
Zaid Ibrahim & Co

Mexico

Rafael Valdés Abascal, **Enrique de la Peña Fajardo**
Valdes Abascal Abogados

Netherlands

Stijn de Jong, **Roos Elemans**
Stibbe

Portugal

Mário Marques Mendes, **Pedro Vilarinho Pires**
Gomez-Acebo & Pombo Abogados

Singapore

Lim Chong Kin, **Corinne Chew**
Drew & Napier LLC

South Korea

John H Choi, **Jooyoung Park**, **Changhun Lee**, **Hyunah Kim**, **Jae-Hyuk Choi**
Shin & Kim

Switzerland

Mario Strebel, **Fabian Koch**
CORE Attorneys Ltd

United Kingdom

Samantha Ward, **Elizabeth Morony**, **Ben Jasper**, **Bethany Downey**
Clifford Chance

Overview

Neil Campbell

McMillan LLP

This 24th edition of LexGTDT *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. There is almost universal consensus that certain types of competitor coordination are so unlikely to have pro-competitive effects that it is appropriate to prohibit and penalise them without the need for a case-specific determination of anticompetitive effects.

Despite soft convergence on the importance of cartel enforcement, there are significant differences between regimes. Cross-border cases are particularly complex due to differences in institutional design, legal standards, enforcement processes, and penalties or other remedies. The criminal liability and civil damages exposures in many jurisdictions are enormous. Cross-border coordination between some agencies is significant, although it is less frequent or extensive than in merger reviews, in part because of constraints arising from confidentiality rules and rights of defence.

There has been a decline in the use of immunity/amnesty/leniency regimes in many jurisdictions in recent years. It is possible that the deterrent effects of large penalty and damage exposures in an increasing number of jurisdictions may be deterring 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 enforcers are responding by enhancing their bid-rigging detection, whistle-blower, electronic evidence gathering and other monitoring and enforcement mechanisms.

Competition in digital markets has now become a major focus for competition enforcers. While much of the policy and enforcement activity relates to unilateral conduct and market power, new forms of competitor coordination are also receiving scrutiny. In particular, the possibility that collusion that may be facilitated or implemented through algorithms is a new frontier that will produce challenging issues for market participants and enforcers.

This edition of LexGTDT *Cartel Regulation* provides in-depth explanation of how cartel regimes work in practice, including recent developments over the past year and an overview of future changes expected in each of the jurisdictions covered.

This resource is structured to provide consistent presentation and easy access to the relevant information about each key subject in each jurisdiction. The country contributions include an overview of legislation and the 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 litigation and enforcement proceedings.

The contributions to this edition of LexGTDT *Cartel Regulation* 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 LexGTDTteam for all the work they do to produce this excellent annual compendium.

Neil Campbell neil.campbell@mcmillan.ca

McMillan LLP

Read more from this firm on Lexology

Cartel Regulation: Quick reference tables

McMillan LLP

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Argentina

Is the regime criminal, civil or administrative?	The regime is administrative but refers to certain sections of the criminal code on offences relating to frauds in commerce and industry, and offences against the economic and financial order.
What is the maximum sanction?	The maximum sanction that may be imposed is a fine of up to 200 million adjustable units, equivalent to 32,510 million Argentine pesos.
Are there immunity or leniency programmes?	A leniency programme is in place, which provides exemptions and reductions for sanctions in cartel cases.
Does the regime extend to conduct outside the jurisdiction?	The regime applies only to conducts that have or may have an effect on the Argentine market.

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 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, with the exception of bid rigging of public procurement procedures, which is also considered to be a criminal offence. Individuals can be administratively prosecuted and sanctioned, and in cases of bid rigging can also be criminally 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?	The Administrative Council for Economic Defence (CADE) is the Brazilian antitrust agency responsible for prosecuting and adjudicating cartel cases in the administrative sphere. In the criminal sphere, collusive conducts (including cartels) are prosecuted by federal or state criminal prosecutors, who are completely independent of CADE. Criminal cases will be adjudicated by a criminal court. The Brazilian Civil Code also foresees that civil damages recovery lawsuits (individual claims or class actions) can be filed as follow-on or stand-alone claims by any affected third parties.
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, the maximum administrative fine is 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, the maximum administrative fine is 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 programme is exclusively granted to the initial applicant. Other companies or individuals may enter into settlement agreements (TCCs) with CADE to pursue a reduction in their respective fines. A TCC does not grant criminal immunity to individuals. The leniency agreement and the TCC do 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.

Bulgaria

Is the regime criminal, civil or administrative?	The regime is administrative and the relevant state authority is the Commission for Protection of Competition (CPC) for both undertakings and individuals. The decisions of the CPC are subject to appeal before the Administrative Court for Sofia District.
What is the maximum sanction?	The maximum administrative (pecuniary) sanction that the CPC can impose on the undertaking to which the infringement of a cartel prohibition could be attributed is up to 10% of the total turnover of that undertaking in the preceding financial year. The maximum fine that the CPC could impose on individuals who have assisted in the cartel commitment is 50,000 Bulgarian lev.
Are there immunity or leniency programmes?	The Law on Protection of Competition provides a leniency programme granting full or partial immunity to an undertaking that revealed a secret cartel.
Does the regime extend to conduct outside the jurisdiction?	The regime 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. Also, the Bulgarian competition authority has the power to directly apply article 101 of the Treaty on the Functioning of the European Union, provided the conditions therein are met.

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 came into force in June 2023, with penalties of up to 14 years in prison and fines in amounts that are at the discretion of the court.

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?	Administrative.
What is the maximum sanction?	The guidelines concerning fines, on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No 1/2003, allow for the imposition of significant financial sanctions on companies engaged in cartel activities, up to 10% of an undertaking's annual total turnover in the business year preceding the decision.
Are there immunity or leniency programmes?	The European Commission uses a leniency programme to encourage cartel members to come forward with information in exchange for reduced fines. The specific guidelines and procedures governing this programme are outlined in the 2006 Notice on immunity from fines and reduction of fines in cartel cases (the Leniency Notice).
Does the regime extend to conduct outside the jurisdiction?	The European Commission does not impose fines on individuals (although several member states themselves do).

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. 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 is immunity and leniency programmes largely harmonised with that of the Commission and the ECN.
Does the regime extend to conduct outside the jurisdiction?	Yes, if such conduct has effects in Finland.

Germany

Is the regime criminal, civil or administrative?	Administrative.
What is the maximum sanction?	Fines imposed against natural persons are limited to €1 million. An undertaking can be fined up to 10 per cent of its 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.

Greece

Is the regime criminal, civil or administrative?	The regime before the HCC is administrative. As per article 44 of the Greek Competition Act, criminal sanctions may be imposed on individuals by the courts. Civil actions before Greek civil courts are also provided under the provisions of Law 4529/2018, transposing Directive 2014/104/EU.
What is the maximum sanction?	Regarding administrative sanctions, the fine shall not exceed 10 per cent of the total worldwide turnover of the undertaking in the preceding business year. With regard to criminal sanctions in the case of cartels, imprisonment of at least two years and fines ranging from €100,000 to €1 million are provided.
Are there immunity or leniency programmes?	Yes, articles 29B to 29Z of the Greek Competition Act and HCC Decision 791/2022 set out the national leniency programme.
Does the regime extend to conduct outside the jurisdiction?	The Greek Competition Act applies to all restrictions of competition that affect or might affect Greece.

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.

Japan

Is the regime criminal, civil or administrative?	The regime is both criminal and administrative, however, the criminal procedure can only be initiated if the Japan Fair Trade Commission (JFTC) files an accusation with the Public Prosecutors' Office.
What is the maximum sanction?	**Criminal sanctions** Cartel activity is subject to a criminal fine of up to ¥500 million for a corporation, and imprisonment with hard labour for up to five years or a fine of up to ¥5 million or both. **Administrative sanctions** In addition to a cease-and-desist order, cartel activity is subject to an administrative surcharge payment order. The maximum administrative surcharge that may be charged for a cartel infringement is the total of (1) 10 per cent of the sales amount of the goods or services subject to the cartel for the period of the cartel; (2) 10 per cent of the amount of consideration paid to businesses closely related to the goods or services subject to the cartel; and (3) 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 repeated offenders and those who played a leading role, the administrative surcharge amount may be increased by 50 per cent.
Are there immunity or leniency programmes?	A leniency programme is in place, providing for both immunity from and reduction of administrative fines in cartel cases. The first leniency applicant before the commencement of the JFTC's investigation will also be exempt from criminal sanctions.

Does the regime extend to conduct outside the jurisdiction?	The regime applies to conduct occurring outside the jurisdiction insofar as the conduct substantially restricts competition in Japan.

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 18.7 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.
Remarks (if applicable).	In September 2023 COFECE issued a decision that determined that a non-compete agreement executed with a former partner (when their exit from the company was negotiated) may be interpreted as cartel conduct.

Netherlands

Is the regime criminal, civil or administrative?	The public enforcement of the Dutch cartel prohibition is governed by administrative law. In addition, it is possible to claim damages for anti-competitive behaviour in civil proceedings, but only to compensate for the loss suffered.
What is the maximum sanction?	The maximum fine for undertakings is €900,000 or 10% of annual turnover, if the latter is higher. These amounts will be multiplied if the infringement lasted for several years (with a maximum of four) and could be doubled in case of recidivism. In the worst case, the maximum fine can thus amount to either €7.2 million or 80% of annual turnover.
Are there immunity or leniency programmes?	It is possible to apply for leniency. The first undertaking to apply can be granted full immunity. Subsequent applicants can still obtain significant reductions of the fine.
Does the regime extend to conduct outside the jurisdiction?	Yes, article 6 of the Competition Act applies to restrictive behaviour that affects competition on (part of) the Dutch market.

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 double 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 or may produce effects within Portugal.
Remarks	Law No. 19/2012 of 8 May 2012 (the Competition Act) applies to the promotion and defence of competition, notably as regards restrictive practices and concentration operations that occur within the national territory or that have or may have effects within such territory.

Singapore

Is the regime criminal, civil or administrative?	The competition law regime in Singapore is civil and 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 (if applicable).	The CCCS can 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 (if applicable).	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.

Türkiye

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 (through disinformation or other fraudulent means), 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?	Türkiye is one of the 'effect theory' jurisdictions, where it may not matter whether: • the nationality of the cartel members; • where the cartel activity took place; or • whether the members have a subsidiary in Türkiye. Turkish markets, regardless of:

United Kingdom

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 can also be brought by any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of the prohibition under Chapter I of the Competition Act 1998.
What is the maximum sanction?	Criminal sanctions for individuals include custodial sentences of up to five years and fines. Civil sanctions for undertakings include fines of up to a maximum of 10 per cent of the worldwide turnover of the undertaking. Directors can also be disqualified for up to 15 years.
Are there immunity or leniency programmes?	The CMA offers three types of leniency. These vary in terms of the reductions offered and the eligibility criteria.
Does the regime extend to conduct outside the jurisdiction?	The regime governs agreement that are implemented or intended to be implemented in the United Kingdom, even if entered into outside of the United Kingdom.

McMillan LLP

Read more from this firm on Lexology

Argentina

Miguel del Pino, **Santiago del Río**
Marval OFarrell Mairal

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

The cartel investigation is conducted by the Argentine Antitrust Commission (Antitrust Commission). The Commission issues recommendations to the Secretary of Trade, the ultimate ruling body. For this chapter, all references to the Antitrust Commission will encompass the Secretary of Trade, unless expressly stated.

The Antitrust Law created a new antitrust authority, the National Competition Authority, but this is not fully operational as its members have not been appointed. It will be a decentralised and self-governing body within the executive branch of government. Once created, the National Competition Authority will include three divisions:

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

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

Changes

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

In November 2020, a new bill was submitted to incorporate a series of modifications to our current Antitrust Law. The project has already received partial clearance from the Chamber of Senators in February 2021. However, the current political context and the upcoming presidential elections appear to have shifted the government's priorities away from the bill. As such, we have no visibility as to when (or if) it will be passed.

Should the bill for the amendment of the Antitrust Law be approved, clearance for formal and informal agreements that could harm the general economic interest (section 29 of

the Antitrust Law) and the leniency programme (section 60 of the Antitrust Law) will be eliminated.

Despite the lack of further developments within the Legislative Branch it should not be discarded as a plausible scenario that the Executive Power may decide to introduce the pre-closing system with a Decree of Necessity and Urgency.

Substantive law

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

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

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

- fix, directly or indirectly, the price of the purchase or sale of products or services;
- establish obligations to limit:
    - the number of goods manufactured, distributed, bought or sold; or
    - the number, volume or frequency of services;
- divide, allocate or horizontally impose areas, portions or segments of the market, clients or supply sources; or
- establish or coordinate submissions or abstentions in public bids.

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

Joint ventures and strategic alliances

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

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

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

- Antitrust Commission precedents and general rules of the Antitrust Law;

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

Extraterritoriality

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

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

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

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

Export cartels

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

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

Industry-specific provisions

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

No, there are not.

Government-approved conduct

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

The Antitrust Law does not distinguish between infringers. In that sense, a state-owned enterprise might be prosecuted for anticompetitive conduct. However, certain conducts might fall outside the scope of the Antitrust Law if they are regulated by another law invoking a public interest standard (eg, legal monopolies set out by regulation). Consequently, the activities of private entities in the promotion of state policies actively supervised by the state would not be subject to scrutiny from an antitrust point of view (State Actions Doctrine).

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

Section 34 of Antitrust Law No. 27,442 (the Antitrust Law) establishes that the anticompetitive conduct investigation may begin by means of an ex officio investigation by the Antitrust Commission or by a claim filed by any physical or legal, private or public person. Once the claim is submitted, the claimant will be summoned to ratify or rectify it. The claim shall contain:

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

Claims may be dismissed in limine if the Antitrust Commission concludes that the alleged infringement does not fall within the legal description of restrictive practices. Otherwise, the defendant has 15 business days from the formal notification by the Antitrust Commission to provide explanations as to why its conduct should not be deemed anticompetitive.

The Antitrust Commission will analyse the explanations to assess whether they are regarded as conclusive or not. If it concludes that there is not enough evidence for the claim, the investigation will be closed and the docket may be archived. Otherwise, the Antitrust

Commission must initiate a formal investigation and file an indictment describing in detail the anticompetitive conduct. It has 180 business days from the initiation of the investigation to collect evidence to decide whether to indict the defendant or close the docket.

The defendant will have 20 business days to file its defence and offer evidence from the notification of the indictment. Once the defendant has filed the defence, it has a period of 90 business days to produce the evidence offered. The evidence period may be extended for another 90 business days.

Once the evidence period is closed, all parties have the chance to provide their closing arguments within a period of six business days.

Upon the submission of the closing arguments, the Antitrust Commission must issue its final decision within 60 business days. This decision includes the analysis of the evidence produced and a recommendation to the Secretary of Trade as to whether the defendant should face sanctions.

The ultimate decision-making power lies with the Secretary of Trade under the current double-tier regulatory system, although recommendations by the Antitrust Commission are usually adopted in full.

In the event a sanction is imposed, it can be appealed before the Civil and Commercial Federal Court of Appeals.

Investigative powers of the authorities

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

The Antitrust Commission has several investigative powers. It can begin investigations ex officio in a particular market. In addition, it has a wide array of tools at its disposal provided by the Antitrust Law, such as:

- the ability to summon witnesses for hearings;
- examination of books and documents;
- the issuance of requests of information to other regulators; and
- the execution of dawn raids with a court order, including the seizure of documentation that may be necessary for the investigation process.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Antitrust Commission has a close relationship in terms of cooperation with antitrust agencies in other jurisdictions. It has recently signed an agreement with the antitrust agency of the Dominican Republic to establish the basis for collaboration between both

agencies for institutional strengthening and development, through technical cooperation activities.

Interplay between jurisdictions

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

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

CARTEL PROCEEDINGS

Decisions

16 How is a cartel proceeding adjudicated or determined?

The proceeding for cartel investigations is the same as for other antitrust violations. The Antitrust Commission is responsible for investigating them and issuing recommendations to the Secretary of Trade.

Burden of proof

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

As cartels are presumed to be anticompetitive conduct per se under section 2 of Antitrust Law No. 27,442 (the Antitrust Law), the burden of proof is reversed and defendants must demonstrate that the cartel was not implemented or had no effect. In addition, they must demonstrate the lack of damages to the general economic interest.

Circumstantial evidence

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

The Antitrust Law does not prohibit the use of circumstantial evidence to establish an infringement. Due to this, the Antitrust Commission may use any kind of relevant evidence, including indirect evidence. However, there is case law in which the decision of the Antitrust Commission was overturned by the courts because the infringement was determined using solely indirect evidence.

Appeal process

19 What is the appeal process?

The decisions issued by the Secretary of Trade can be appealed by the parties before the Antitrust Commission.

An appeal can be brought against any decision when they order:

- application of sanctions;
- cessation of, or abstention from, conduct;
- imposition of conditions on, or rejection of, a transaction;
- rejection of the complaint;
- rejection of the application of the leniency programme; and
- imposition of precautionary measures.

The notice of appeal must be filed within 15 business days of the date on which the decision was served. The Antitrust Commission must then deliver the appeal application and its own response to the Civil and Commercial Federal Court of Appeals, the appellate body that will decide on this issue, within 10 days of it first being filed.

The Court of Appeals has 90 days to review the case and issue a decision. In certain cases, it can be appealed by filing an extraordinary appeal before the Supreme Court of Justice.

However, the Antitrust Law created a Special Antitrust Room, which will have the jurisdiction over antitrust appeals. In the meantime, since as of the date of writing the Special Antitrust Room has not yet been constituted, the Civil and Commercial Federal Court of Appeals remains the competent judicial body.

SANCTIONS

Criminal sanctions

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

Antitrust Law No. 27,442 (the Antitrust Law) does not establish criminal sanctions. However, section 300 of the Argentine Criminal Code establishes imprisonment from six months to two years for price fixing. At the time of writing, we are not aware of any convictions under this provision.

Civil and administrative sanctions

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

Section 55 of the Antitrust Law establishes the possible administrative sanctions if anticompetitive conduct is proved. These include:

- a cease-and-desist order regarding the anticompetitive conduct;
- corrective measures to guarantee the cessation of the anticompetitive conduct, including, among other things:

- amendments to contracts and agreements; and
- limitations on advertising and marketing strategies;

- an order suspending the infringing company from the National Registry of State Suppliers for up to five or eight years (the general rule is that five years is the maximum except in relation to public bidding cartels, where the maximum can be increased to eight years); and
- a fine of either:
  - up to 30 per cent of the turnover related to the products or services involved in the unlawful conduct committed, during the last fiscal year, multiplied by the number of years the conduct has lasted, without exceeding the national consolidated turnover registered by the economic group of the parties during the last fiscal year; or
  - up to twice the economic benefit produced by the unlawful conduct committed.

Where either amount could apply, the highest is imposed. Where neither applies, the fine can be up to 200 million adjustable units, equivalent to 32,510 million Argentine pesos. The amounts set out in the Antitrust Law are fixed in adjustable units, which are adjusted on an annual basis; the latest update of the adjustable unit stands at 162.55 Argentine pesos.

The fine amount is calculated considering:

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

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

If these sanctions are not complied with, the Secretary of Trade may request the courts to enforce them.

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

However, in the case of bilateral anticompetitive conduct such as cartel activity, it is possible to obtain immunity or leniency from any fines, since only this type of conduct falls under the scope of the leniency programme.

Guidelines for sanction levels

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

There are no guidelines regarding penalties.

Compliance programmes

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

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

Director disqualification

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

The Antitrust Law does not differentiate between individuals or legal entities. Therefore, the fine imposed for cartel activity to legal entities are also jointly extended to corporate directors and any other member whose action or omission on its corporate duties has led, encouraged or enabled the constitution of the cartel. In addition, disqualification from engaging in commerce for one to 10 years may be imposed as a complementary sanction to the legal entity, its corporate directors and members. Decision-making relies on the Secretary of Trade.

Debarment

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

Debarment from government procurement procedures is available as a discretionary sanction, complementary to the fine imposed for cartel infringements, under disqualification from engaging in commerce. The usual duration is of one to 10 years. Decision-making relies on the Secretary of Trade.

Parallel proceedings

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

Criminal and civil penalties can be pursued in respect of the same conduct as follow-on actions and stand-alone actions.

Follow-on actions result from a prior judgment by the Secretary of Trade condemning the cartel activity in question, and are binding to the court since they stand with the force of res judicata. Claims proceed under a summary trial limited to the quantum damages claim, rather than the liability of the already-sanctioned defendant. Follow-on actions must be initiated within two years of the Secretary of Trade's decision.

Stand-alone actions are not tied to a prior decision of the competition authorities. The claim proceeds under ordinary trial. Liability, legitimacy of the claim and quantum of damages are subject to proof. Stand-alone actions must be initiated within three years of the Secretary of Trade's decision.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

Private damage claims are available for direct and indirect purchasers, including final consumers. The link between the damage and the anticompetitive practice must be proved for compensation to be granted.

Purchasers that acquired the affected product from non-cartel members can also bring claims based on alleged parallel increases in the prices they paid, provided they prove that prices by the non-conspirators rose in respect of the conspiracy, and that prices by the non-conspirators rose due to the increased prices by conspirators.

Damages claims are ruled by the Civil and Commercial Code and must be filed before the competent courts (civil and commercial federal courts at a national level or federal court in the provinces) within the jurisdiction of the defendant's domicile. These might be initiated either as follow-on actions or stand-alone actions.

When more than one defendant is held responsible, they will jointly pay damages, regardless of the recovery actions that may apply. However, infringers who obtained immunity from fines as a result of the leniency programme will be liable to their direct or indirect buyers or suppliers, and any other injured parties, only when the full reparation of the damages of the conduct could not be obtained from the other companies involved in the same anticompetitive conduct.

The affected parties may request three types of damages compensation that are not mutually exclusive: actual damages, recovery for loss of goodwill and moral hardship.

The leading case on damages claims (*Auto Gas SA c/ YPF SA y otro s/* ordinario, 2009) left on record that anticompetitive claims proved by the competition authorities and confirmed by the Supreme Court would not be analysed by the courts in these claims, since they would focus their ruling on the relationship between the anticompetitive conduct and the damages caused to the parties. It also provided an interesting interpretation on the statute of limitation that could be applicable to these cases, which could lead to an increase in litigation seeking damages from high-profile cases that fall within such time frame.

A private claim case was initiated by Auto Gas, a company that claimed that it had been affected by the anticompetitive conduct performed by YPF. The damages claimed involved two aspects:

- The difference in prices that Auto Gas had to pay between the LPG's local price and the one that had been set up for the exporting of the product. The court decided to accept 30 per cent of such a claim taking into account the pass-on defence sustained by YPF.
- The loss of profits from the reduction in the amount of LPG that was commercialised by Auto Gas, due to the practice performed by YPF. The court considered the analysis performed by the financial expert witnesses regarding the financial records of the company, which showed that this loss of profit rose to 15 per cent of the requested amount, due to the relationship between the cost of the product and the financial cost of its commercialisation.

Other types of damages were also analysed, such as those that stemmed from the breach of contract or ones that were originated by the alleged supply cut performed by YPF to Auto Gas. The court ordered YPF to pay 13.1 million Argentine pesos to Auto Gas due to the above-mentioned damages, plus attorneys' fees.

Class actions

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

Class actions are possible and may be submitted by the affected person, the ombudsman and associations authorised by law. Active and passive legitimation in these cases is quite broad and covers both victims and consumer associations.

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

The Argentine Supreme Court, in a leading case in this matter, identified the requirements that must be met to bring a collective action, namely: the existence of a common factual cause that causes injury to a significant number of individual rights; the claim must be focused on the collective effects of the cause and not on what each individual might seek; and a demonstration that individual actions are not justified, which could affect access to justice.

At the time of writing, there have been no class actions involving antitrust matters.

COOPERATING PARTIES

Immunity

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

The immunity programme follows international standards with a full and partial reduction of the fine based on a run-to-the-door system.

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

Subsequent cooperating parties

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

Parties that are not the first to apply for a leniency programme are not eligible for a full exemption from sanctions but can request a reduction if they meet the general requirements for leniency and provide the Antitrust Commission with information that is useful for its investigation.

For parties who are not the first to apply, reductions range from 20 to 50 per cent of the sanction that would have otherwise been imposed.

Where there are multiple applications for leniency, the Antitrust Commission will determine the percentage reduction based on the chronological order of the applicant's filing. Antitrust Law No. 27,442 (the Antitrust Law) specifies that two parties cannot make a joint application for the same level of immunity or reduction of sanctions.

Going in second

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

The Antitrust Law also includes a 'leniency plus' provision. Those parties not able to request an exemption, but that provide information on a different anticompetitive conduct, may obtain an exemption on the latter and a one-third reduction in the former. There are no rewards nor payments outside the leniency programme for third parties or individuals who report competition violations or cartels.

Approaching the authorities

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

A request for leniency can be submitted at a pretrial stage prior to any formal accusation issued by the Antitrust Commission. Markers are available but cannot be obtained to secure full or a certain level of leniency until all conditions are met.

Cooperation

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

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

Confidentiality

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

The applicant's identity is confidential during the course of the proceedings and their identity is only disclosed when the final opinion is made public. Rejected applications are not considered to be a recognition or confession by the applicant of the unlawfulness of the conduct. Information and evidence obtained within the framework of the rejected application cannot be utilised by the Antitrust Commission. Rejected requests cannot be disclosed.

Settlements

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

Before the Antitrust Commission issues its final decision, the alleged infringer may commit itself to the immediate or gradual cessation of the actions for which it is being investigated or to the amendment of the aspects related to it. The commitment must be approved by the Antitrust Commission for the procedure to be suspended. The Antitrust Law also provides

that the docket will be archived if, after three years of the fulfilled commitment, there is no relapse.

Corporate defendant and employees

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

Current and former employees involved in the infringement benefitting from the leniency programme must apply to the programme and comply with its requirements separately from the legal entity. Compliance shall be analysed on an individual basis.

Dealing with the enforcement agency

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

Practical steps for an immunity applicant or subsequent cooperating party comprise four stages, namely:

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

As at the time of writing, no guidelines have been issued regarding the procedural implementation of the leniency programme.

DEFENDING A CASE

Disclosure

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

Only the parties have access to the docket and all information filed is confidential in relation to third parties during proceedings. Information or evidence is disclosed when the Antitrust Commission and Secretary of Trade's Opinion is made public.

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

Further, pursuant to Law No. 23,187, lawyers must preserve attorney–client privilege unless otherwise authorised by the interested party (eg, the client). Likewise, Law No. 23,187 provides that lawyers have the right to keep confidential information protected under attorney–client privilege. Likewise, the Argentine Civil and Commercial Procedural Code provides that a witness may refuse to answer a question if the answer would entail revealing information protected under a professional secret (including attorney–client privilege).

Representing employees

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

There is no provision that forbids counsel to represent both employees and the corporation that employs them. Present or past employee should be advised to obtain independent legal advice or representation when a conflict of interest arises before or after representation has been undertaken.

Multiple corporate defendants

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

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

Payment of penalties and legal costs

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

Neither Antitrust Law No. 27,442 (the Antitrust Law) nor its regulation forbids a company to pay either the fines imposed on its employees or their legal costs.

Taxes

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

Under section 227 of Regulatory Decree 862/19 of Income Tax Law No. 20,628, administrative fines and penalties are not deductible from income tax. Tax deduction for private damages payments must be analysed on a case-by-case basis. At the time of writing, there are no precedents regarding tax deduction for private damages payments under antitrust proceedings.

International double jeopardy

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

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

Getting the fine down

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

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

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

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

UPDATE AND TRENDS

Recent cases

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

Notebooks case (2023)

The *Notebooks* case is a corruption scandal uncovered in 2018 involving an organised corruption scheme that involved the delivery of bribes to various people and places, including politicians and many businesspeople who allegedly benefited from large public contracts between 2005 and 2015.

The Antitrust Commission opened a parallel investigation into allegations of bid-rigging that arose from testimony given in the criminal investigation, and in May 2019 sent an ex officio investigation notice to the 52 companies involved. The alleged collusive conduct involved agreements and coordination of positions or abstentions in bids, tenders, and auctions for public works, in the road construction, energy and transport sectors, and in infrastructure in general.

In September, the Antitrust Commission closed the investigation but did not find clear evidence of collusion between the companies, although it issued 'pro-competitive' recommendations to be implemented by the Argentine Chamber of Road Companies.

In this regard, the Antitrust Commission found that:

- there is a large number and heterogeneity of suppliers;
- the market is deconcentrated with approximately 150 participants;
- the market affected by the alleged conduct consists of differentiated products, which significantly reduces repeated interaction between market participants;
- there is a lack of stability in demand; and
- there are many actors outside of the alleged agreement.

The pro-competitive recommendations also included, but were not limited to:

- reporting to the enforcement authority any anticompetitive practices that have the potential to harm, or do harm, the general economic interest;
- establishing internal policies and compliance programs and promoting the adoption of such policies among employees;
- avoiding the purchase, sale, collection, or other similar activities on behalf of or for the account of associate members (each member must maintain independence from its associate members);
- avoiding buying, selling, managing, collecting, and other similar activities on behalf of and for the account of associate members (each member must maintain complete independence to set its own price and to decide when and with whom to contract and on what terms);
- avoiding exchanging sensitive commercial information (information regarding prices, invoicing, costs and volumes of production, customers, advertising expenses, etc), particularly when such information is confidential, current or relates to future projections; and
- refraining from discussing, agreeing, limiting or imposing conditions on, directly or indirectly, the commercial policies of partners or competitors, whether with respect to prices, discounts or promotions or other competitive variables, such as the quality of goods or services offered.

Molino Cañuelas and Trade Associations Cartel (2022)

This investigation was initiated following a complaint filed by the NGO IMPULSAR.

Within the framework of the investigation, the Antitrust Commission proved the existence of a collusive agreement designed, implemented, and monitored by the FAIM, the CIM, the APYMIMRA (trade associations) and the firm Molino Cañuelas, to fix minimum prices and exchange sensitive information in the wheat milling and wheat flour commercialisation markets.

The purpose behind the agreement was to fix a minimum selling price and prevent competition in the commercialisation of wheat flour. The genesis of the agreement took place at the event that was called Fiesta De La Harina, in which the three milling entities sketched out 'the idea' of its implementation. Since its implementation, compliance audit systems have been put in place, as well as sanctions for non-compliance. The agreement was in force from October 2014 until at least April 2017, restricting competition among wheat mills across the country and directly harming consumers.

The sanction recommended by the Antitrust Commission consisted of fines of 150 million Argentine pesos for Molino Cañuelas, 150 million Argentine pesos for FAIM, 93.97 million Argentine pesos for CIM and 51.13 million Argentine pesos for APYMINRA, bringing the total amount of fines to just over 445 million Argentine pesos. In addition, behavioural obligations were established to avoid the repetition of this type of practice.

Bariloche Nightclubs Cartel (2022)

The investigation began in 2018 following a complaint by the managing partner of Powerlink, a company dedicated to organising shows and meetings of an artistic and cultural nature in the establishment called Puerto Rock Bariloche and that organises 'welcome parties' and other parties for student tourists visiting the city of Bariloche. The companies investigated, Alliance and Grisú, offer discotheque services in the city of Bariloche and, specifically, offer this type of service to tourist agencies that market student travel packages for high school leavers throughout the country.

The investigated companies established an agreement for the joint price fixing of tickets in their discotheques issuing a single price, periodically sent to the tourist agencies, including the percentage increase. Though in some cases there were negotiations with the tourist agencies regarding price and payment conditions, these were based on the single price list. Likewise, a market division agreement by time slot was verified between the companies denounced and the complainant, Powerlink. This agreement was implemented by means of a memorandum of understanding, in force from 2004 to 2017, which was signed by both the defendants and the claimant. The market division scheme was based on two time phases: the 'pre-dancing' segment, from 5pm to midnight, and the 'night club' segment, from midnight onwards.

The distribution of the market was organised such that Powerlink, in the pre-dancing segment, offered the 'welcome party' and other parties, and Alliance and Grisú, in the night club segment, offered discotheque services in their dance establishments. Distribution of clients was corroborated so that, throughout the duration of the graduation trip, the students would attend at least one night at each discotheque (the night club segment) and the parties provided in the pre-dancing segment.

These concerted practices generated a clear prejudice directly against student tourism agencies at a national level and indirectly to the students who ultimately chose the city of Bariloche as a destination for graduation trips. Indeed, these practices allowed the companies to charge higher prices allowing a better bargaining position with the tourist agencies and preventing final consumers from purchasing a different number of nights in discotheques from those established by the investigated firms.

Although the original claimant Powerlink was found responsible with Alliance and Grisú, the Commission considered that had the memorandum not been signed, Powerlink would have been excluded not only from the night club segment, but also from the pre-dancing segment because of the coercion exercised by the dominant companies in the market.

In particular, the Commission referred to the leniency programme and the power of penalty graduation established in section 56 of Antitrust Law No. 27,442 as 'tools aimed at combating cartelisation, encouraging the parties involved in the collusion to break the links between them and to provide sufficient evidence for its detection'.

Based on the above, the Commission decided to exempt Powerlink from a fine imposition, carrying out a first application of the leniency programme while the remainder of the participants were fined.

Regime reviews and modifications

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

Under the current political agenda, there have been no ongoing or anticipated reviews or proposed changes to the legal framework.

As regards the leniency programme, despite its plausible elimination should Congress approve the bill, the Antitrust Commission's leading case the Bariloche Nightclubs Cartel (2022) investigation stands as the first precedent where the leniency programme has been tacitly implemented to exempt one of the investigated companies from a fine imposition for assisting the Antitrust Commission in obtaining proof during the proceedings.

Miguel del Pino
Santiago del Río
sdr@marval.com

Marval OFarrell Mairal

Read more from this firm on Lexology

Austria

Andreas Traugott, **Anita Lukaschek**
Baker McKenzie

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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

7 | 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

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

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

Export cartels

9 | 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

10 | 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

11 | 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

12 | 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

13 | 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

14 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

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

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

16 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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

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

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

23 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

24 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

25 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

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

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

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

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

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

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

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

An immunity 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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

The 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

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

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

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

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

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

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

36 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

37 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

38 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

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

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

Multiple corporate defendants

40 | 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

41 | 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

42 | 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

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

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

44 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

45 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.

Regime reviews and modifications

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

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.

**The information in this chapter was accurate as at 15 October 2022.*

Andreas Traugott
Anita Lukaschek
anita.lukaschek@bakermckenzie.com

Baker McKenzie

Belgium

Pierre Goffinet, Mediona Shehu
Strelia

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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?

First, on 24 November 2022, the Law of 28 November 2022 transposing the European Whistleblowing Directive 2019/1937 was adopted (and published in the Belgian Official Journal on 15 December 2022).

This law introduces a set of common minimal rules for the protection of persons reporting breaches of EU law observed in the context of their professional activities.

The law includes protection for whistleblowers in respect of a wide range of breaches of law, and applies to any worker, self-employed person, consultant, shareholder, director, manager, or person working under the supervision and management of (sub)contractors and suppliers. Any company with at least 50 employees is subject to this law. The public sector is, however, not covered as it is governed by specific rules (ie, the Law of 8 December 2022 relating to reporting channels and the protection of persons reporting breaches of integrity in federal public sector organisations and within the integrated police).

Companies subject to the Law of 28 November 2022 must put in place internal and external channels for reporting. If reporting via both internal and external channels is unsuccessful, employees can still publicly report EU violations in the press, provided that there is an imminent threat to the public interest, or where there is a risk of retaliation in the context of an external reporting channel.

Any reporting must result in a follow-up and feedback by a reporting supervisor. There is also an obligation to implement a backup of a record-keeping.

The law grants a series of protection measures to the whistleblower: the prohibition of retaliation; the granting of supporting measures to the whistleblower where appropriate; the right of whistleblowers to file a complaint in the case of retaliation, etc.

To be granted protection, the whistleblower must:

- have reasonable grounds to believe that the EU violation he or she wishes to report was true at the time of the report; and
- have already reported the violation through the internal, external or press channels.

Federal ombudsmen will be responsible for assessing the admissibility of reports and transfer the information to a competent authority, and the Federal Institute for the Protection and Promotion of Human Rights will also provide whistleblowers with professional, legal and psychological help.

The law entered into force on 15 February 2023.

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

7 | 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

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

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

9 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

10 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

11 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

12 | 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

13 | 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

14 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

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

The 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

16 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

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

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

Before the 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

18 | 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

19 | 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 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

20 | 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

21 | 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

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

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

23 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

24 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

25 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

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

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

27 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they

paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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

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

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

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

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

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

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

36 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

37 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

38 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

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

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

Multiple corporate defendants

40 | 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

41 | 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

42 | 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

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

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

44 | 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

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

Caudalie

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.

Following this decision of 1 December 2021 by the Market Court, the BCA adopted a new decision on 18 January 2023 and imposed the same fine of €859,310 to Caudalie and qualified the practices as hardcore restrictions by object (see Case ABC-2023-P/K-01).

Orange and Proximus

On 30 January 2023, the BCA dismissed Telenet's complaint against the mobile network sharing agreement concluded in July 2019 by Orange and Proximus (see Case BMA-2022-P/K-45-AUD).

The contested agreement concerns the Radio Access Network, which connects individuals' devices to other parts of a network through radio connections. The aim of the agreement was for Orange and Proximus to save costs by combining their 2G, 3G and 4G networks and jointly rolling out their 5G network. The agreement concerned passive assets (infrastructure) and active radio equipment (base station, antennas, controller nodes).

Telenet first argued that the agreement would restrict competition between the two parties because (1) the exchanges of information between them may affect their behaviour during the auction or reduce the uncertainty of each other's behaviour, and (2) it would reduce the incentives of the parties to compete aggressively given that the agreement would mitigate any adverse consequence resulting from the failure of a party to secure a specific part of the spectrum. Secondly, Telenet argued that the agreement would restrict competition on the wholesale and retail markets for mobile telecommunications services by (1) limiting competition on key parameters; (2) reducing incentives to innovate and invest in new technologies and infrastructure; and (3) increasing the risk of coordination due to the increased common costs of both parties.

The BCA dismissed the claims raised by Telenet on the following grounds:

- Irrespective of the agreement, Orange and Proximus remain technically and commercially independent and determine their spectrum strategy based on their own commercial interests.
- The agreement does not restrict the parties' incentives to invest and innovate as each party remains free to invest in new sites without sharing active equipment. Such a sharing only occurs for radio sites if a common interest has been identified through the joint venture created between the parties.
- No restriction of competition on key parameters was found. First, given that Orange and Proximus remain independent in their investment decisions regarding their networks, there is sufficient price competition between them, as well as vis-à-vis Telenet, which is a close competitor. Secondly, the parties do not reduce the number of services offered to customers. Thirdly, the agreement does not restrict competition on network coverage insofar as the parties remain independent in their investment decisions. Finally, the parties remain independent on the three factors determining network capacity, namely, the number of sites, the amount of activated spectrum, and the implemented technology.
-

> The sharing of common costs among the parties is unlikely to lead to collusion, and the BCA excluded such a risk. In addition, as the parties operate through a joint venture, there are no direct contacts between them. Following the investigation and recommendations made by the Institute for Postal Services and Telecommunications, the parties also incorporated additional safeguards to avoid exchanging sensitive information.

For all these reasons, the BCA decided that the agreement between Orange and Proximus was not restrictive of competition and dismissed Telenet's complaint.

Tobacco manufacturers

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 (ELF), British American Tobacco Belgium NV (BAT) and JT International Company Netherlands BV (JTI)). These companies were receiving confidential and commercially sensitive information on their competitors through wholesalers between 2011 and 2015 without objecting, and had even requested such information (see Case No. MEDE-I/O-17/0020).

The four tobacco manufacturers subsequently filed an appeal with the Markets Court. By decision of 15 February 2023, the Markets Court partially annulled the BCA's decision (see Case 2023/1305).

Based on the *VM Remonts* judgement of the Court of Justice (Case C-542/14), the Markets Court held that when competitors share information through a third party, such a practice may be contrary to article 101 of the Treaty on the Functioning of the European Union (TFEU) when:

- there was an intention from a company to disclose its commercially sensitive information to its competitors through a third party;
- a company expressly or tacitly approved the sharing of commercially sensitive information by the third party with competitors; or
- a company could reasonably foresee that the third party would share its commercially sensitive information with its competitors and was willing to accept the risk, without it being necessary that the third party actually informed the company of the sharing of information with a competitor.

The Markets Court held that the four tobacco manufacturers exchanged commercially sensitive information regarding their pricing through their wholesalers without taking any action to prevent the transmission of such pricing information. In addition, the Markets Court held that the four tobacco manufacturers did not rebut the presumption derived from the EU case law that companies that take part in a form of concertation and remain active on the market use the information exchanged to adapt their conduct on the market, barring proof to the contrary. The Markets Court also confirmed the qualification of the conduct as a restriction of competition by object.

On the other hand, the Markets Court found that the BCA failed to provide sufficient reasons in its conclusion that the conduct formed a single and continuous infringement, which was

only addressed in one paragraph of the decision and did not distinguish between the two practices at hand, namely, the concerted practice involving ELF, JTI and PMB and the other concerted practice between PMB and BAT. The Markets Court held that the BCA should have established the existence of a single and continuous infringement for each of these two agreements. In this respect, the BCA should have concretely demonstrated that the concerned manufacturers (1) had each contributed to an overall plan to restrict competition through these two concerted practices, and (2) were aware of the illegal nature of the sharing of pricing information.

The Markets Court also found that the reasoning of the BCA was flawed insofar as it resulted from the duration of the infringement as decided by the BCA that BAT would have been alone in the anticompetitive agreement for part of its infringement duration, which is impossible.

Based on these grounds, the Markets Court therefore annulled the decision of the BCA (while still confirming the infringement of article IV. 1 CEL and article 101 of the TFEU by the four tobacco manufacturers) and referred the case back to the BCA. The Markets Court also ordered that the parties were to be refunded their fines pending a new decision.

Regime reviews and modifications

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

There is no ongoing review of the Belgian legal framework.

Strelia

Pierre Goffinet pierre.goffinet@strelia.com
Mediona Shehu

Strelia

Brazil

André Cutait de Arruda Sampaio, Onofre Carlos de Arruda Sampaio
OC ARRUDA SAMPAIO Sociedade de Advogados

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The Brazilian Competition Law is Law No. 12,529/2011, which became effective on 29 May 2012 (replacing Law No. 8,884/94). The Brazilian Competition Law applies equally to companies and individuals. There are additional provisions in the form of resolutions and ordinances. 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 collusive conducts (including cartels) cases: the Administrative Tribunal and the General Superintendence. CADE's General Superintendence is responsible for the investigation and prosecution while CADE's Administrative Tribunal adjudicates the cases investigated and prosecuted by CADE's General Superintendence.

In the criminal sphere, collusive conducts (including cartels) are prosecuted by federal or state criminal prosecutors, who are completely independent of CADE. Criminal cases will be adjudicated by a criminal court.

The Brazilian Civil Code also foresees that civil damages recovery lawsuits (individual claims or class actions) can be filed as follow-on or stand-alone claims by any affected third parties.

Changes

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

Law No. 14,470/2022 became effective on 16 November 2022. It amends the Brazilian Competition Law by introducing new rules applicable to the enforcement of violations of the economic order. The main changes concern the provision for a double damages policy, longer civil statutes of limitations, the reverse burden of proof in the case of a passing-on defence and allowing Federal Court judges to use CADE decisions as the basis for granting an injunction in damage recovery lawsuits.

In September 2023, CADE issued a Guideline for Cartel Fines Calculation, consolidating the methodology it has been using to apply the legal criteria, serving as a reference for future cases.

Substantive law

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

The Brazilian Competition Law establishes that actions, regardless of their form, that produce or may produce adverse effects in the Brazilian territory — even if not realised — constitute a breach of competition regulations, regardless of fault.

Article 36 contains a non-exhaustive list of behaviours that can be categorised as violations of the economic order, even if their anticompetitive effects are only potential. These behaviours, notwithstanding their form, may result 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.

Specifically concerning collusive behaviours (including cartels), the following provisions in article 36, paragraph 3 are relevant:

- 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 the above, collusive conduct (including cartels) can be identified when, among other conditions and not necessarily cumulatively, it seeks to:

- regulate 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;
- limit or prevent the access of new companies to the market; or
- create difficulties for the establishment, operation or development of a competitor or supplier, acquirer or financier of goods or services, among others.

Pursuant to the Brazilian Competition Law, a cartel is not automatically considered a per se violation in Brazil. A conduct is deemed an antitrust violation only if it produces or has the potential to produce the adverse effects mentioned above. Therefore, a case-by-case analysis must be conducted, taking into account the circumstances, the 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?

Joint ventures and strategic alliances are not exempt from the Brazilian Competition Law. Article 36 of the Brazilian Competition Law stipulates that an antitrust violation can be characterised irrespective of its form. Consequently, any behaviour that might lead to potential anticompetitive effects within the Brazilian territory is subject to CADE's prosecution. The parties may proactively submit joint ventures and strategic alliances for CADE's merger control clearance in advance.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

Law No. 12,529/2011 (the Brazilian Competition Law) applies equally to individuals and legal entities operating under public or private law, as well as any associations formed by entities or individuals, whether established in fact or by law, even if temporary, with or without legal personality, even if they engage in activities under a legal monopoly regime.

Individuals can also face criminal prosecution under Law No. 8,137/90.

Extraterritoriality

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

The Brazilian Competition Law applies to potential antitrust violations that occur within Brazilian territory as well as those taking place beyond Brazil's borders, but which may have direct or indirect effects in Brazil. In simple terms, collusive conducts (including international cartels) that lead to direct or indirect consequences within Brazilian territory fall under the jurisdiction of the Administrative Council for Economic Defence (CADE), even if no illegal conduct occurs in Brazil.

The application of this law remains unaffected by conventions and treaties signed by Brazil. It applies to practices that occur wholly or partly within the national territory or those that yield or may yield effects therein.

Export cartels

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

There is no specific exemption or defence in the Brazilian Competition Law regarding export cartels.

In September 2018, CADE's Administrative Tribunal ruled on a case involving the American Natural Soda Ash Corporation (ANSAC), which was charged with being part of an export cartel that allegedly violated the Competition Law. CADE conducted an analysis based on the rule of reason and the potential detrimental effects of ANSAC's exports on the Brazilian market. The Administrative Tribunal concluded that ANSAC's exports to Brazil did not have adverse effects on competition in the Brazilian market, and the case was closed.

Industry-specific provisions

10 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 Brazilian Competition Law.

Government-approved conduct

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

There are no exemptions in the Brazilian Competition Law.

INVESTIGATIONS

Steps in an investigation

12 What are the typical steps in an investigation?

Prior to the commencement of the administrative process, CADE's General Superintendence may conduct a confidential preparatory investigation. The investigation becomes public upon publication in the Official Gazette.

Following the start of the administrative process, all defendants are served and are expected to provide their defences within 30 days. The 30-day deadline starts from the date on which the last defendant is served. Exceptionally, if 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).

Following the submission of these defences and within a 30-working-day time frame (this deadline is to be regarded as a reference), CADE's General Superintendence will determine the evidence to be gathered. This evidence may include various elements, such as witness testimonies; requests for supplementary information from the defendants, companies, associations or other entities; and economic studies.

Upon the conclusion of the fact-finding phase, defendants are expected to provide revised statements within five working days (or 10 working days if multiple defendants are represented by different attorneys). Following this, the General Superintendence will issue its recommendation (whether to convict or close 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 within the Administrative Tribunal. The reporting commissioner may request that CADE's Attorney General's Office or a federal prosecutor provide their opinions within 20 days.

The reporting commissioner may also, at their discretion, decide to undertake additional fact-finding steps. Following the supplementary fact-finding, the defendants are required to submit their final statements within 15 working days (or 30 working days if there is more than one defendant represented by different attorneys).

Subsequently, the reporting commissioner will arrange for the case to be adjudicated. The adjudication takes place during a public plenary sitting at CADE. The Tribunal's final decision can be challenged only before the federal courts.

Investigative powers of the authorities

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

The General Superintendence of CADE holds the jurisdiction to investigate antitrust violations and possesses the authority to request information and documents from individuals, legal entities, state bodies and authorities, whether they are public or private entities. Additionally, the General Superintendence is empowered to summon individuals or legal entities (public or private) for hearings.

Failure to comply with CADE's request constitutes a violation subject to daily fines starting at 5,000 reais, which can be increased by up to 20 times that amount if deemed necessary to ensure the effectiveness of the request (article 40 of Law No. 12,529/11 (the Brazilian Competition Law)).

Nonetheless, the Brazilian Constitution guarantees the right against self-incrimination, affording a witness the choice to remain silent if the response could potentially incriminate them. Should the information request require a written response, individuals or companies may also decline to answer on the grounds of self-incrimination. Nevertheless, it is crucial to file a motion before the specified deadline confirming the intent to invoke this privilege, as failure to do so could result in sanctions for non-compliance with the information request's deadline.

To conduct an inspection at a company's premises, the General Superintendence may obtain the company's prior consent, or may request authorisation for a dawn raid from a federal court.

In a consented visit, the General Superintendence is authorised to examine the headquarters, establishments, offices, branches or subsidiaries of the subject company. This entails the search for inventories, objects and documents of various types, including commercial books, computers and electronic files. In this context, the inspection's execution relies on the company's approval, as the inviolability principle that protects homes is extended to a company's premises under the Brazilian Constitution. This legal safeguard can only be overcome through the company's consent or by a court order. Should a company wish to withhold consent, it is recommended to officially register the objection before CADE, as inaction might be misconstrued as consent.

Conversely, the General Superintendence, through CADE's Attorney General, may request authorisation for a dawn raid from a federal court, which allows for the confiscation of objects and documents of any nature, including commercial books, computers and electronic files, as means of administrative investigation. The company cannot decline to permit the search, as it is mandated by a federal court order. In practice, due to the complexities within the court system in granting warrants for dawn raids, the General Superintendence often relies on evidence provided in leniency agreements to persuade federal judges to authorise such actions.

It is important to highlight that CADE's General Superintendence does not have the authority to conduct or request wiretaps or email monitoring. Such actions are only allowed in criminal investigations following specific court authorisation, usually initiated by the police or a criminal prosecutor. Any evidence obtained in a criminal investigation can be utilised as borrowed evidence in CADE's administrative proceedings. In recent years, CADE has established a series of cooperation agreements with Criminal Prosecutor's Bureaus across various Brazilian states.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes, the Administrative Council for Economic Defence (CADE) has entered into several cooperation agreements with various antitrust authorities in jurisdictions including Argentina, Canada, Chile, Colombia, Ecuador, the European Union, France, Japan, Peru, Portugal, South Korea, the United States of America and the member states of BRICS (namely, Russia, India, China and South Africa). These agreements facilitate the exchange of non-confidential information pertaining to ongoing antitrust investigations between the respective authorities.

Interplay between jurisdictions

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

CADE's General Superintendence has significant interplay with US and EU authorities, which has resulted in a series of international investigations in Brazil following similar investigations undertaken by such authorities.

CARTEL PROCEEDINGS

Decisions

16 | How is a cartel proceeding adjudicated or determined?

An antitrust violation (including cartel) is adjudicated by the Administrative Tribunal of the Administrative Council for Economic Defence (CADE) after the conclusion of the investigation by CADE's General Superintendence. The General Superintendence is responsible for the administrative investigation and the adjudication of antitrust violations, while the Administrative Tribunal is responsible for the final judgment within the administrative sphere.

During proceedings at the Administrative Tribunal, cases of antitrust violations, such as cartels, are adjudicated by the Administrative Tribunal during a public plenary sitting at CADE. The defendant is allotted a 15-minute period to present oral defence arguments before the reporting commissioner casts their vote. Subsequently, the votes of the other commissioners are gathered. Decisions are reached by a majority vote. The Administrative Tribunal comprises one president and six commissioners.

It is important to register that criminal prosecutions operate independently from administrative investigations. The responsibility for criminal prosecutions lies with the public prosecutor, who oversees trials conducted in a criminal court.

Burden of proof

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

The burden of proof rests with CADE's General Superintendence, who is tasked with substantiating the charges against the defendants. Evidence can be gathered using the authority's investigative powers or through leniency or settlement agreements entered between the authority and individuals or companies implicated in the antitrust violation. The standard of proof is determined on a case-by-case basis, considering the characteristics of the market involved, the nature of the misconduct and the evidence gathered.

Circumstantial evidence

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

Yes, circumstantial evidence can be used to support convicting decisions.

Appeal process

19 | What is the appeal process?

Decisions rendered by CADE's Administrative Tribunal (CADE) can be challenged in the federal courts. The scope of the appeal is broad and may pertain to issues of due process, the merits of the case and the appropriateness of the penalties. However, legal proceedings in Brazil are not swift, typically lasting from five to 10 years or even longer. Furthermore, it is important to note that challenging an adverse decision by CADE requires the advance deposit of the full amount of the fine imposed by the tribunal into a designated judicial bank account.

In May 2019, the Brazilian Federal Supreme Court (STF) ruled on Extraordinary Appeal No. 1.083.955, which sought the annulment of a decision made by CADE in an antitrust case. The case involved allegations of anticompetitive conduct by a company in the fuel resale market. The STF rejected the appeal, affirming that judicial oversight of administrative actions is permissible, but limited to assessing their legality and possible abuses. The Court emphasised that judicial control should not delve into administrative merits, as excessive intervention could disrupt regulatory policies and compromise the unity of the regulatory framework. It is important to clarify that this decision is not of general repercussion and does not bind other cases to it.

As a result of the STF's ruling, judicial deference has become the approach taken by the judiciary when evaluating administrative-regulatory actions by CADE. This means that if the criteria of legality, reasonableness and proportionality are met, the agency's decision must be respected and upheld. In such cases, judges are not permitted to substitute their judgment for that of the administrative authority or administrative judge when it comes to administrative merits, ensuring a balanced and consistent regulatory environment.

SANCTIONS

Criminal sanctions

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

Criminal Law No. 8,137/1990 provides as a criminal offence the 'establishment of an agreement, convention, arrangement or alliance between suppliers, aiming at (i) artificially fixing prices or quantities sold or produced; (ii) the regionalized control of the market by a company or group of companies, or (iii) the control, to the detriment of competition, of a distribution network or suppliers'.

Only individuals can be criminally prosecuted for such offences, and the corresponding criminal penalty involves imprisonment for a period ranging from two to five years, in addition to a fine. The criminal law is applicable only to individuals, not to companies.

In recent years, the administrative prosecution of cartels by the Administrative Council for Economic Defence (CADE) has shown greater effectiveness than criminal prosecutions overseen by criminal public prosecutors. Nevertheless, there has been a noticeable surge in the criminal prosecution of collusive conducts (including cartels). Recognising this evolving trend, CADE has recently forged multiple cooperation agreements with the Criminal Prosecutor's Bureaus across different states in Brazil.

Civil and administrative sanctions

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

Administrative sanctions are enforced by CADE's Administrative Tribunal in alignment with the provisions outlined in article 37 of Law No. 12,529/2011 (the Brazilian Competition Law). The primary forms of penalties include fines, namely:

- For companies, a fine ranging from 0.1 per cent to 20 per cent of the gross revenues of the company, group or conglomerate, as reported in the last fiscal year preceding the start of the administrative proceeding, within the relevant business sector in which the violation occurred. This fine shall not be lower than the illicit gain, provided it can be reasonably calculated.
- For individuals in managerial roles (such as chief executives, directors and managers), directly or indirectly accountable for the violation, if their culpability or intentional wrongdoing is established, a fine ranging from 1 per cent to 20 per cent of the fine imposed on the company.
- For other individuals, public or private legal entities, or any association formed by entities or individuals, whether established in fact or by law, even if temporary, with or without legal personality, which do not engage in business activity, rendering the application of the gross sales criteria unfeasible, a fine ranging from 50,000 reais to 2 million reais.

In addition to the penalties above, pursuant to article 38 of the Brazilian Competition Law, CADE may also cumulatively impose other sanctions alongside fines. These sanctions include:

- the requirement to publish the adverse decision in a widely circulated newspaper;
- a prohibition on engaging with public financial institutions and participating in bids conducted by public entities for a minimum of five years;
- corporate spin-off, divestiture of assets company and transfer of corporate control;
- recommendation to the respective public agencies for the issuance of a compulsory licence over intellectual property rights when the violation is related to the use of such rights;
- denial of instalment payment of federal taxes, or the complete or partial cancellation of tax incentives or public subsidies;
- for individuals, a ban on the offender from engaging in commercial activities in their own name or as a corporate representative for a period of five years;

- the inclusion of the offender in the National Consumer Protection Registry; and
- any other act or measure necessary to eliminate harmful effects on the economic order.

CADE recently issued a Guideline for Cartel Fines Calculation to serve as a reference on the methodology used to apply the legal criteria.

Regarding civil liabilities, the Brazilian Competition Law explicitly acknowledges the separation between administrative and civil liabilities. This signifies that pursuing a civil damages recovery lawsuit does not require a prior adverse decision by the CADE Tribunal. Civil damages recovery lawsuits, whether individual claims or class actions, can be initiated as follow-on or stand-alone claims by any affected third parties. This aligns with articles 186 and 927 of the Brazilian Civil Code, which establish a general obligation for the party at fault to provide compensation for damages caused to others.

The party bringing a civil damages compensation claim must demonstrate:

- the violation of the law;
- the wrongdoing of the responsible party;
- the actual damage incurred; and
- the causal link between the violation and the damage.

Nonetheless, civil damages recovery lawsuits stemming from breaches of the Competition Law continue to be infrequent in Brazil. Law No. 14,470/2022 introduced several amendments to the Brazilian Competition Law, including the incorporation of a double damage policy, extended civil limitation periods, a reversal of the burden of proof for the pass-on defence, and the possibility of Federal Court judges granting injunctive relief to affected parties in damage recovery lawsuits based on CADE's decision. These rules apply only to events that occurred after the enactment of Law 14,470/2022.

Guidelines for sanction levels

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

The Administrative Tribunal of CADE shall consider the following factors when determining fines, according to article 45 of the Brazilian Competition Law:

- the severity of the violation;
- the offender's good faith;
- the benefit gained or intended by the offender;
- whether the violation was consummated or not;
- the degree of harm or danger to free competition, the national economy, consumers or third parties;
- the negative economic effects produced in the market;

- the economic status of the offender; and
- the recurrence of the violation.

CADE recently issued a Guideline for Cartel Fines Calculation to serve as a reference on the methodology used to apply the legal criteria. These criteria are evaluated on a case-by-case basis by the Administrative Tribunal. However, the Brazilian Competition Law does state that fines will be doubled in cases of recurrence, which is the primary factor that can lead to an increase in fines.

The Brazilian Competition Law does not specify specific mitigating factors, with the exception of cooperation through leniency agreements or settlement agreements. These cooperative measures can lead to complete immunity or a reduction in fines, respectively.

Compliance programmes

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

A compliance programme is not typically taken into consideration as a factor for reducing sanctions.

Director disqualification

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

Article 38, subsection VI of the Brazilian Competition Law empowers CADE to impose, as an additional penalty, a prohibition on individuals who violate the economic order from participating in commercial activities either under their own name or as corporate representatives for a period of five years.

Debarment

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

Other penalties may be imposed cumulatively with fines. One such penalty is the prohibition on contracting with public financial institutions or participating in tenders conducted by public bodies. Should this specific ancillary penalty be imposed, it shall remain valid for a minimum of five years. Ancillary penalties are applied at the discretion of the Administrative Tribunal. There are CADE precedents involving bid rigging in which these penalties were applied.

Parallel proceedings

'

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

It is crucial to recognise that administrative, criminal and civil liabilities operate independently of one another. Consequently, the same action can trigger legal actions in administrative, criminal and civil spheres simultaneously. In practice, CADE's decisions are typically expedited, making them frequently utilised as evidence in related criminal prosecutions and civil recovery lawsuits.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

The Brazilian Civil Code foresees the possibility of damages claims being brought by anyone affected by the violation. Additionally, article 47 of Law No. 12,529/2011 (the Brazilian Competition Law) stipulates that private claims remain independent of investigations conducted by the Administrative Council for Economic Defence (CADE).

Civil damages recovery is contingent upon the extent of actual damages suffered by plaintiffs, who could be direct or indirect purchasers. The civil courts recognise the pass-on defence, as the right to recovery belongs to the entity that genuinely incurred the damages. While no precedent exists in civil courts concerning umbrella purchasers initiating claims against cartel members based on alleged parallel price increases for products from non-cartel members, the law does not preclude this possibility.

Law No. 14,470/2022 brought several amendments to the Brazilian Competition Law. One significant change is the introduction of a double damage policy, which entitles affected parties to double compensation for damages resulting from violations of the economic order. This entitlement exists independently without prejudice to sanctions enforced in the administrative and criminal spheres. It is noteworthy, however, that this provision does not extend to companies or individuals who have entered into leniency or settlement agreements with CADE. Such entities remain exclusively liable for the damages they have caused to the affected parties.

Class actions

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

Class actions aimed at recovering civil damages are a viable recourse in Brazil. Entities authorised to initiate class actions include:

- the Federal Prosecutor;
- the Union, states, municipalities and the Federal District;
- public administration entities and bodies, particularly those dedicated to safeguarding interests and rights protected by the Consumer Protection Code; and
- associations that have been officially registered for at least one year, with one of their institutional objectives being the protection of interests and rights outlined in the Consumer Protection Code.

The Brazilian Competition Law explicitly acknowledges the independence of administrative and civil liability, ensuring that a civil damages recovery lawsuit is not contingent upon a prior adverse decision by CADE. To substantiate a claim for damages compensation in civil court, the plaintiff must demonstrate:

- the violation of the law;
- the wrongdoing of the responsible party;
- the actual damage incurred; and
- the causal link between the violation and the damage.

Public prosecutors have been increasingly pursuing civil damages lawsuits (class actions) in connection with collusive conducts (including cartels), particularly those involving bid rigging.

COOPERATING PARTIES

Immunity

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

The Brazilian leniency programme was established by Law No. 10,149/00 in 2000, and since then has undergone subsequent enhancements.

A successful leniency application confers upon applicants both criminal immunity and full immunity from administrative fines imposed by the Administrative Council for Economic Defence (CADE), or a reduction of fines by one-third to two-thirds if the General Superintendence had prior knowledge of the reported violation. It also affords individuals complete immunity from criminal antitrust prosecution. However, this immunity does not extend to civil damages recovery lawsuits.

A company or individual is eligible to submit a leniency application to CADE if they have participated in the antitrust violation and meet the subsequent cumulative criteria:

- being the first to apply for leniency regarding the disclosed violation;
- halting participation in the disclosed violation;
- at the time of leniency application, the General Superintendence lacked sufficient evidence to secure the applicant's conviction;

- admitting their participation in the violation;
- offering full and permanent cooperation with the investigation and relevant administrative processes, attending to any investigative actions at their expense; and
- the cooperation leads to the identification of other participants involved in the violation, and the gathering of evidence to substantiate the disclosed violation.

The reach of a leniency agreement can be extended to other entities within the same economic group and their employees. However, this extension is not automatic. To receive leniency protection, these entities and employees must actively adhere to the leniency agreement and commit to all stipulated obligations within it. It is also noteworthy that in cases where leniency is proposed by an individual rather than a company affiliated with that individual, the associated company cannot adhere to or benefit from the agreement.

After the execution of the leniency agreement, CADE will proceed with the regular course of the investigation. For the leniency obligations to be deemed fulfilled, CADE's Administrative Tribunal must formally declare full compliance when rendering the decision on the merits of the case. If the Administrative Tribunal confirms that all obligations have been satisfied, the case will be dismissed concerning the parties to the leniency agreement, and all other benefits will come into effect.

In Brazil, the execution of a leniency agreement does not confer immunity or benefits to the leniency applicants in private claims.

Subsequent cooperating parties

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

Full immunity under the leniency programme is exclusively granted to the initial applicant. Other companies or individuals who sought leniency benefits but were not the first to apply may enter into settlement agreements (TCCs) with CADE to pursue a reduction in their respective fines.

The TCC programme permits companies and individuals who are defendants in the administrative proceeding to settle the antitrust investigation if they:

- admit their participation in the violation;
- fully cooperate with the investigation; and
- pay a pecuniary contribution (in investigations related to collusive conducts).

Leniency and TCC applicants are only liable for the damage they have caused to affected parties. They are not jointly and severally liable for damages caused by other violators of the economic order.

Going in second

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

The leniency programme in Brazil is applicable exclusively to the first applicant. Therefore, subsequent applicants approaching CADE should seek settlement under the TCC programme. The main advantages of the TCC programme include:

- a reduction in the expected fine;
- suspension of the administrative process concerning the applicant; and
- exemption from the cost of legal defence.

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

The reduction of expected fines in a TCC negotiated by the General Superintendence varies based on the collaboration offered by the applicant and the timing of the TCC application (the earlier the application, the greater the discount), within the following ranges:

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

In practice, for individuals in managerial positions, the pecuniary contribution is typically set at up to 5 per cent of the contribution applied to the company. For individuals in non-managerial positions, it generally ranges from 50,000 reais to 150,000 reais, but it can be higher to comply with minimum legal standards.

TCC applicants may be eligible for an enhanced reduction referred to as 'leniency plus'. This entails a reduction of one-third to two-thirds of the fine if a defendant (company or individual) is ineligible for a leniency agreement regarding the investigated conduct but possesses information about a different conduct. This would potentially allow the defendant to enter into a new leniency agreement related to the violation that the General Superintendence was previously unaware of.

In a leniency plus application, the following parameters for fine reductions will apply to the TCC:

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

The TCC discounts above depend on the defendant fully complying with the leniency agreement regarding the new investigation. If the defendant fails to fulfil the leniency obligations, CADE will enforce the payment of the TCC contribution in full, calculated based on the standard parameters for TCCs.

Approaching the authorities

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

There are no specific deadlines for a leniency agreement application. Once the administrative process has begun, the applicant may become eligible for a fine reduction, although not for complete immunity. It is important to note that the execution of a leniency agreement is dependent on the General Superintendence's discretion, which becomes less likely once the administrative process is underway.

When an applicant lacks all the necessary information and documents to formally submit a leniency application, they can request a 'marker' to secure their place in the leniency application queue.

This marker request can be made orally or in writing to the General Superintendence and should contain some or all of the following information regarding the conduct to be reported:

- full identification of the leniency applicant and the identities of other known companies and individuals involved in the reported violation;
- the products and services affected by the violation;
- an estimated duration of the violation if possible; and
- the geographic area impacted by the violation (in cases of international conducts, it must be indicated that the conduct could potentially have consequences in Brazil).

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

In September 2021, CADE introduced the 'Click Leniency' online marker request system on its website. This electronic marker request is confidential, and CADE will not disclose any information regarding the applicant on its website. The online marker request must include the details listed above. The online system does not exclude the option of requesting a marker in person or via email. The rules regarding the online marker request became effective on 1 October 2021.

Similarly, there is no fixed deadline for applying for a TCC. However, the position in the TCC queue and the timing of the application in relation to the administrative process phase directly impact the level of discount in the pecuniary contribution. Hence, it is advisable that any defendant interested in applying for a TCC submits its request as soon as possible. CADE also employs a marker system to track TCC applicants, and the extent of discount in the pecuniary contribution varies according to the applicant's position in the TCC queue, which is determined by the date on which the TCC marker was issued.

If a marker for a leniency agreement is not available, the applicants on the waiting list for a leniency agreement proposal will have the opportunity to negotiate a TCC in the same chronological order in which they joined the leniency agreement queue.

Cooperation

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

The applicant seeking a leniency agreement is required to provide evidence substantiating the reported violation and must cooperate fully and consistently with the investigation. The extent of information necessary to secure a leniency agreement may vary from case to case. Typically, the General Superintendence requests documents and emails exchanged with competitors that demonstrate the reported violation. Additionally, copies of telephone records, agendas, records of employee meetings, and other relevant materials might also be solicited.

For a TCC, the level of cooperation will directly influence the extent of the discount applied to the pecuniary contribution. In this context, offering more substantial evidence results in an increased discount.

Confidentiality

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

The identity of the leniency agreement applicant remains confidential until the case is adjudicated by CADE. Additionally, the process of requesting and negotiating leniency agreements and TCCs is treated as confidential. After the execution of these agreements, confidentiality is governed by the Brazilian Competition Law and by CADE Resolution No. 21/2018, which designates the following documents and information as confidential:

- the history of conduct, including any amendments and attachments, related to leniency and TCC agreements;
- information related to trade secrets and pertinent to the business activities of individuals or private legal entities;
- information that falls under the categories of confidentiality as outlined in Brazilian legislation, such as fiscal, banking, market operations and services, commercial, professional, industrial or legal confidentiality;
- documents or information ordered to be kept confidential by a judicial decision; and
- documents or information submitted in unsuccessful leniency or TCC applications.

Upon the adjudication of the case by the Administrative Tribunal, all documents become publicly accessible, except for those mentioned above. CADE's Resolution No. 21/2018 also establishes the following exceptional conditions under which access to the documents and information referred to above may be granted to third parties:

- express legal provision;
- specific judicial decision;
- consent by the leniency or TCC applicants, subject to CADE's authorisation and provided that the investigation is not harmed; and
- international legal cooperation, subject to CADE's and the applicants' authorisation, and provided that the investigation is not harmed.

A precedent has been established by the Superior Court of Justice, which ruled for the disclosure of a leniency agreement to the plaintiff in a civil damage recovery lawsuit. In this context, it was determined that the confidentiality of such documents applies solely during the administrative investigation. However, recent rulings from lower courts uphold the confidentiality of documents within CADE's records, aligning with the provisions of Resolution No. 21/2018.

There is a precedent from the Superior Court of Justice mandating the disclosure of a leniency agreement to the plaintiff in a civil damage recovery lawsuit. In this case, the Superior Court of Justice ruled that the confidentiality of such documents only applies during the administrative investigation. However, it is important to note that this decision is not binding, and there have been recent decisions by lower courts upholding the confidentiality of documents in CADE's records, citing CADE's Resolution No. 21/2018.

Settlements

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

In an administrative proceeding, CADE may propose a TCC to the defendants. Negotiations can occur either before the General Superintendence (within 60 days, with the possibility of extension) or, if the case has already progressed to the Administrative Tribunal, with the designated reporting commissioner (within 30 days, also extendable). Upon approval of the TCC, once the settlement contribution is paid and all other agreed-upon commitments are met, the case against the defendant will be temporarily suspended. When the Administrative Tribunal adjudicates the merits of the main investigation, it will also evaluate the fulfilment of all obligations outlined in the TCC. If these obligations have been properly met, the case will be dismissed with regard to the applicant, although civil and criminal liabilities will persist.

In federal civil courts, if a lawsuit is filed to challenge a decision rendered by CADE, the Administrative Tribunal may authorise CADE's Attorney General to settle the case through a judicial agreement on a case-by-case basis.

If a criminal investigation is underway, the party under investigation may enter into a plea bargain.

Corporate defendant and employees

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

The protection afforded by a leniency agreement can be extended to other entities within the same economic group and their employees. However, this extension is not automatic. To receive leniency protection, these entities and employees must actively adhere to the leniency agreement and commit to fulfilling all obligations therein.

With regard to TCC agreements, the possibility of extending protection to employees and former employees depends on the presence of specific clauses within the TCC. These clauses should expressly permit employees and former employees to become parties to the TCC negotiated by the company. Alternatively, an 'umbrella clause' may be included, automatically encompassing other entities within the same economic group and their respective employees.

Dealing with the enforcement agency

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

The leniency agreement application can be divided into four phases:

- securing a marker;
- negotiating and submitting the content of the history of conduct (a document with a detailed description of the conduct) and the evidentiary documents to be provided;
- executing the leniency agreement; and
- obtaining the Administrative Tribunal's final declaration of compliance with the leniency agreement, resulting in the confirmation of immunity. This declaration is made when the Administrative Tribunal renders its final decision.

A TCC application can be divided into four phases:

- securing a marker;
- negotiating and submitting the content of the history of conduct (a document with a detailed description of the conduct) and the evidentiary documents to be provided;
- obtaining the Administrative Tribunal's approval to execute the TCC, and the resulting suspension of the investigations regarding the TCC applicant(s); and
- obtaining the Administrative Tribunal's final declaration of compliance with the TCC. This declaration is made when the Administrative Tribunal renders its final decision.

DEFENDING A CASE

Disclosure

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

According to the Brazilian Constitution, defendants are entitled to full access to the records, including the complete content of a leniency agreement or settlement agreement (TCC). This guarantee ensures that all information and evidence are provided to defendants, enabling them to exercise their right to due process of law and safeguarding all rights of defence.

Representing employees

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

Counsel may represent both the corporation under investigation and its employees. Typically, employees are represented by the same legal team hired by the corporation. However, when conflicts of interest arise between the corporation and a current or former employee, it is advisable for the employee to seek separate legal representation to ensure their rights and interests are fully protected.

Multiple corporate defendants

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

It is possible for counsel to represent multiple corporate defendants if there is no conflict of interest.

Payment of penalties and legal costs

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

The Brazilian Competition Law does not prevent the company from paying individuals' penalties or employees' legal costs.

Taxes

42 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

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

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

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

The timing and extent of cooperation, as well as the quality of the cooperation, significantly affect the magnitude of sanctions. The adoption of a compliance programme, whether pre-existing or initiated after the investigation has commenced, does not influence the fine calculation. The most effective way to reduce a potential fine is through cooperation, via a leniency agreement or a TCC.

UPDATE AND TRENDS

Recent cases

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

In 2022, the Administrative Council for Economic Defence (CADE) adjudicated a total of 13 cases. The CADE Court ruled against eleven of the subsequent administrative proceedings. Among the administrative cases heard by CADE, nine cases were related to cartel practices and two to unilateral conduct.

The fines imposed in the convictions amounted to approximately 1.7 billion reais, with the top three cases accounting for around 90 per cent of this total. Furthermore, CADE approved 37 settlement agreements (TCCs) across various sectors, of which 32 were for cartel practices. These cases were related to various sectors, including the resale of liquefied petroleum gas, the distribution of aviation kerosene engineering and civil construction works and cafeterias at airports.

Between September 2021 and September 2022, the fines imposed on the companies amounted to approximately 1.7 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. During this period, there were five leniency agreements, 15 adhesions to leniency agreements and an additional 23 leniency requests. Furthermore, CADE approved 23 settlement agreements (TCCs) across various sectors, including infrastructure, foreign currency exchange, automotive lock parts and cardiovascular orthosis, prosthesis, and related materials, resulting in total contributions of approximately 632.4 million reais. CADE declined one TCC request in the infrastructure sector due to an insufficient proposed contribution. During this period, CADE also closed three administrative proceedings due to a lack of evidence and declared the statute of limitations expired for individuals in two administrative proceedings.

Regime reviews and modifications

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

On 17 November 2022, Law No. 14,470/2022 came into effect, introducing significant changes to the Brazilian Competition Law, including:

- Double damage compensation: the law now doubles the compensation awarded to parties affected by collusive conducts (including cartels), aligning the compensation for victims with the damages incurred. However, an exception is made for defendants who have executed leniency agreements or TCCs; they will only be liable to pay single damage payments.
- Extension of civil statute of limitations: during CADE's investigation, the civil statute of limitations is now interrupted. It will only commence after the publication of CADE's final decision in the Official Gazette. Additionally, there is now a limitation period of five years for parties to seek compensation, starting from the publication of CADE's final judgment in the administrative proceeding.
- No joint civil liability for TCC defendants.
- Passing-on presumption removed: in cartel cases, there is no longer a presumption that a company passed on increased costs to customers. The burden of proof is now on the defendants that this pass-on did not happen.
- Federal Court injunctions for damage recovery: the law grants the Federal Court the authority to issue injunctions in damage recovery lawsuits based on CADE's final decision.

On 15 September 2021, CADE published Ordinance No. 416, setting up the 'Click Leniency' system, which became effective on 1 October 2021. This ordinance establishes rules for CADE to electronically receive and process marker requests for negotiating leniency agreements. Previously, marker requests were personally submitted to the General Superintendence.

In September 2023, CADE issued a Guideline for Cartel Fines Calculation, consolidating the methodology it has been using to apply the legal criteria, serving as a reference for future cases.

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

OC ARRUDA SAMPAIO Sociedade de Advogados

Bulgaria

Anna Rizova, **Hristina Dzhevlekova**
Wolf Theiss

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

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

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

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

Changes

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

There has been no change in the LPC since its substantial revision in 2021. The 2021 revisions, which were formally triggered by the local implementation of Directive (EU) 2019/1 (ECN+ Directive) and Directive (EU) 2019/633 (Unfair Trade Practices in Agricultural and Food Supply Chain Directive), ended up introducing much wider reconstruction – in terms of both procedures and substantive competition regulations. For instance:

-

the CPC is now empowered to establish priority areas in its agenda and reject certain cases if they fall short of the areas of priority (including in cartel cases);

- the area of merger control was aligned with the significant impediment of effective competition substantive test (instead of the historically applied dominance tests); and
- the unfair trade practices (which under Bulgarian law form part of the competition law, along with antitrust, merger control and dominance areas) have been significantly revisited.

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

Other more significant changes in recent years include the following:

- In January 2018, an amendment and supplement (the Private Damages Amendment) to the LPC became effective, implementing into Bulgarian law the provisions of Directive 2014/104/EU on antitrust damages actions (the Private Damages Directive);
- As of 1 January 2019, amendments were made to the competent court to hear appeals against decisions and other acts of the CPC from the Supreme Administrative Court (SAC) to the Administrative Court for Sofia District. The amendment aimed to reduce the timeline of appeal procedures (which before SAC sometimes exceeded one year). These changes proved successful, as the duration and efficiency of appeal procedures have been significantly improved (the approximate duration of appeal procedures is now, on average, six months); and
- The LPC was also amended in April 2019 with 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.

In 2021, the CPC updated its secondary legislation, including the methodology for calculation of sanctions, the leniency programme and its rules of application. The CPC also 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 Commission itself has outlined. They are expected to achieve a balanced ratio between different kinds of proceedings that the CPC has the authority to commence. The CPC has the power to decide which of the criteria has more significance in light of its priorities and to refuse whatever claim does not satisfy the criteria. The criteria contain considerations of:

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

In 2022–2023, the CPC's annual priorities included cartel and antitrust investigations in the healthcare, energy, fuel, food supply chain and manufacturing sectors. The CPC also highlighted its focus on the digital and sustainability markets, acknowledging the importance of those markets in the context of EU competition development and EU priorities in digital market integration and the Green Deal.

In the light of the above priorities, and the huge rise in inflation in Bulgaria in the period 2022–2023, the CPC reconfirmed its focus on consumer-sensitive sectors. It initiated three big cartel proceedings for establishing infringement by way of coordinated practices (price signalling and publishing misleading information on huge costs for main consumables as electricity, fuel, etc) in the dairy and egg product markets, through their nationwide associations. The CPC also opened separate proceedings against the largest retail food chains in the country for alleged cartel infringement by increasing retail prices of the main groups of food products on the market. The proceedings are still pending.

Substantive law

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

Article 15 of the LPC mirrors article 101 TFEU. The LPC prohibits horizontal and vertical agreements and concerted practices between undertakings, namely, 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 TFEU. However, in its practice, the CPC – similarly to the EC – views cartels as one of the most serious infringements of competition law. Following the practice of the EC and ECJ, the CPC also considered that cartels, due to their direct negative result on competition, are to be treated as 'restrictions by object' rather than 'restrictions by effect' (whereas both qualifications are provided as alternatives under article 15 of the LPC). The CPC does not view the 'object' of the agreement or concerted practice subjectively (ie, through the viewpoint and intentions of the parties) but objectively (ie, as the logical result that a cartel would produce in a competitive environment).

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

In the 2021 cartel case of the CPC against 33 construction companies for cartel infringement (bid rigging) in tender proce dings under the National Energy Efficiency Program (decision of the CPC No. 762 of 22 July 2021), similar to the previous 2019 cases of the CPC fining 24 construction companies for bid-rigging practices under the same programme (decisions of the CPC No. 1312 and 1313 of 5 December 2019), the CPC reaffirmed its approach that fixing of prices and market allocation are abusive by their very object and nature. However, the case was appealed by 21 of the sanctioned undertakings before the Administrative Court for Sofia District in 2022 – the appellants submitted that the public procurements subject to the proceedings cover an insignificant share of the total market and that, due to no detriment to the public interest, the parties' behaviour may

be objectively justified. After several hearings, the last one taking place on 15 September 2022, a decision by the Administrative Court for Sofia District is, as at the time of writing, still awaited. (Administrative Case No. 1016/2021). The CPC's focus on bid-rigging continued in 2023, with the CPC opening several new proceedings for alleged cartel infringements in public procurement.

On a separate note, in the 2019 bid-rigging cases, the CPC rejected the defence of some of the cartel participants that their cartel activity only helped them to get in the short-listed candidates for the tender, and that it 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 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 had entered into a framework agreement with the tender authority, and so 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 projects, bids and prices offered within the framework agreement.

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

The LPC provides a de minimis exemption for restrictive agreements, decisions and concerted practices that have an insignificant effect on competition (article 16 of the LPC). In recent years, the CPC has viewed the de minimis exemption as not applicable to cartel infringements as defined by LPC. In the 2021 bid-rigging cartel case (decision of the CPC No. 762 of 22 July 2021), one of the arguments for appeal was the refused application of the de minimis exemption. As at the time of writing, the final decision is still pending.

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

Joint ventures and strategic alliances

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

Joint ventures that do not meet the requirements, developed in ECJ and EC practice and the EC Jurisdictional Notice on Concentration, for full-functioning joint ventures, are viewed as horizontal or vertical agreements under the general framework of article 15 of the LPC and article 101 TFEU. The EU test for full-functioning joint ventures aims to distinguish between joint ventures that will participate as separate market players apart from their parent companies (and hence shall be reviewed under merger control regulations), and dependent joint ventures that will mainly serve the commercial needs of their parent

companies (and thus represent a form of horizontal agreement or 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, not under the merger control. To our knowledge, however, the CPC has not yet reviewed in practice a non-full-functioning joint venture as a horizontal agreement or concerted practice (and potentially an alleged cartel infringement) as per article 15 of the LPC and article 101 TFEU.

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

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

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

Extraterritoriality

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

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

According to article 3(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty on the Functioning of the European Union (TFEU) (Regulation No. 1/2003), the Commission for Protection of Competition (CPC) has the authority to apply (and usually does so) article 101 TFEU in parallel with national anti-cartel provisions if the agreement or concerted practice may affect trade between EU member states. As part of its standard review under a cartel case, the CPC will ex officio assess the applicability of article

101 TFEU to the case and, if applicable, will follow the EU acquis (including European Competition Network (ECN) cooperation procedures) regarding cross-border cartels.

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

Export cartels

9 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

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

Neither the LPC nor the secondary legislation provides for any industry-specific infringements, defences or exemptions in relation to cartel activity (the recent amendments of the LPC introduce such with respect to unfair trade practices, but for antitrust infringements). Thus, the general exemptions and defence strategies (group exemptions, proving pro-competitive effects) would apply. It is expected that the CPC will broaden the scope of possible exemptions at EU level for sustainability agreements. These, however, are still being discussed between the European Commission (EC) and national competition authorities.

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

Government-approved conduct

11 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 they constitute an economic activity and may qualify the

state or public body as an 'undertaking' (ie, as an equal participant on the commercial scene). On the contrary, where a state or public body exercises its entrusted public powers and competencies, or executes a non-profit activity, they will not be treated as an undertaking and will not fall in the scope of the competition rules under the LPC or the TFEU. The CPC has already reviewed potential antitrust abuses by the National Health Insurance Fund (NHIF) and various other public authorities and organisations (most recently, the nationwide collective management organisations for IP and related rights MUSICAUTOR and PROFON). It conducted the assessment on a case-by-case basis, with respect to each particular activity conducted by the public body, and in some instances, the same public body (eg, NHIF) was found to be acting as an undertaking, while in others it was not. In the cases of MUSICAUTOR and PROFON, the CPC further clarified that it is not only the direct activity that is relevant for the assessment, and in this case, 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 the competition law and a checklist for (potentially) abusive provisions.

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

Where the CPC is competent to apply article 101 or article 102 TFEU, the parties might be able to invoke the 'regulated conduct defence', subject to the requirements developed in the EC and ECJ case law for that defence. However, we are not aware of any such defence being brought before the CPC.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

A cartel investigation procedure is opened by the Commission for Protection of Competition (CPC) upon:

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

- a request by the European Commission (EC).

Most often the CPC initiates a cartel investigation based on sector inquiries conducted by the EC or upon written request by affected persons. Contracting authorities also notify the CPC about suspected bid rigging in public procurement tenders – in 2019–2022, 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, it has only been used in the past few years (for the first time in 2019 in a bid-rigging investigation where three of the cartelists applied for leniency). In 2021, again in the context of a bid-rigging investigation, two of the cartelists applied for leniency and were granted, respectively, full and partial immunity from the fine. The leniency programme was modified in 2021 to introduce the rules of Directive (EU) 2019/1 (the ECN+ Directive) and stimulate more undertakings to assist the cartel investigations.

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

The working group compiles information and sends questionnaires for information (eg, market and financial data relevant to the investigation of the undertaking in question). Addressees are given approximately one month to provide the requested information. The CPC does not disclose the exact behaviour it is investigating, but must inform those it contacts of the legal grounds of the investigation; nor does it send a copy of the complaint. When the investigation has been initiated following a decision by the CPC, more information on the particular reasons can be obtained from the CPC decision 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. An interesting defence in a 2023 case (Decision 634 of 29 June 2023) that, although not a case concerning vertical restraint or resale price maintenance (RPM), did have a potential effect on defence in cartel cases, was invoked by the alleged infringer. They argued that the issued statement of objections was not clear enough, including on the legal ground of the accusations and the particular form of RPM. The accused party claimed that each form of RPM has possible exemptions and mitigations under the EC Guidelines on Vertical Restraints, which they currently cannot use because of the vagueness of the statement, and that this breaches their right of defence. The CPC rejected the complaint, and this is now one of the appeal points.

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. With the 2021 amendments in the LPC, the parties are also entitled to request oral hearing of witnesses who have direct knowledge of the facts and circumstances of the cartel case. In a recent 2023 case, however, the CPC clarified that direct witness statements shall be acceptable in cases where the facts and circumstances are still not supported at this late stage of the cartel proceedings; by sufficient written evidence. Otherwise, the witness will bring little value and the CPC would likely reject it.

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

I

13 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, a 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 to disclose it to other parties. The CPC may fine any legal or natural person who, without reasonable grounds, fails to comply with a formal information request.

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

To carry out a dawn raid at the premises of an undertaking under investigation, the CPC must obtain explicit authorisation from the Administrative Court in Sofia, based on which it may enter all of the undertaking's business premises, irrespective of their location and means (eg, offices and motor vehicles). With the local implementation of the ECN+ Directive, private homes and vehicles of the management, other relevant representatives and employees of the company could be inspected if there is reason to believe that business-related files may be found and subject to prior authorisation by the Administrative Court for Sofia District. The CPC case handlers and other specified persons (such as IT experts) are authorised to:

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

Bulgarian law recognises attorney–client privilege in communications between undertakings with their external legal advisers (ie, if communication is properly and clearly marked as being subject to attorney-client privilege). However, advice from in-house legal counsel is not privileged and can be seized and used by the case handlers as evidence.

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

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

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

The CPC also cooperates with the EC and other EU member states' national competition authorities (NCAs), by receiving and rendering assistance and exchanging information under the procedure set forth in Regulation No. 1/2003 and the Empowering National Competition Authorities Directive (EU) No. 2019/1 (ECN+ Directive). Based on the ECN+ Directive and the amendments in the local legislation, the CPC may, among others:

- forward or request information obtained during a cartel investigation to the European Commission (EC) and to EU member states' competition authorities (as an exception to the general rule that member states' confidential information collected by the CPC during the investigations shall not be disclosed and should only be used for purposes under the Law on Protection of Competition);
- serve or request to be served in another EC member state procedural documents in the course of pending investigation, including statements of objection and final acts

or decisions, acts on imposition and enforcement of fines and periodic penalties; and

- assist 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 (KEVR) – based on how the competition authority 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

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

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

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

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

CARTEL PROCEEDINGS

Decisions

16 How is a cartel proceeding adjudicated or determined?

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

Burden of proof

17 | 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 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, the undertaking must prove that the requirements laid down in those provisions are fulfilled.

Circumstantial evidence

18 | 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 a 2019 bid-rigging decision 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 whereby, 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.

Most recently, in 2023 the CPC initiated three separate cartel proceedings based on circumstantial evidence against the national associations of dairy products manufacturers, the associations of bird breeders, and the biggest retail food chains in Bulgaria for coordinating and keeping prices beyond market levels. To initiate those investigations the CPC relied entirely on circumstantial evidence, including:

- comparison of prices at retail and wholesale level between various food manufacturers, wholesalers and retailers;
- statistics relating to price increases of input products and consumables, such as fuel, energy and transportation; and
- comparison of prices in Bulgaria and neighbouring EU member states.

Ultimately, the CPC found no apparent evidence in support of the 30 to 40 per cent increase in the prices of the mentioned categories of foods products, or that such high levels were kept in the comparable member states. In addition, the CPC found suspicions of 'price signalling' between the national associations of the main food categories based on analysis and comparison of their public announcements as to why prices are so high and their expected levels in the following months. For the CPC, although circumstantial, this evidence showed possible coordinated behaviour and no objective justification for the high prices, and so the CPC opened respective cartel investigations, which are still pending.

Appeal process

19 | What is the appeal process?

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

The parties involved in a cartel investigation are entitled to submit appeals against CPC decisions within 14 days of receiving notification of the CPC's decision. Any third party that can prove it has a direct legal interest is also entitled to appeal a CPC decision within 14 days of its publication on the CPC website.

The appeal should be submitted through the CPC. The entire CPC file is provided to the Administrative Court for Sofia District. Any evidence and information marked as confidential are kept in separate files to which only the court's judges have access – where the access to confidential materials under the case file by public officials and any third parties is further tightened with the option of the ECN+ Directive procedural rules (for public officials, only those with need-to-know and for third parties partial access based on evidenced legal interest). The appellant, the CPC and all interested parties submit written statements regarding the appeal and are summoned to take part in oral hearings before the court. The court may appoint external experts on specific technical or financial issues. The Administrative Court for Sofia District has significant power of judicial review over the decisions of the CPC, and it may review both legal and factual questions, including the correctness and completeness of the facts established by the CPC, modification of the imposed fines, and review of the CPC's interpretation of the economic facts. Usually, the appeal procedure can take between three months and one year.

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

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

The SAC's three-panel judgment is final and binding. The appeal usually takes about six months to one year (depending on the difficulty of the case, the workload of the court and the measures in place to prevent the spread of covid-19).

SANCTIONS

Criminal sanctions

20 | 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

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

Civil sanctions

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

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

Administrative sanctions

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

Recent CPC decisions on cartel cases show that the CPC is inclined to impose sanctions of almost the maximum amount provided in the law. For example, in 2012 the CPC imposed the highest fine for horizontal anticompetitive cooperation at the total amount of 2,914,560 leva. The fine was imposed on three Bulgarian companies for bid rigging in a public procurement for the supply of air tickets. One of the participants was sanctioned with the highest fine ever imposed by the CPC on a particular undertaking for horizontal cooperation – 2,818,800 leva. However, in 2016 the SAC repealed this decision. In its recent decision fining 33 construction companies for bid rigging, the CPC imposed fines of up to 8 per cent

of the turnover of the cartel participants (where the participant was formally an association of undertakings, the fine was imposed on its members).

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

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

Most frequently, the CPC imposes sanctions (between 0.01 and 1 per cent) on undertakings for non-cooperation (non-provision of requested information) during the investigations. In a recent case (decision of the CPC No. 619 of 5 June 2018) the CPC imposed a sanction of 1 per cent of the global turnover of a company for delaying the CPC inspection by five hours, restricting the CPC's access to some of the relevant digital files, providing a fake email address for the manager and attempting to manipulate the folders on the manager's computer during the inspection. The appeal court usually upholds such sanctions.

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

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

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

Guidelines for sanction levels

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

In 2009, the CPC adopted a methodology for calculating fines under the LPC. Since then, the methodology has been updated several times, with some major revisions introduced in 2021 (all of which aimed at increasing the level of the sanctions or the scope of parties that may be caught by them).

In general, fines for cartel activity are set by using a two-step approach – the basic amount of the sanction, which is then adjusted based on aggravating or mitigating circumstances.

The basic amount is based on the value of sales of the products or activities affected by the cartel, depending on the gravity and duration of the infringement. According to the recent amendments in the methodology, cartels are considered a serious infringement, and therefore the basic amount is up to 15 per cent of the value of sales of the affected products. After the amendments, the basic amount can be further increased from 10 to 100 per cent for each aggravating factor (where a 100 per cent increase is prescribed for second or repeated cartel infringement if the CPC or any other EC competition authority has already sanctioned the party). Mitigating circumstances may allow for a 10 per cent reduction of the fine (for each circumstance). The exact amount of the sanction cannot exceed the maximum amount of 10 per cent of the total turnover of the undertaking for the preceding financial year (ie, not limited to the turnover from the infringing activities).

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

- commission of the same or similar violation (second or repeated violation), established by the CPC, another national competition authority of an EU member state or the EC;
- refusing cooperation, hindering the CPC during its investigation or opposing the investigation;
- the undertaking played the role of ringleader (ie, initiated, led or incited the breach or exercised coercion – undue influence – upon another undertaking to participate in the infringement). In that case, the basic amount of the sanction can be increased by 10 per cent;
- paying or offering to pay 'compensation' or 'damages' to other enterprises to include them in the violation;
- affecting competition of related or neighbouring markets; and
- other factors, depending on the facts of the case, taken on a case-by-case basis.

In a recent bid-rigging case, the CPC increased the fine of the leader of the cartel by the maximum possible percentage due to an aggravating circumstance.

The mitigating factors that the CPC should consider include:

- terminating an infringement immediately after the start of an investigation (this is a new mitigating circumstance, adopted with the 2021 amendments);
- passive behaviour of the undertaking or the association, playing a limited role in the violation or adopting the strategy of 'follow the leader';
- effectively cooperating with the CPC outside the scope of the leniency programme and the obligation for cooperating pursuant to the LPC;
- taking appropriate measures for restricting the detrimental consequences of the infringement such as voluntarily providing adequate compensation to the ill-affected parties for any damages the breach has caused; and
- other factors, depending on the case.

In another recent case (decision of the CPC No. 761 of 27 June 2019), the defendants tried to claim as a mitigating circumstance that they ended the infringement before the CPC intervention. However, this argument was rejected by the CPC, as at that time early termination was not yet recognised as a separate mitigating factor. Since the latest changes, 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 of the fine.

In the determination of the amount of the sanction, other factors, such as the duration of the cartel and its effectiveness, are also taken into consideration by the CPC. To ensure that the sanctions will have sufficient dissuasive effect upon the fined undertaking, the new methodology for calculation of fines introduces a cap of 25 per cent added to the basic amount of the sanction in cases 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 has broadened the range of related entities that it may engage in the sanctioning process. Namely:

- the CPC would be able to impose sanctions on the parent companies of a local infringer (if they have had the power and opportunity to control the infringing entity, regardless of whether they used that power in the particular case);
- the CPC would be able to hold members of a trade association responsible for payment of the fine imposed to the association for competition breaches; moreover, in calculation of the fine to the association, the CPC will take into account the worldwide turnovers of all of its members (thereby leading to potentially very significant fines);
- the CPC may hold responsible and seek payment of a fine from any subsequent acquirer or successor of shares of an infringer, or assets or business activity used for the infringement; and
- the CPC will be offered support within the ECN with the enforcement of fines outside Bulgaria.

Compliance programmes

23 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

24 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

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

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

Parallel proceedings

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

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

27 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they

paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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

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

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

There are no specific provisions under Bulgarian law on 'umbrella purchaser claims'. However, based on the general principles of the LPC on private damages claims as well as on the European Court of Justice practice (Case C–557/12 *Kone AG and others v ÖBB–Infrastruktur AG*, 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

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

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

COOPERATING PARTIES

Immunity

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

The Law on Protection of Competition (LPC) sets out the legal basis for granting full or partial immunity to an undertaking that participated in a secret cartel. The legislative rules are further developed in a leniency programme and Rules for Application of the Leniency Programme, adopted by the Commission for Protection of Competition (CPC) in 2011 and recently amended in 2021 to align with the ECN+ Directive principles and rules for leniency.

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

If the conditions for the above first option are not present, the cartel participant may still apply for full leniency if 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

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

The CPC's 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

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

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

The CPC leniency programme provides incentives for applicants to come forward with information about other cartels they are involved in. If, during an investigation, any cartel participant provides information regarding involvement in another cartel, such undertaking may benefit from an additional reduction of up to 10 per cent of the fine for the first cartel ('leniency plus'). If the undertaking provides information disclosing the existence of more cartels, the CPC may reduce the fine imposed for participation in the first cartel by up to 10 per cent for any subsequent cartel, but by no more than 30 per cent overall.

Approaching the authorities

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

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

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

33

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

According to the leniency programme and Rules on the Application of the Leniency Programme, all leniency applicants should cooperate in good faith, fully and continuously with the CPC from the submission of the application to the adoption of the decision by the CPC. The leniency applicant shall provide at its own initiative or at the CPC's request all information and evidence that are at his or her disposal. In particular, the applicant should provide the authority with all non-legally privileged information, documents and evidence available regarding the existence and activity of the reported cartel and, where appropriate, 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 hearing or witness statements. The applicant should not destroy, conceal or fabricate any information. It must not disclose in any way 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 the participation or its continuance. Failure to comply with these requirements could lead to the loss of all protection under the leniency programme.

Confidentiality

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

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

35 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty

for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In addition to leniency, which is settled at an earlier stage of a cartel investigation and when the CPC is yet to determine the existence of a cartel, another option for relief or reduction of a penalty is for the cartel participant to offer commitments to the CPC once the cartel is discovered. The LPC does not allow the commitments procedure to be applied to harsh infringements of competition law (which cartels are usually considered as). However, in practice, it has been applied to several cartel cases – most recently, to a cartel case in the retail fuel market in 2020.

After being served with the CPC's statement of objections, the LPC gives the option for the infringing party, within a term of not less than 30 days, to offer the CPC commitments that it will immediately cease the infringing (cartel) activity and execute adequate changes in the behaviour that has led to it. Both behavioural and structural commitments are offered (although the CPC usually shows preference to structural ones).

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

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

In the latter scenario, if there are any subsequent changes in the circumstances of a cartel, the cartel participant does not fulfil their agreed commitments, or if any information that the CPC's decision was based on is found to be incorrect or misleading, the CPC may reopen the case and sanction infringing entities.

Corporate defendant and employees

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

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

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

Undertakings wishing to take advantage of the leniency programme should contact the CPC and apply for leniency. The application must be signed by a person who represents

the applicant and should be submitted in the format adopted by the CPC. The application should contain information on the cartel's participants and detailed information about the cartel's activity, including:

- affected products or services;
- affected territories;
- the nature of the infringement (eg, price-fixing, client and market allocation);
- the duration of the cartel;
- a description of the way it functions (including telephone calls and emails);
- any past or future leniency applications that the entity has initiated or is planning to initiate in the future; and
- a description of any evidence presented in favour of the application.

The application should be supplemented with relevant evidence.

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

Leniency applications submitted to other competition authorities or the EC are not recognised by the CPC and will not give the protection admitted to leniency applications submitted to the CPC. If the EC is the best-placed authority to investigate particular cartel activity, an undertaking applying to the EC for immunity may submit a leniency application to the CPC in short form. The procedure for submitting a short-form leniency application as well as the content requirements thereof have recently been introduced in the amended rules for application of the leniency programme.

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

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

DEFENDING A CASE

Disclosure

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

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

No specific details about the alleged infringement or documents that have been provided are given to the defendant until the CPC serves the statement of objections or issues a

decision that there was no competition infringement. In both cases, the defendant is not provided with access to confidential information or the CPC's internal documents (including correspondence with the EC or with EU national competition authorities (NCAs)). If the CPC considers certain information is not confidential as per its criteria, it issues a ruling stating so and makes the information accessible by parties to the CPC investigation.

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

Representing employees

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

The 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

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

As long as there are no conflicts of interest, attorneys-at-law (members of the Bar) can represent multiple defendants.

Payment of penalties and legal costs

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

The LPC does not regulate this issue. Based on the general rules of the Bulgarian Obligations and Contracts Act, the corporation could pay fines imposed on its employees and legal costs.

Taxes

42 | 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

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

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

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

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

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

Outside of the leniency programme, participants in a cartel may obtain a 10 per cent reduction in a fine from mitigating circumstances.

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

- terminating an infringement immediately after the start of an investigation (introduced in 2021);
- passive behaviour by the undertaking in the cartel activity;
- a limited role in the infringement or adopting the strategy of ‘follow the leader’;
- short-term participation in the cartel and terminating participation upon the company’s management becoming aware of it (for which compliance programmes may help);
- fully cooperating with a competition authority during an investigation;
- undertaking measures to remedy unfavourable consequences of the infringement, such as voluntarily providing adequate compensation to the ill-affected parties for any damages the breach has caused; and

- other circumstances, depending on the specific case.

As cartels are considered a material infringement of the law, the CPC cannot adopt commitment decisions in cartel cases, even if certain commitments are proposed by parties.

UPDATE AND TRENDS

Recent cases

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

Similar to the reviewed period in 2022–2023, the focus of the Commission for Protection of Competition (CPC) has been on the traditional sectors prone to cartels where it has detected coordinated behaviour (eg, retail chains, fast-moving consumer goods and their production sector, and industry trade associations). These cases, which previously formed a minor part of the CPC's work, have become a prime focus for the CPC due to the political and economic effects of the situation in Ukraine, high inflation rates and rapidly increasing prices on basic consumer goods and products (reaching 30 to 40 per cent), public pressure and the increase in the number of infringements in recent years.

Unlike in previous years where the CPC pursued an increased number of bid-rigging cases, in 2022–2023 only a few proceedings for alleged infringement through manipulation of public procurement process have been opened. Nevertheless, since covid-19, 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.

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

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

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

Wolf Theiss

Anna Rizova anna.rizova@wolftheiss.com
Hristina Dzhevlekova hristina.dzhevlekova@wolftheiss.com

Wolf Theiss

Canada

Neil Campbell, **Guy Pinsonnault**, **William Wu**
McMillan LLP

Summary

PRIVATE RIGHTS OF ACTION

COOPERATING PARTIES

DEFENDING A CASE

UPDATE AND TRENDS

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 regulating cartel activity 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). Administratively, the Commissioner and Bureau report to the Minister of Innovation, Science and Industry, but they have substantial independence on investigation and enforcement matters.

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 and conduct 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 may be 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 for the new conspiracy offence. The maximum penalties were further amended in 2023 to be a fine at the discretion of the court or up to 14 years in prison. 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, which 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 June 2022, the Act was amended to introduce a new criminal offence prohibiting no-poach and wage-fixing agreements between employers. This offence came 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 (which is defined to include a person who is likely to compete in the absence of an agreement) in respect of a particular product, conspires, agrees or arranges to engage in any of the following activities 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 likely 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.

Several courts have confirmed 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. These guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court. However, a recent Federal Court decision has adopted this interpretation of section 45(1).

In June 2022, the Act was amended to introduce a new criminal offence in section 45(1.1) related to labour markets. It provides that an employer who conspires, agrees or arranges to engage in any of the following activities with another employer is guilty of an indictable 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 applies to any employers regardless of whether they are competitors.

This new wage-fixing and no-poach offence came into force in June 2023. The Bureau published the enforcement guidelines on wage-fixing and no poaching agreements in May 2023 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 indicate that the criminal offence in section 45 of the Act will be reserved for agreements between competitors (or likely 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. These guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court. However, a recent Federal Court decision has adopted this interpretation of section 45(1).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

7 | 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 a corporation or other organisation as well as individuals involved in problematic conduct including 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 prosecuted 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 (eg, pricing of products).

Extraterritoriality

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

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 Bureau has adopted an expansive interpretation of the *Libman* decision. 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 a misleading advertising investigation involving Thomas Liquidation, 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

9 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

10 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 any of the following matters 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 for offences under section 49 are a fine of C$10 million per count and five years in prison.

Underwriting

The conspiracy offence in 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. This decision was recentlyupheld by the Federal Court of Appeal, but an application has been made for leave to appeal to the Supreme Court of Canada.

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 the conspiracy offence in 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) offence 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 conspiracy offence in section 45 of the Act. However, the Bureau may investigate such agreements as reviewable practices under section 90.1 of the Act and seek prohibition orders if anticompetitive effects are likely to occur.

Government-approved conduct

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 (1) a regulatory body exercising its authority under a validly enacted provincial legislation, or (2) regulated persons proceeding in accordance with such provincial regulation. Canadian courts have also 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 in 2010, 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

12 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 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

13 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 (ie, responses to questions in writing) 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

14 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 competition agencies to coordinate their enforcement activities, exchange confidential information and 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

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

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, United Kingdom 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 importance in developing a comprehensive strategy.

CARTEL PROCEEDINGS

Decisions

16 | 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

17 | 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. However, the Act expressly provides for the admissibility of statistical evidence that might not be admissible in other types of criminal cases.

Circumstantial evidence

18 | 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

19 | 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;
- there was an incorrect 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; no substantial wrong or miscarriage of justice has occurred, even if one of the grounds of appeal is established; 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

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

Conspiracy and bid rigging are the most serious indictable offences under the federal Competition Act (the Act) and are subject to 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 large and 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-directed conspiracy in Canada has never had a statutory maximum fine. 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;
- C$30 million against Yazaki Corporation in April 2013 for bid rigging in the supply of wire harnesses (auto parts) – the highest fine ever imposed under the bid rigging offence; and
- C$50 million against Canada Bread Company for multiple counts of price-fixing conspiracy involving fresh commercial bread.

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 many 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

21 | 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

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

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 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 (including timeliness) 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, 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

23 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

24 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

25 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 Canadian government 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 Canadian government and not of a particular supplier.

In March 2018, the Canadian 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

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

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 it has adequate information to decide which track is more appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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, 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'. However, the claimant will need to establish causation and injury, which may be difficult in practice,

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 have attempted to use section 36 to bring a private action in respect of an alleged breach of the conspiracy or bid rigging provisions in respect of conduct that the Competition Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track. A recent Federal Court decision has held that section 45(1) is limited to naked restraints on competition, which would limit the scope of the private right of action to the same conduct.

Class actions

28

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

Class actions are available and are now a virtual certainty in multiple provinces in Canada after (and often before) there is a conviction or guilty plea 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.

Class actions may be brought on the basis of classes defined by reference to customers located in the province in question, However, several provinces including Ontario and British Columbia allow nationwide class actions to be brought in their courts. Class actions may also be initiated on a national basis in the Federal Court.

Canada's class action 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. 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 several provinces and has mainly been used for approvals of settlements.

To date, most cases have been resolved through settlements, which are subject to court approval to ensure that they are fair, reasonable and in the best interests of the proposed class. The largest single settlement to date involved a long-running class action against Microsoft for C$517 million. 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.

COOPERATING PARTIES

Immunity

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

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

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

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 a resolution that reflects favourable treatment 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 in 2018. Under the prior programme, 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 each applicant's 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' where a subsequent cooperating party also brings the Bureau information about additional conduct (eg, time periods, products and geographies) that were not covered by the original immunity applicant.

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

There are no 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 maximise the 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 an investigation as to whether an offence has been committed. 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 (with a focus on Canada, in international cases) 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 in parallel with, or promptly after, approaching foreign competition law authorities.

Cooperation

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

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

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

The 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 cooperating 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 third parties (eg, plaintiffs in private or class 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

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

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 (eg, *R v Maxzone Canada Corporation*).

Corporate defendant and employees

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

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), its 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

37 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 by legal counsel, 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 and confidential proffer by legal counsel that describes the conduct and the potential evidence that the cooperating party can provide.

At the proffer 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

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 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

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

The Director of Public Prosecutions (DPP) is required to provide to a person accused of a criminal offence all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP has some discretion as to the timing of the disclosure where necessary for the protection of witnesses or a continuing investigation, but must disclose this information before the trial.

This disclosure obligation begins at the outset of the prosecution (ie, the first court 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

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

As individual employees and the corporation can both be charged with an offence under the federal Competition Act, conflicts of interest can potentially arise if legal 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.

Legal counsel for a corporation must caution employees that they act for the corporation 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,

the Competition Bureau (the Bureau) investigators or DPP prosecutors may resist joint representation if there is a risk of divergent interests.

Multiple corporate defendants

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

Affiliated companies normally do not require separate representation.

There is a potential for conflicts of interest among multiple corporate defendants that 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 screens 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

41 | 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

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

Fines and penalties can be categorised as follows: (1) judicial (imposed by a court of law for a breach of any public law); and (2) 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

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

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.

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

44 | 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

45 | 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, which was subsequently upheld by the Federal Court of Appeal. 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.

In *Difederico et al v Amazon.com, Inc. et al*, the Federal Court of Canada clarified that the mens rea elements of the section 45 conspiracy offence requires proof of (1) subjective intention to enter into the agreement and knowledge of its terms, and (2) an objective intention to do one or more of things described in section 45(1)(a)-(c), namely price-fixing, output restriction and market allocation.

The Bureau released Enforcement Guidelines on wage-fixing and no-poaching agreements in May 2023 in advance of the coming into force of the wage-fixing and no-poaching provisions in section 45(1.1) in June 2023. Among other things, the enforcement guidelines clarified that the Bureau considers one-way no-poaching agreements (ie, where one party agrees not to hire or solicit the employees of the other, with no corresponding commitment from the other party) to be outside the scope of the prohibition against no-poaching agreements.

Regime reviews and modifications

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

Recent amendments to the Act in June 2022 introduced a new offence against wage-fixing and no-poach agreements between employers, came into effect in June 2023. The Bureau published the Enforcement Guidelines on wage-fixing and no poaching agreements in May 2023.

The Canadian government conducted a broad consultation about competition law reform in 2023, which considered possible changes in the provisions related to cartels and other competitor agreements. Further amendments to the Act may be proposed following the consultation.

Neil Campbell
Guy Pinsonnault
William Wu

guy.pinsonnault@mcmillan.ca
william.wu@mcmillan.ca

McMillan LLP

Cyprus

Panayiotis Agisilaou
Trojan Economics Consultants Ltd

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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) as amended by Law No. 169(I)/2022;
- the Law on Actions for Damages for Infringements of Competition Law of 2017 (Law No. 113(I)/2017); and
- the Regulations on the Immunity 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 2022 (Regulation 442/2022).

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). There is no separate prosecution authority. Cartel matters are adjudicated or determined by the CPC. However, any person with a legitimate interest may file an appeal before the Administrative Court and, subsequently, before the Supreme Court, under article 146 of the Constitution of the Republic of Cyprus.

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. The Law was amended on 14 November 2022 to further align with the ECN+ Directive (EU) 2019/1 especially concerning the impartiality requirements upon the exercise of the powers vested in the CPC.

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

7 | 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

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

The 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

9 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

10 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

11 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

12 | 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

13 | 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

14 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

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

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

CARTEL PROCEEDINGS

Decisions

16 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 60 days of the 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

17 | 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

18 | 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

19 | 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 of 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 of its issuance.

SANCTIONS

Criminal sanctions

20 | 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

21 | 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

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

The Law does not contain any guidelines or principles for setting fines. However, section 47(7) of the Law stipulates that the CPC may issue a decision specifying how it will assess the gravity and duration of the infringement, and the aggravating and mitigating circumstances it will consider when setting the fine.

In practice, when setting a fine, the CPC considers the gravity and duration of the infringement as prescribed in sections 29 and 50 of the Law. The CPC may adjust the fine according to the existence of aggravating and mitigating circumstances, especially by

considering whether the undertaking or the association of undertakings has infringed the provisions of the Law negligently or intentionally, and any compensation paid as a result of a consensual settlement according to Law 113(I)/2017, as stipulated in section 47(4) of the Law.

Compliance programmes

23 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 sections 29 and 50 of the Law.

Director disqualification

24 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

25 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

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

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

27 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have

the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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 August 2023, there is no case law on actions under the Law on Damages.

Class actions

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

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

COOPERATING PARTIES

Immunity

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

Regulations on the Immunity 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 2022 (Regulation 442/2022) (the Leniency Programme) set out the terms and conditions for immunity or reduction in case of cartels. The Leniency Programme provides both full leniency (immunity from fines) and partial leniency (fine reduction).

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. In addition, immunity cannot be granted to undertakings that have forced other undertakings to enter into or remain in a cartel.

An undertaking seeking immunity must fulfil the following conditions:

- cooperate fully, sincerely, continuously and swiftly 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 investigation);
- demonstrate that it has not incited other undertakings to participate in the infringement; and
- not destroy, falsify or conceal information or evidence related to the alleged infringement.

Subsequent cooperating parties

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

Subsequent cooperating parties may apply for a reduction of the administrative fine, provided they have submitted evidence of significant added value, strengthening the CPC's ability to prove the alleged infringement.

Undertakings applying for a reduction of the administrative fine must also cooperate fully, actively and continuously with the CPC, and terminate their involvement in the infringement when 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 after an immunity application has been made.

Going in second

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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 of the administrative fine.

There is no immunity plus or amnesty plus treatment available.

Approaching the authorities

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

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 relevant conditions.

The first immunity applicant may apply for a marker to ensure priority until all necessary information and evidence are gathered. If the marker is perfected within the time frame provided by the CPC, 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 before 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

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

Participating undertakings must cooperate fully, actively, continuously and swiftly with the CPC from the date of submission of the leniency application to the date the procedure is completed.

Confidentiality

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

The 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

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

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

Corporate defendant and employees

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

The 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

37 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

38 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.

On 25 May 2022 the CPC issued a notice regarding access to the file.

Representing employees

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

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

40 | 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

41 | 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

42 | 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

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

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

44 | 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.

UPDATE AND TRENDS

Recent cases

45 | 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. Since this case, according to publicly available information, the Commission for the Protection of Competition has not issued any other decision concerning anticompetitive agreements.

Regime reviews and modifications

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

There are no ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime.

Panayiotis Agisilaou p.agisilaou@trojaneconomics.com

Trojan Economics Consultants Ltd

Denmark

Frederik André Bork, **Søren Zinck**, **Olaf Koktvedgaard**
Bruun & Hjejle

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 that is 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. Material decisions by the Council may be appealed to (1) the Danish Competition Appeals Tribunal (DCAT) and subsequently to the Danish courts; or (2) directly to the Danish courts, while decisions on formality may not be brought before the courts until the DCAT has made its decision. 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

7 | 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

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

The 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

9 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

10 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

11 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

12 | 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 for it 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

13 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 as 'private'. The burden of proof rests with the employee to document that correspondence on a medium is in fact 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

14 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

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

In general, jurisdictions within the European Union (and the ECN) cooperate with the Danish competition authorities.

CARTEL PROCEEDINGS

Decisions

16 | 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

17 | 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 be 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

18 | 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 constitute an infringement of 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' (see for example, 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

19 | 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 rendered 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

20 | 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

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

Following the amendment of the Danish Competition Act of 4 March 2021 (the Act), 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, (see section 23b(1) of the Act). Further, according to section 23b(4) of the Act, the undertaking's worldwide group turnover of the previous financial year must be considered, as fines should not exceed 10 per cent of the undertaking's worldwide group turnover. Section 23b also contains a list of aggravating and mitigating circumstances to consider when deciding 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

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

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 several aggravating and mitigating circumstances to be taken 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 (see section 23b(1) of the Act). Further, according to section 23b(4) of the Act, the undertaking's worldwide group turnover of the previous financial year must be considered, as fines should not exceed 10 per cent of the undertaking's worldwide group turnover. Section 23b also contains a list of aggravating and mitigating circumstances to consider when deciding the level of the fine.

Compliance programmes

23 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

24

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

25 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

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

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

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

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

28

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

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. On 17 February 2021, the High Court of Eastern Denmark ruled in favor of the DCCA. This judgment was subsequently upheld by the Supreme High Court of Denmark in the final judgment of 4 April 2023.

COOPERATING PARTIES

Immunity

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

The Danish Competition Act (the Act) provides for a leniency programme, which is comparable to the leniency programme set out under EU law.

Thus, according to section 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) of the Act 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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

There are no 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 (see section 23f of the Act). The applicant must hand in a preliminary application for leniency and must subsequently deliver further documentation to the Danish Competition and Consumer Authority (DCCA) within a fixed time frame.

There are no formal requirements as to the form of application to be submitted to the DCCA for leniency but using the application form provided on the DCCA's website is recommended.

Cooperation

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

To 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

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

The 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

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

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

36 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

37 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 either Danish or English, or, upon agreement with the DCCA, in another official language of the European Union.

In practice, the DCCA will usually invite the applicant to a meeting to discuss the application.

DEFENDING A CASE

Disclosure

38 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 regarding 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

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

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

40 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

41 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

42 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

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

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

44 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

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

The most recent case by the Danish Competition Council (the Council) concerned the Danish online provider of auto mechanic services, Autobutler. Autobutler's online platform acts as an intermediary between buyers of car maintenance and repair services and the mechanics that provide them. The Council found that Autobutler had entered into fixed price agreements with hundreds of mechanics on a series of specific services provided through the platform and that the agreements were capable of restricting competition contrary to section 6 of the Act and article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The Council emphasised that the agreements limited the ability of the participating mechanics to compete on prices and attract customers, leading to less customer mobility on the market, risk of higher prices and lower-quality services. The Council further concluded that the Danish Competition and Consumer Authority (DCCA) should continue the case with the aim of imposing a fine.

On 29 March 2023 the Council rendered a case concerning the Danish retail chain Ønskebørn. Ønskebørn is a nationwide retail chain whose members consist of independent businesses opting in on a voluntary basis for the purpose of facilitating cooperation among the members. Emphasising the fact that independent businesses are expected to determine prices, product selection, discounts and other essential competitive parameters independently, the Council found that Ønskebørn had violated section 6 of the Act and article 101(1) TFEU by coordinating prices on baby and children's products among its members in respect of two different periods. The Council has referred the case to the Danish Maritime and Commercial High Court, where the case will proceed as to imposing a fine on Ønskebørn.

On 19 May 2023, the High Court of Eastern Denmark found that two outdoor media companies, Clear Channel Danmark A/S and AFA JCDecaux A/S, had violated section 6 of the Act and article 101(1) TFEU by coordinating rebates and remunerations to media agencies on the Danish market for outdoor media in the period from September 2008 to April 2015. According to previous decisions, the violation had taken place in two distinct periods:

- period 1, in which there were written agreements between the parties covering four rebates/remunerations from September 2008 to 31 December 2010; and
- period 2, in which the parties had a concerted practice covering three out of the four rebates/remunerations from 1 January 2011 to 21 April 2015.

The Court of Eastern Denmark found that documentary evidence prior to the period of the alleged concerted practice was sufficient to proof the existence of a concerted practice in period 2 and, thus, overturned the former judgment of the Maritime and Commercial High Court of 10 November 2021 with regard to period 2. The case is highly interesting because the Maritime and Commercial High Court and the Court of Appeal interpreted leading EU case law diversely, resulting in two very distinct conclusions regarding the standard of proof required to document a concerted practice in temporal extension of an already-terminated and time-limited agreement.

On 22 June 2022, another case from the Council was rendered. 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 from marketing 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 the purpose of restricting competition in the retail market for household goods and therefore constituted an infringement of section 6 of the Act and article 101(1) TFEU. The case will be interesting to follow, as it will be the first case in which the Council brings 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 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 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 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.

Several recent cases have been closed with the undertaking accepting to pay a fixed penalty fine. The most recent decision was rendered on 19 April 2023, in which Broste Copenhagen accepted a fine of 6 million Danish kroner for having coordinated prices with a direct competitor. The fine was reduced from initially 7.5 million Danish kroner as Broste Copenhagen had taken active efforts to ensure compliance with the Act henceforth and had assisted with clarifying the extent of the price collusion. On 1 March 2023, the DCCA issued its final fine in lieu of prosecution concerning the case complex NyeVisioner where a total of 13 companies were found to have violated section 6 of the Act by entering into pricing and customer sharing agreements. The fines varied from zero to 90,000 Danish kroner, in line with the 10 per cent turnover cap pursuant to section 23b(4) of the Act. 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, and on 15 April 2022 Peugeot Forhandler Forening accepted a fine of 500,000 Danish kroner for adopting a collective boycott. On 9 July 2021, Ageras A/S accepted a fine of 1.28 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 2020.

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.

Regime reviews and modifications

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

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 is increasingly interested in the growing market for digital platforms and has stressed its continued focus on the area in its annual report from June 2022, inter alia by emphasising the importance of not letting price algorithms serve as a trojan horse for cartel-esque behaviour within the context of the digital economy. Thus, an increase in cases involving digital platforms can be expected to continue.

On 11 May 2022, the European Commission published a new Block Exemption Regulation for vertical agreements, accompanied by the new guidelines on vertical restraints. 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. On 1 June 2023, the Commission also adopted two new Horizontal Block Exemption Regulations, including new guidelines for the assessment of such horizontal cooperation agreements. The DCCA has noted that the new rules and guidelines will be applicable under Danish competition law.

BRUUN & HJEJLE

Frederik André Bork fab@bruunhjejle.dk
Søren Zinck szi@bruunhjejle.dk
Olaf Koktvedgaard oko@bruunhjejle.dk

European Union

Hendrik Viaene, **Stéphane Dionnet**
McDermott Will & Emery

Summary

PRIVATE RIGHTS OF ACTION

COOPERATING PARTIES

DEFENDING A CASE

UPDATE AND TRENDS

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The prohibition on cartels in the European Union is laid down in article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101 prohibits anticompetitive agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the EU. This encompasses typical cartel behaviour, such as price-fixing, market allocation and bid-rigging.

The main regulation governing cartels is Council Regulation (EC) No 1/2003, which empowers the European Commission and national competition authorities to enforce EU competition rules.

The Commission also uses a leniency programme to encourage cartel members to come forward with information in exchange for reduced fines. The specific guidelines and procedures governing this programme are outlined in the 2006 Notice on immunity from fines and reduction of fines in cartel cases (commonly known as the Leniency Notice).

Other relevant guidance can be found in:

- the Guidelines on the setting of fines (2006);
- the Notice on cooperation within the Network of Competition Authorities (2004);
- the Notice on cooperation with national courts (2004);
- the Guidelines on the effect on trade concept (2004);
- the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022); and
- the Guidelines for the assessment of horizontal cooperation agreements (2023), which deal with purchasing agreements, information exchanges, production agreements, commercialisation agreements, etc.

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 European Commission and all national competition authorities of EU member states and national courts can find infringements of the cartel prohibition.

Typically, cartel infringements can be investigated either by the Commission or by one or more national competition authority. Regulation 1/2003 and the notice on cooperation within the Network of Competition Authorities (2004) set out rules to determine which authority is best placed to investigate a particular cartel, to avoid the same behaviour being investigated by both the Commission and one or more national competition authorities.

The Commission investigates the infringement and will also take a final decision. It can find no infringement (finding of inapplicability), find an infringement with or without imposing fines, or find an infringement and impose behavioural or structural remedies. It can also take a decision accepting commitments but without making a finding as to whether article 101 TFEU has been infringed. Finally, it can also take a settlement decision where parties admit their wrongdoing in return for a reduction of the fine. This procedure is laid down in the Notice on the conduct of settlement procedures (2008).

The Commission can take cartel decisions on its own. These decisions are open to judicial review by the General Court and, ultimately, by the European Court of Justice.

Changes

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

There have been no recent changes to cartel enforcement as such.

However, specifically in the field of horizontal cooperation, the European Commission on 1 June 2023 adopted revised Horizontal Block Exemption Regulations pertaining to R&D and specialisation agreements. In particular, the accompanying Guidelines provide up to date guidance on production, commercialisation, purchasing agreements between competitors, and information exchanges between competitors.

Substantive law

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

Article 101(1) TFEU encompasses three different forms of conduct of anticompetitive behaviour, including agreements, decisions by associations of undertakings and concerted practices. Typical examples of cartel behaviour are fixing purchase or selling prices, limiting production, and sharing markets or sources of supply. These are also listed in article 101(1) TFEU, imposing dissimilar conditions on equivalent transactions, or adding unrelated additional obligations to contract conclusions.

The key criterion for determining the prohibition of these behaviours is whether they have as their 'object or effect the prevention, restriction, or distortion of competition' within the EU. In practice it is not always easy to identify 'by object' restrictions, and even these restrictions must be assessed in their legal and economic context to determine whether the restriction is a 'by object' restriction that does not require an assessment of its effects.

Any restriction of competition, whether by object or by effect can qualify for an individual exemption under article 101(3) TFEU if certain conditions are met. To qualify for exemption, the agreement must:

- improve the production or distribution of goods;
- benefit consumers fairly;
- necessitate the imposed restrictions to achieve those objectives; and
- not eliminate competition in a substantial part of the relevant market.

Hardcore cartels will not be eligible for an exemption under article 101(3) TFEU.

Undertakings are responsible for their employees' behaviour. Therefore, even if they are not aware of the existence of a cartel, the undertaking will be considered a cartel participant, and will be liable for paying any fines imposed and repairing any damages claimed and awarded.

Joint ventures and strategic alliances

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

Full-function joint ventures are covered by the EU rules on merger control. Non-full-function joint ventures and strategic alliances should comply with article 101 TFEU. This implies that parties will have to check whether the non-full-function joint venture or the strategic alliance engages in behaviour or contains contractual provisions that amount to the 'by object' or 'by effect' restrictions of competition covered by article 101(1) TFEU. If so, parties will need to assess whether the contract can benefit from either a block exemption or the legal exception of article 101(3) TFEU.

- Examples of non-anticompetitive collaborations are cooperations for legitimate business purposes, such as cost-sharing, research and development or market access, that do not harm competition.
- Examples of cooperations that will require more intense scrutiny are price-fixing, market allocation, output restrictions, sharing sensitive competitive information, etc. For these practices it will need to be assessed whether they have the object or effect of reducing competition.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

Article 101 of the Treaty on the Functioning of the European Union (TFEU) applies to undertakings and associations of undertakings only. It does not cover individuals not engaged in an economic activity – employees, for example, are not undertakings. However, an individual engaged in an economic activity, such as an independent medical professional, is an undertaking.

Established case law defines undertakings as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. A typical example of an association of undertakings is a trade association or other professional association. In addition to legal entities operating in a market, the following have been considered undertakings or associations of undertakings within the meaning of competition law:

- professional orders;
- trade unions;
- sports federations and associations;
- entities working in the social sector;
- professional associations; and
- public agencies that do not exercise the prerogatives of a public authority.

The European Commission can only impose fines on undertakings and associations of undertakings, not on individuals that do not qualify as an undertaking.

Extraterritoriality

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

When a cartel is implemented in the EU, even when some or all cartel members are located outside of the EU, the European Commission has jurisdiction for the cartel. This is referred to as the implementation doctrine. However, actual implementation in the European Union is not required. It suffices that the conduct has an effect within the EU. Indeed, based on the most recent case law, the Commission can apply the cartel prohibition extraterritorially when it can demonstrate that the cartel behaviour likely has an impact on the EU market. It suffices that the effects in the European Union are foreseeable, immediate and substantial. This is referred to as the qualified effects doctrine.

Export cartels

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

No, there is no explicit exemption for export cartels. In theory, if one could demonstrate that such a cartel has no actual or potential effect on the market in the EU, one could claim that the European Commission has no extraterritorial competence. In practice, however, such a claim stands little chance to succeed.

Industry-specific provisions

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

No, there are no industry-specific infringements, defences or exemptions.

Government-approved conduct

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

Government-owned entities are subject to the cartel prohibition, as any other undertaking.

However, undertakings that behave anticompetitively because national legislation requires them to do so, or following irresistible pressure from the government, are not caught by the cartel prohibition. This is referred to as the theory of state compulsion, which is applied restrictively. Indeed, a mere suggestion by the government to behave in an anticompetitive manner will not suffice for the undertaking to avail itself of the state compulsion exemption.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

An overview of the different steps in an investigation can be found in the European Commission's notice on best practices for the conduct of proceedings concerning articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Any cartel investigation will start following an immunity or leniency application by one of the undertakings involved in the cartel, a formal complaint filed with the Commission or an informal provision of information about a cartel to the Commission. In addition, the Commission can always launch an ex officio investigation based on its own monitoring of markets or the press or its findings in a sector enquiry.

Any case that arrives at the Commission is subject to an initial assessment phase whereby the Commission will decide whether it will pursue the case. It will also try to determine whether it is the best-placed competition authority to handle the case, or whether to refer the case to one or more national competition authorities.

In a cartel context, the Commission will often start its investigation by carrying out surprise inspections at the involved undertakings' premises. Following that, the Commission will continue its investigation by sending out requests for information to the parties involved and often also to other parties in the market, such as suppliers, customers and competitors that were not involved in the cartel, depending on the facts of the case.

Once the Commission is convinced that the case merits further investigation, it will open proceedings. The opening of proceedings typically is published on the Commission's website. In the case of cartels, the opening of proceedings often coincides with the issuance of the statement of objections to the parties. Sometimes the opening of proceedings may occur earlier, but this is the exception. In its statement of objections, the Commission sets out its preliminary position on the infringement of article 101 TFEU. If the Commission wants to impose fines, the statement of objections should clearly mention this, and should also list the essential facts and matters of law that it will consider in determining the amount of the fine, such as the gravity and duration of the infringement. The fact that the parties have received a statement of objections will be made public by the Commission in a press release.

Once the parties receive the statement of objections, they will be granted access to the Commission's file. The details on such access can be found in the Commission's notice on access to file (2005). Following access to the file, the parties can file a written reply to the statement of objections. The parties should get at least four weeks to respond. In practice, parties often will get more time to respond to allow them to avail themselves of the right to be heard properly. Normally the time will start running only after access to the file has been granted.

Any disputes on the handling of this part of the proceedings needs to be brought before the hearing officer. This ranges from discussions on how access to the file is organised to extensions of time limits for responding.

Parties also have the right to request an oral hearing. They should do so within the time limit set for responding to the statement of objections. At the hearing the parties can present their case by orally explaining the arguments made in writing, further developing certain points or emphasising the key points for not finding an infringement or for limiting the amount of the fine.

If at some point after the issuance of the statement of objections the Commission finds new evidence it wants to use in the investigation, or wants to modify its legal reasoning or qualifications to the detriment of the parties, the Commission must issue a supplementary statement of objections, allowing the parties to respond. When it only concerns new facts corroborating existing objections, the Commission will send a letter of facts, not a supplementary statement of objections.

At the end of the proceedings, the Commission can still decide that no infringement can be found. A more likely outcome, however, is that the Commission adopts a decision ordering the cartel members to terminate the cartel and pay a fine.

The Commission can also adopt a commitment decision whereby the companies under investigation offer commitments to address competition concerns without admitting wrongdoing. The Commission can accept these commitments, making them legally binding without finding an infringement. However, commitments are not available in the case of hardcore cartels.

Investigative powers of the authorities

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

The European Commission's investigative powers to enforce article 101 are detailed in Chapter V of Regulation 1/2003. The Commission possesses several investigative powers to effectively enforce EU competition law, including the ability to (1) conduct inspections (dawn raids), (2) request information, (3) take statements and (4) inspect other premises, as detailed below.

Inspections

Article 20 of Regulation 1/2003 grants the Commission the authority to carry out inspections (dawn raids) at the premises of companies suspected of violating EU competition rules.

This power allows the Commission to take a series of investigative actions during these inspections. They include entering the company's premises, thoroughly examining records and documents related to its business activities, making copies of pertinent records, and, where necessary, sealing the premises and records.

Additionally, the Commission is entitled to engage with staff members or company representatives, posing questions related to the subject and purpose of the inspection and recording their responses. To ensure transparency and clarity throughout the inspection process, an inspection explanatory note is provided, offering insights into the procedures involved and elucidating the rights and responsibilities of the company undergoing inspection.

Requests for Information (RFIs)

To gather the essential information required for its investigative processes, the Commission can issue Requests for Information (RFIs), as stipulated in article 18 of Regulation 1/2003.

These RFIs can take two forms: a simple RFI or a Commission decision. They are directed to a range of entities, including undertakings, associations of undertakings, governments and competent authorities within EU member states.

When issuing an RFI, the Commission provides a clear legal basis, outlines the purpose of the request, and specifies the precise information needed for the investigation. Furthermore, the Commission sets a defined time limit within which the requested information must be provided. The Commission explicitly outlines the penalties prescribed in article 23 of Regulation 1/2003 for instances of supplying incorrect or misleading information.

In cases where information is sought through a Commission Decision, the Commission communicates or imposes the penalties as specified in article 24 of the same regulation.

The responsibility to supply the requested information falls upon the owners of undertakings or their authorised representatives. For legal persons, companies, firms, or associations without legal personality, the obligation to provide information rests with individuals duly authorised to represent them. Additionally, duly authorised lawyers are permitted to supply the required information on behalf of their clients, with a model power of attorney available to facilitate the appointment of legal representatives in this context.

Power to take statements

Article 19 of Regulation 1/2003 authorises the Commission to conduct interviews, allowing it to fulfil its responsibilities under the regulation. This power enables the Commission to interview any willing natural or legal person to gather information pertaining to the subject matter of an ongoing investigation. Importantly, this provision ensures that cooperation and the sharing of relevant information are facilitated during the investigative process. In cases where interviews are conducted at the premises of an undertaking, the Commission is

obliged to notify the competition authority of the member state where the interview is taking place. Furthermore, if requested by the competition authority of that member state, their officials may collaborate with and assist the officials and accompanying persons authorised by the Commission in conducting the interview. This collaborative approach enhances the efficiency and comprehensiveness of the investigative process while upholding the principles of transparency and cooperation among relevant authorities.

Inspection of other premises

Article 21 of Regulation 1/2003 confers upon the Commission the authority to conduct inspections in premises other than those initially subject to investigation, including homes of directors, managers and staff members of the undertakings and associations involved, if there is a reasonable suspicion that relevant books or records linked to the business and the subject matter of the inspection might be located there. This provision underscores the Commission's commitment to thoroughly investigate potential serious violations of articles 101 and 102 of the Treaty.

The Commission initiates such inspections through a decision specifying the subject matter, purpose, and commencement date, while also granting the right to seek a review by the European Court of Justice. The decision, based on reasons for the suspicion, is made after consulting the competition authority of the member state where the inspection is to occur.

Importantly, the execution of such a decision necessitates prior authorisation from the national judicial authority of the member state involved. The judicial authority ensures the authenticity and proportionality of the coercive measures proposed by the Commission, taking into account factors such as the seriousness of the suspected infringement and the likelihood of finding pertinent business books and records. While the national judicial authority cannot question the necessity of the inspection or demand access to the Commission's file, the lawfulness of the Commission's decision is subject to review solely by the European Court of Justice. Officials and accompanying persons authorised by the Commission to conduct these inspections are granted specific powers, as outlined in article 20(2)(a), (b) and (c), and provisions from article 20(5) and (6) as applicable.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes, there is extensive cooperation between the European Commission and competition authorities in other jurisdictions. This cooperation takes place at both bilateral and multilateral levels and involves various mechanisms, including bilateral agreements, memoranda of understanding, and participation in international organisations. Competition authorities interact globally through meetings of the Organisation for Economic Co-operation and Development and of the International Competition Network.

Within the European Union there is the European Competition Network (ECN), which organises cooperation effectively. This was created based on the Notice on cooperation within the Network of Competition Authorities (2004). The ECN+ Directive, adopted in 2018, aims to further strengthen the network by introducing guarantees for national competition authorities of independence, resources, enforcement and fining powers.

Interplay between jurisdictions

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

The European Commission engages in significant interplay with national competition authorities from various jurisdictions in cross-border cases. This cooperation is governed by article 11 of Regulation 1/2003 and is further structured and facilitated by the 2004 Commission Notice on cooperation within the Network of Competition Authorities.

Furthermore, article 19 of Regulation 1/2003 authorises the Commission to conduct interviews, allowing it to fulfil its responsibilities under the regulation by interviewing any willing natural or legal person to gather information pertaining to the subject matter of an ongoing investigation. Importantly, this provision ensures that cooperation and the sharing of relevant information are facilitated during the investigative process. In cases where interviews are conducted at the premises of an undertaking, the Commission is obliged to notify the competition authority of the member state where the interview is taking place. Furthermore, if requested by the competition authority of that member state, their officials may collaborate with and assist the officials and accompanying persons authorised by the Commission in conducting the interview. This collaborative approach enhances the efficiency and comprehensiveness of the investigative process while upholding the principles of transparency and cooperation among relevant authorities.

The Commission also cooperates with competition authorities globally, ensuring close coordination between authorities in the case of global cartels. Information exchange systems exist, and authorities coordinate to organise surprise inspections (dawn raids) simultaneously in order not to tip off the companies under investigation.

A notable instance of recent collaboration occurred within the fragrance and fragrance ingredients sector, where the European Union engaged in cooperative efforts with Swiss, US and UK authorities to conduct joint raids on companies operating in this industry.

CARTEL PROCEEDINGS

Decisions

16 How is a cartel proceeding adjudicated or determined?

At the end of a hardcore cartel investigation, the European Commission will take a decision ordering that the infringement be terminated and imposing fines on the parties.

If a settlement procedure is followed, a settlement decision is taken whereby the parties involved admit wrongdoing in return for a 10 per cent reduction of the fine. A settlement decision typically contains much less detail about the infringement, which makes it interesting for parties to contemplate using the settlement procedure as a settlement decision gives private damage claimants less information that can inform their damage claims.

Final versions of decisions, including prohibition and commitment decisions, are made public. These include summaries of the decisions, reports from the hearing officer, and opinions from the advisory committee. These are published on the Directorate-General for Competition's website and in the Official Journal.

Burden of proof

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

In EU law, Council Regulation 1/2003, article 2 stipulates that the responsibility for demonstrating a violation of article 101(1) of the Treaty lies with the party or authority making the allegation of infringement. The European Commission must establish both the existence and the duration of the alleged infringement.

Circumstantial evidence

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

An infringement can be established through circumstantial evidence when direct evidence of the actual agreement is lacking. In T-445/14 – *ABB v Commission*, and ABB's subsequent action for annulment, the focus was on the European Commission's definition of the relevant products and time frames in the cartel agreement.

ABB argued that the Commission incorrectly inferred the cartel's scope from documents, challenging the burden of proof. The General Court disagreed initially, highlighting the secretive nature of anticompetitive practices with limited documentation. Such cases often rely on circumstantial evidence, where various factors and coincidences collectively form a body of evidence. This evidence, when compelling and without alternative explanations, can substantiate a competition rule violation.

Appeal process

19 | What is the appeal process?

A cartel decision of the European Commission can be appealed to the General Court (GC), based on points of law and points of fact. The GC can confirm the Commission decision or annul it. The GC possesses unlimited jurisdiction, enabling a comprehensive assessment of Commission decisions. It holds the authority to annul, increase, or decrease

imposed fines, serving as a vital check on the Commission's enforcement actions. Against the judgment of the GC, an appeal may be lodged before the European Court of Justice on points of law only. There are no fixed timelines within which either court must decide on the application for annulment, or the appeal respectively. However, the judgment must be taken within a reasonable time, considering the complexity of the case, the arguments invoked, and the parties' conduct throughout the proceedings.

SANCTIONS

Criminal sanctions

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

No criminal sanctions are imposed for cartel infringements. Cartel violations resulting in a decision of the European Commission are subject to civil and administrative penalties. The Commission can impose fines, and only on undertakings and associations of undertakings.

Civil and administrative sanctions

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

Administrative sanctions for cartel activity within the European Union are in the form of fines imposed on undertakings found to have violated competition rules. These fines serve a dual purpose: (1) to penalise the infringing undertakings; and (2) to act as a deterrent against future anticompetitive behaviour, both by the offending entities and others in the market.

Private damage claims can be lodged with national courts. These cannot be lodged with the European Commission.

Guidelines for sanction levels

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

To ensure transparency and accountability, the European Commission published fining guidelines in 1998, amended in 2006.

The determination of the fine amount considers two key factors: the gravity and duration of the infringement, as specified in article 23(3) of Regulation 1/2003. Importantly, the fine must not exceed 10 per cent of the undertaking's total turnover generated in the business year preceding the decision, in accordance with article 23(2) of the same regulation.

The fine calculation process involves assessing the percentage of the undertaking's annual sales related to the product or service affected by the infringement, known as the 'gravity percentage'. For cartel cases, this gravity percentage begins at 15 per cent. The resulting

amount is further adjusted based on the duration of the infringement, using a duration multiplier determined by the number of days of participation in the cartel.

Fines can be increased for repeat offenders or decreased in cases where a company's involvement was limited. For cartel violations specifically, an additional deterrent known as an 'entry fee' may be imposed, equivalent to 15 to 25 per cent of the value of one year's sales. Such entry fees can also be applied to especially harmful infringements.

The maximum limit for fines is set at 10 per cent of the undertaking's consolidated global annual turnover generated in the business year preceding the adoption of the decision. This encompasses not only the highest parent entity held liable but also all its subsidiaries, with the consolidated turnover of the group of companies being the relevant benchmark. The fines collected are channelled into the general EU budget, contributing to the financing of the European Union and relieving the burden on taxpayers.

European courts oversee the Commission's decisions, including fine determinations, to ensure legality and proportionality. Factors considered when setting fines include the seriousness and duration of the violation. Fines may increase for ringleaders, repeat offenders or those obstructing investigations.

Mitigating circumstances, as per the Commission's guidelines, can reduce fines. These include promptly ending infringements upon Commission intervention (except clandestine cartels), limited involvement, cooperation beyond requirements, and situations where public authorities authorised anticompetitive behaviour.

In rare cases, fines may be reduced if an undertaking can prove severe harm to its economic viability, substantial asset losses upon insolvency, and specific economic and social circumstances.

Basic Fine	Percentage of value of relevant sales (0-30%) x duration (years or periods of less than one year) + 15-25% of value of relevant sales (additional deterrence for cartels).
Increased by	Aggravating factors (eg, ringleader, repeat offender or obstructing investigation).
Decreased by	Mitigating factors (eg, limited role or conduct encouraged by legislation).
Overall cap	10% of turnover (per infringement).

Possible further decreased by	Leniency (100% for first applicant, up to 50% for next, 20 to 30% for third and up to 20% for others); settlement (10%); or inability to pay (reduction).

Compliance programmes

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

The European Commission is not obligated to consider compliance programmes.

Director disqualification

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

Currently, there is no existing legal framework that imposes orders prohibiting individuals involved in cartel activity from serving as corporate directors or officers.

Debarment

25 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 a sanction under Regulation 1/2003. However, it is worth noting that Directive 2014/24, more specifically recital 101, addresses the possibility of excluding economic operators from government procurement based on grave professional misconduct, including violations of competition rules. The duration of debarment in the Directive is set at a maximum of three years, though it is subject to national regulations.

Parallel proceedings

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

Cartel sanctions encompass both administrative penalties and the potential for civil damages. These two forms of enforcement complement each other and serve as a deterrent mechanism.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

The European Court of Justice ruled that member states must ensure that their national laws provide an action for damages in the event of a violation of EU competition law by a third party (*Courage v Crehan* (Case C-453/99) EU:C:2001:465, at paragraphs 23 to 28).

The European Union has since adopted Directive 2014/104/EU 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 establishes a framework for private damage claims for both direct and indirect purchasers, or, in the case of a buying cartel, its direct or indirect providers, affected by competition law infringements. It addresses issues related to disclosure, including absolute protection of corporate leniency statements and settlement submissions, evidentiary value, limitation periods, joint and several liability, passing-on of overcharges, and quantification of harm. The Damages Directive aims to ensure effective compensation for victims of competition law violations while promoting consistency in private and public enforcement. In particular, the Damages Directive provides that infringement decisions by national competition authorities should be binding on national courts in damages actions and sets out the minimum limitation periods for bringing damages actions. It also contains provisions about quantification of harm and the role of consensual dispute resolution.

Class actions

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

Class actions or representative claims are a matter of national law, and the Damages Directive does not contain provisions on collective redress mechanisms. However, in January 2018, the European Commission published a report on the progress made by member states implementing measures allowing for collective redress.

This resulted in Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the Directive), which entered into force on 24 December 2020. The Directive intends to supplement existing national collective action mechanisms, rather than replace them. The Directive can be incorporated into member states' existing or new national representative action mechanisms.

In addition, the Directive seeks minimal harmonisation. This means that member states may introduce regimes with greater risk for defendants than those permitted by the Directive.

Principally, the Directive permits individual consumers from a member state to join proceedings in other member states on an opt-in basis (it should be noted, however, that an opt-in or opt-out mechanism is not required if an injunction order is sought).

COOPERATING PARTIES

Immunity

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

Under the European Commission's leniency programme, laid down in the 2006 Commission Notice on immunity from fines and reductions of fines in cartel cases, companies that provide sufficient information about their involvement in a cartel may receive significant benefits, including full or partial immunity from fines.

The Commission offers full immunity from fines to the first undertaking that discloses its involvement in a cartel and provides information and evidence enabling targeted inspections or establishing an article 101 TFEU infringement when the Commission lacks sufficient evidence at the time of submission.

Prospective applicants for immunity must satisfy several cumulative conditions.

Subsequent cooperating parties

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

Partial immunity applies to applicants for a reduction of the fine when they are the first to supply compelling evidence used to establish additional facts increasing the gravity or duration of the infringement.

Subsequent cartel participants who decide to cooperate with the European Commission's leniency programme after an investigation has commenced can still benefit from reduced fines if they provide evidence that holds 'significant added value' and demonstrate genuine cooperation. Evidence is deemed to have significant added value when it strengthens the Commission's ability to establish the cartel's wrongdoing. The first company meeting these criteria may receive a substantial reduction of between 30 and 50 per cent of the fine that would otherwise have been imposed. The second cooperating company could see a reduction ranging from 20 to 30 per cent, while subsequent applicants may secure reductions of up to 20 per cent. Given that the timing of a submission affects the qualification and ranking of leniency applicants and, consequently, the extent of the fine reduction, undertakings reporting cartel activities are strongly advised to apply as early as possible to maximise the benefits of the leniency programme.

Going in second

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

The timing of a submission affects the qualification and ranking of leniency applicants and, consequently, the extent of the fine reduction.

The first company meeting these criteria may receive a substantial reduction of between 30 per cent and 50 per cent of the fine that would otherwise have been imposed. The second cooperating company could see a reduction ranging from 20 per cent to 30 per cent, while subsequent applicants may secure reductions of up to 20 per cent. There is currently no immunity plus or amnesty plus option.

Approaching the authorities

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

Informal exchanges

The European Commission offers a valuable opportunity for informal exchanges on a ‘no names’ basis, enabling undertakings to explore the likelihood of qualifying for immunity or leniency without disclosing sensitive details such as the sector involved or the identities of participants. This confidential dialogue empowers undertakings to make informed decisions about whether to pursue leniency.

Markers

The Commission utilises a marker system for leniency applicants. The first applicant can secure its place in the leniency queue while gathering evidence, within a set time frame, to perfect its marker. The Commission decides on markers and their duration based on specific conditions, usually granting a one-month marker. Extensions may be considered for complex cases, depending on progress and circumstances.

Cooperation

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

To be eligible for leniency, all applicants must:

-

demonstrate genuine, continuous, and expedient cooperation throughout the European Commission's administrative procedure, including providing relevant information promptly and responding to Commission requests;

- cease participation in the cartel immediately upon submitting the leniency application, with exceptions allowed only when necessary to preserve the integrity of inspections; and
- not destroy, tamper with or conceal evidence related to the cartel, or disclose the fact or content of the contemplated application, except when sharing information with other competition authorities. This includes actions like deleting evidence, withholding it from the Commission, or publicly disclosing the application or its details to co-cartelists.

Confidentiality

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

In European Commission cartel investigations, the identity of the immunity or leniency applicants (or both) is confidential until the statement of objections is issued. Their identities become public when the final decision is published.

During the investigation, Commission files are confidential, accessible only to those who receive the statement of objections to protect their defence rights.

This confidentiality covers all documents except internal Commission ones. Documents with business secrets may be redacted, and immunity and leniency applicants' corporate statements can only be accessed at the Commission's premises.

In damages actions in member states' courts, access to Commission materials follows national rules aligned with the Damages Directive, limiting access. The ECN+ framework ensures confidentiality of leniency applications by obliging national competition authorities to prevent leniency statement disclosure.

Settlements

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

The cartel cases settlement procedure employed by the European Commission serves to expedite the resolution of cartel-related decisions.

In this process, the involved parties must acknowledge their involvement in anticompetitive conduct and come to a mutual understanding with the Commission regarding the facts and legal characterisation of their actions.

Additionally, they must commit to the maximum potential fine that could be imposed upon them by the Commission in the final decision. Successful participation in the settlement procedure leads to a 10 per cent reduction in the fine imposed, in addition to any fine reduction granted under the leniency programme.

The Commission benefits from a streamlined administrative process, resulting in more efficient resource utilisation within the Cartels Directorate and a reduced number of appeals to the court. Parties, however, are not obligated to enter into settlement discussions or ultimately settle. If discussions are initiated but discontinued by either the Commission or the party involved, the standard (normal) procedure is followed.

In certain cases, a hybrid settlement may occur, where the Commission adopts a decision against parties who followed the settlement procedure and a decision against those who discontinued it via the standard (normal) procedure.

Corporate defendant and employees

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

Protections from prosecution are available to employees of immunity applicants under the European National Competition Authorities Directive No. 2019/1 (ECN+ Directive). While individuals are not held liable for breaches of EU competition law at the EU level, it is important to note that some member states have established their own legal frameworks that impose criminal, administrative or civil sanctions on individuals for their involvement in secret cartels. However, the ECN+ Directive mandates that member states must ensure that employees, including current and former directors, managers and staff members, of immunity applicants who cooperate with the relevant authorities are shielded from sanctions at the national level. The ECN+ Directive seeks to provide a level of protection to individuals who assist in investigations into anticompetitive practices, encouraging cooperation and the disclosure of crucial information in cartel cases.

Dealing with the enforcement agency

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

In October 2022 the European Commission published updated Frequently Asked Questions (FAQs) on Leniency that elaborate on the modalities to discuss a potential application on a 'no names' basis for a possible immunity applicant. The Commission may be reached for informal exchanges regarding potential immunity applications on a no names basis while avoiding having to disclose the cartel's sector, participants, or other identifying information. In addition, companies can make a hypothetical application (paragraphs 16 and 19 of the Leniency Notice). While it is not obligatory for the applicant to reveal its name or that of its co-cartelists prior to submitting the specified proof in the hypothetical application, it is nonetheless necessary for the applicant to provide information regarding the sector, geographic extent and expected length of the cartel. Upon notification

from the Commission of the adequacy of the evidence's type and content in meeting the criteria for immunity, the applicant is obligated to reveal the evidence in its entirety.

Subsequent leniency applicants must contact the Directorate-General for Competition before the statement of objections is issued.

The Commission recently upgraded its eLeniency tool, which enables applicants to directly submit their leniency applications, including marker applications, online. This new version of the platform enables the Commission to securely provide authorised parties with access to corporate statements and other leniency information, normally only accessible at the Commission's premises.

DEFENDING A CASE

Disclosure

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

The information or evidence disclosed to a defendant or parties under scrutiny can vary depending on whether it is a standard procedure or a settlement procedure.

Standard procedure

When the European Commission identifies competition concerns through its investigation, it initiates the issuance of a statement of objections (SO). The SO contains the following information: the nature of concerns, geographical area, gravity and duration, and liability of infringing companies.

Each defendant must have a clear understanding of the alleged infraction and have access to the case team's file, but not internal documents or communications with national competition authorities. Access is also denied to documents containing confidential information, or those pertaining to business secrets.

Settlement procedure

In the settlement procedure, parties are informed in the objections about the Commission's intention to raise concerns against them and the maximum amount of the potential fine that may be imposed. During the settlement procedure, defendants have access to all the evidence on which the Commission intends to rely. This may consist of evidence, documentation and other pertinent data.

Representing employees

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

The European Commission does not impose fines on individuals, except if the individual is himself an undertaking. Individuals run the risk of being sanctioned as several EU member states (eg, Denmark and France) can impose sanctions on individuals, including imprisonment sentences.

Multiple corporate defendants

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

The question of whether counsel can represent multiple corporate defendants, including whether they are affiliated, is determined at the national level in accordance with each country's specific laws and regulations regarding conflicts of interest. In practice, it is customary for each investigated company to be represented by its own legal counsel to ensure that any potential conflicts of interest are appropriately managed and that the legal rights and interests of each defendant are adequately protected. However, the European Court of Justice ruled in case C-263/16 of 1 February 2018 *Schenker* that a counsel may represent multiple defendants if their interests are aligned and if there is no risk of conflict in the future.

Payment of penalties and legal costs

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

The European Commission does not impose fines on individuals.

Taxes

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

The deductibility of fines or other penalties, as well as private damages payments, is not governed by European Commission regulations but is rather a matter addressed at the national level within individual EU member states. While the Commission has expressed concerns about tax deductibility potentially undermining the deterrent effect of fines, the specific tax treatment of such payments falls under the purview of each member state's tax laws and regulations. More and more member states in the meantime have case law that prohibits tax deduction of cartel fines.

International double jeopardy

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

Sanctions imposed on companies or individuals within the European Commission's jurisdiction do not consider penalties imposed in non-EU member states. The principle of *non bis in idem* or other similar principles do not obligate the Commission to consider proceedings or penalties that a company may have faced in non-EU jurisdictions.

Getting the fine down

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

The best tool available to companies is the leniency procedure, especially as immunity applicant. For leniency applicants, timely reporting and strong evidence increase chances of a higher reduction range. The settlement procedure also offers a 10 per cent fine reduction. These strategies provide an opportunity to minimise financial penalties for antitrust violations.

UPDATE AND TRENDS

Recent cases

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

Cases

The European Commission fined defence company Diehl €1.2 million in September 2023 for its role in a cartel involving military hand grenades. Diehl's competitor, RUAG, was not fined because it reported the cartel and was granted immunity. The cartel lasted nearly 14 years, with Diehl and RUAG dividing markets in the European Economic Area. Diehl's penalty was reduced by 50 per cent for cooperating with the investigation.

In November 2022, the Commission fined five styrene purchasers (Sunpor, Synbra, Synthomer, Synthos and Trinseo) €157 million for participating in a cartel concerning purchases on the styrene monomer merchant market, while INEOS was granted a full reduction of the fine to be imposed. The Commission granted leniency credit resulting in a fine reduction of 30 per cent to the benefit of Sunpor, 20 per cent for Synthomer, 40 per cent for Synthos and 20 per cent for Trinseo. The last company involved, Synbra, did not apply for leniency. All companies also received an additional 10 per cent reduction of their fine pursuant to the Commission's 2008 Settlement Notice in light of their admission to participating in the cartel and their acknowledgment of liability thereof as part of the Commission's settlement process. The fines imposed ranged from €17 million (Synbra) to €43 million (Synthomer). This was the fourth case concerning purchasing cartels, after the *Car Battery Recycling* case, *Ethylene Purchasing* case and *Raw Tobacco* case. In 2019, the EU's General Court confirmed the Commission's fines to a battery recycling cartel and, in doing so, considered that purchasing cartels are considered 'by object' infringements under EU competition rules.

Crown and Silgan were fined a combined total of €31.5 million by the Commission in July 2022 for participating in a cartel related to metal cans and closures sales in Germany. Both companies admitted guilt and settled the case. The infringement occurred from March 2011 to September 2014 and involved sharing sales data and coordinating pricing strategies. Crown's fine was reduced by 50 per cent for cooperation, and both companies received a 10 per cent reduction under the Settlement Notice. The investigation began with a request from the German Competition Authority and was referred to the Commission due to limitations in German antitrust law.

Trends

Here is a concise summary of the trends:

Fines for cartel infringements (2019 – September 2023 (year to date))

2019: €1.49 billion

2020: €288.08 million

2021: €1.75 billion

2022: €188.59 million

2023 (YTD): €1.2 million

Number of cartel decisions by the European Commission

2019: 5

2020: 3

2021: 10

2022: 2

2023 (YTD): 1

Fines by industry sector since 2010

In various sectors since 2010, the fines levied have been as follows:

Manufacture	37.93%
Finance	21.13%
ICT	13.59%
Manufacture car parts	11.78%

Basic industry	15.57%
Transport	7.87%
Environment	5.12%
Agriculture/food	0.69%

Regime reviews and modifications

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

On 1 June 2023, the Commission adopted revised Horizontal Block Exemption Regulations pertaining to R&D and specialisation agreements (HBERs).

The revised HBERs and accompanying guidelines have been enacted to afford enterprises clearer and more up-to-date guidance for the purpose of assessing the conformity of their horizontal cooperative agreements with the competition regulations of the European Union. The newly revised HBERs came into effect on 1 July 2023.

In September 2022, the European Commission upgraded its eLeniency platform to ensure that companies that are parties to cartel and antitrust proceedings can easily and securely access documents online. The upgraded platform allows for an efficient interaction with the parties and adapts the tool to today's working methods. In October 2022, the Commission published a Frequently Asked Questions (FAQs) document on leniency to clarify certain concepts and current practices when the EC applies the Leniency Notice.

McDermott Will & Emery

Hendrik Viaene hviaene@mwe.com
Stéphane Dionnet sdionnet@mwe.com

McDermott Will & Emery

Finland

Mikael Wahlbeck , **Antti Järvinen**, **Niko Hukkinen**, **Amanda Pekkala-** , **Susanna Kyllöinen**
Frontia Attorneys Ltd

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 significant 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

7 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

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

The Competition Act is not applicable to competition restrictions outside Finland unless such restrictions are directed against Finnish customers. The Finnish government may nonetheless prescribe by decree that the 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

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

There is no specific exemption or defence. The Competition Act is generally not applicable to 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

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

The Competition Act does not contain any industry-specific infringements. However, according to section 4a, an undertaking with a market share of at least 30 per cent in the Finnish daily consumer goods retail trade shall be deemed to occupy a dominant position. Thus, agreements entered into by such undertakings are in addition to the prohibition against 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

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

The Competition Act contains no specific defence or exemption for state actions, government-approved activity or regulated conduct.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

If the Finnish Competition and Consumer Authority (FCCA) suspects that an undertaking or an association of undertakings is engaged in conduct contrary to the 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

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

The FCCA has extensive investigative powers that are largely similar to those of the European Commission.

An undertaking, 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

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

The Finnish Competition and Consumer Authority (FCCA) is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of 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

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

The main interplay for the FCCA is with other European competition authorities within the framework of the ECN. As members of the ECN assist each other in conducting investigations of competition law infringements, the FCCA has, for example, conducted investigations in Finland on behalf of other competition authorities and has received similar assistance from other competition authorities.

CARTEL PROCEEDINGS

Decisions

16 How is a cartel proceeding adjudicated or determined?

The 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

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

The burden of proof to demonstrate a competition infringement lies with the FCCA. The FCCA must provide sufficient proof to establish that there has been an infringement. However, to the extent 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

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

Finnish courts follow the principle of free consideration of evidence and, therefore, circumstantial evidence can also be used to establish an infringement of competition rules.

Appeal process

19 | What is the appeal process?

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Most other FCCA decisions may be appealed to the Market Court. Therefore, a decision by the FCCA declaring an infringement of competition rules without any penalty payment proposal can generally be appealed. In the same manner, a decision finding that no infringement has occurred can be appealed by a third party if it has a direct impact on that party. Appeals shall normally be lodged within 30 days 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

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

There are no criminal sanctions for competition law infringements in Finland. The Ministry of Employment and the Economy and the 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

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

Upon the proposal of the FCCA, the Market Court may impose a penalty payment on undertakings that have violated competition rules unless the conduct is deemed minor or the imposition of 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

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

According to section 13 of the Competition Act, the amount of the penalty payment shall be based on an overall assessment and, in determining it, attention shall be paid to the nature, 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

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

There are no provisions to this effect in the Competition Act. Compliance programmes can as such be taken into account as part of the overall assessment; however, there exist no references to this in the case law.

Director disqualification

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

The Competition Act does not include such provisions.

Debarment

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

According to section 81 of the Finnish Act on Public Procurement (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

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

Criminal sanctions for cartel activities are not available under the Competition Act. Therefore, the sanctions that the FCCA and the Market Court can impose are administrative in nature. Civil law claims for liability for damage can be pursued simultaneously in respect of the same infringement. Such claims may also be made as standalone actions irrespective of any prior FCCA investigation or court decision.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

Private damage claims are available under Finnish law. The Finnish Act on Antitrust Damages Actions came into effect on 26 December 2016. This act implemented the EU Directive on Antitrust Damages Actions and marked considerable changes to the previous regime.

All persons who have suffered harm caused by an infringement of competition law have a right to full compensation. This compensation shall cover actual loss and loss of profit, as well as payment of interest from the time the harm occurred until compensation is paid. The compensation shall not exceed the amount of the actual harm suffered – hence, only single recovery can be ordered.

According to the Finnish Act on Antitrust Damages Actions, compensation can be claimed by anyone who suffered damage, irrespective of whether they are direct or indirect purchasers (or sellers, as the case may be). Therefore, there are no legal obstacles to bring, for example, umbrella purchaser claims. To avoid overcompensation, compensation for actual loss at any level of the supply chain shall not exceed the harm suffered at that level. The act also contains rules concerning the distribution of the burden of proof relating to the passing-on of the overcharge.

Class actions

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

The Finnish Act on Antitrust Damages Actions does not contain any provisions concerning class actions. The Finnish Act on Class Actions (444/2007) entered into force on 1 October 2007. The 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

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

A leniency programme was first implemented in Finland in May 2004. In accordance with section 14 of the Finnish Competition Act (948/2011) (the Competition Act), the first undertaking to expose a cartel may benefit from immunity if the undertaking:

- produces information or evidence, on the grounds of which the Finnish Competition and Consumer Authority (FCCA) may conduct a dawn raid; or
- following such a dawn raid, delivers information or evidence, on the grounds of which the FCCA can establish that section 5 of the Competition Act or article 101 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

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

Undertakings that are not first-in to submit the required information and documents to the FCCA may receive a reduction 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

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

The Competition Act does not provide for an immunity plus or amnesty plus option. Applicants submitting significant information and evidence to the FCCA after the immunity applicant may be entitled to a reduction in the penalty payment as set out in section 15 of the Competition Act. The fine shall be reduced by 30 to 50 per cent if the undertaking is the first one to submit significant information, by 20 to 30 per cent if the undertaking is second and by 20 per cent at most for other applicants fulfilling the criteria.

Approaching the authorities

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

There are no set deadlines for making an application for immunity or leniency. As only the first undertaking to submit the required information and evidence is entitled to full immunity, timing is essential.

It is 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

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

An immunity applicant must provide all relevant information and evidence in its possession to enable the FCCA to conduct an inspection or, following an inspection, to enable the establishment of an infringement.

To receive a reduction 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

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

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

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

The Competition Act does not provide for any settlement procedure for cartel cases.

Corporate defendant and employees

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

The Competition Act only applies to undertakings engaged in economic activity. Therefore, the treatment of current and former employees of a corporate defendant is not within the scope of the Competition Act.

Dealing with the enforcement agency

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

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;

- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application, or the content of the application.

Once the undertaking seeking immunity has provided the FCCA with all the required information and documents in its possession, the FCCA shall inform the undertaking in writing 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.

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.

DEFENDING A CASE

Disclosure

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

Upon request, the undertaking under investigation has the right to receive information, orally or in another appropriate manner, on the documents concerning the investigation and the phase of the proceedings insofar as it cannot harm investigations in the matter, unless otherwise provided in the Act on the Openness of Government Activities (621/1999, as amended) or EU laws.

The Act on Openness of Government Activities applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document 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

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

The FCCA's investigations of 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

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

It is possible for a counsel to represent multiple corporate defendants. However, a conflict of interest between the defendants may in practice prevent such representation.

Payment of penalties and legal costs

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

Penalties cannot be imposed on an undertaking's employees under the Competition Act. If there are legal costs associated with an employee as a result of their involvement in the FCCA's investigations, there is no prohibition under law for a corporation to pay them.

Taxes

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

Under Finnish tax laws, fines are generally not tax-deductible. In contrast, recent tax authority praxis indicates that private damages are tax-deductible under certain circumstances.

International double jeopardy

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

So far, there have not been any instances where the FCCA or Finnish courts would have taken into account penalties imposed in other jurisdictions. This is the case also concerning private damages claims. In such claims, Finnish courts would in any event have to apply the prohibition against unjust enrichment according to which damages shall not exceed the actual damage suffered by the claimant.

Getting the fine down

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

An undertaking can take advantage of the immunity and leniency procedure. 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

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

On 15 December 2022, the Market Court gave its decision on a matter concerning six real estate management companies and the Finnish Real Estate Management Federation. Earlier, in February 2021, the Finnish Competition and Consumer Authority (FCCA) submitted a proposal to the Market Court to impose penalty payments totalling €22 million

on the real estate management companies and the Finnish Real Estate Management Federation for their suspected engagement in a price-fixing cartel. The Market Court found that the Finnish Real Estate Management Federation and the real estate management companies had a nationwide collaboration from 2014 to 2017. The fines ordered by the Market Court amounted to €4.93 million in total, significantly lower than the FCCA's proposal. The Market Court concluded that the activity had not been as intense and extensive as the FCCA had claimed. The FCCA and three real estate management companies have appealed the Market Court's decision, and the case is currently pending before the Supreme Administrative Court (SAC).

On 1 July 2022, the 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 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. The case is currently pending before the Market Court.

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). The case is currently pending before the Market Court.

Regime reviews and modifications

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

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.

Mikael Wahlbeck	mikael.wahlbeck@frontia.fi
Antti Järvinen	antti.jarvinen@frontia.fi
Niko Hukkinen	niko.hukkinen@frontia.fi
Amanda Pekkala	amanda.pekkala@frontia.fi
Susanna Kyllöinen	susanna.kylloinen@frontia.fi

Frontia Attorneys Ltd

Read more from this firm on Lexology

Germany

Markus M Wirtz, Silke Möller
Glade Michel Wirtz

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 13 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 10th amendment of the GWB was enacted in January 2021 and brought 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.

On 6 July 2023, the German Parliament approved the 11th amendment to the GWB, and the bill is expected to pass the second legislative chamber without any major changes in autumn 2023. The cornerstones of the next GWB amendment will be:

- the introduction of new intervention instruments for the FCO in the context of sector enquiries, with a specific focus on structurally encrusted markets;
- 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.

Although the proposed 11th amendment has been partly criticised as a paradigm shift – following a sector inquiry, the Federal Cartel Office is to receive far-reaching powers for 'market design' in structurally very narrow markets that do not require any unlawful conduct on the part of the companies in question – the bill fits neatly into the political agenda that the Federal Ministry for Economics and Climate (BMWK) has set out for the current legislative period (Competition Policy Agenda of the BMWK until 2025 of February 2022).

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

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

7 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

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

According to 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

9 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

10 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

11 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

12 | 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

13 | 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

14 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

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

The 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

16 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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 in 2021 contained 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, €349 million in 2020, €105 million in 2021 and €24 million in 2022. The relatively low aggregates in 2021 and 2022 may be explained by limitations during the covid-19 pandemic on the FCO's investigation activities, which have picked up again in the last 12 months. In parallel, there have been fewer leniency applications.

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

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

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

23 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

24 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

25 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

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

Criminal, 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

27 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have

the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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 in early 2021 also introduced 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

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

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. This topic is still in a state of flux, with a relatively high number of court decisions being published, and it is expected that in the medium term the legislator may further expand the possibilities to seek collective legal redress in antitrust law.

COOPERATING PARTIES

Immunity

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

The 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

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

The competition 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

36 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

37 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

38 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

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

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

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

No.

Payment of penalties and legal costs

41 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

42 | 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

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

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

44 | 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

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

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 up important future contracts. To implement the cartel further, a uniform price calculation formula was agreed upon.

Also in 2022, the FCO imposed fines totalling €12.5 million against a steel manufacturer (A) and a major construction group (B) for concluding illegal agreements in the context of industrial construction. In the early 2000s, a representative of a construction company, which has since been liquidated, had concluded an agreement with representatives of A, the potential contracting party, while at the same time also reaching an agreement with representatives of B, the construction company's main competitor in the procurement procedure for the contracts in question. The agreements upon which the FCO imposed fines covered the period from early 2010 until March 2014. The illegal agreements on the procurement of contracts qualified as vertical and horizontal bid rigging (the term vertical refers to the relationship between the bidder and the contracting party, the term horizontal to the relationship between bidders).

Finally, in a 2022 decision, the FCO also retroactively determined the illegality of a non-compete clause applied contractually by a manufacturer of chainsaws as part of its selective distribution system.

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 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

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

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

The German competition register started operations in 2021 and since mid-2022 it is mandatory for public sector purchasers to request information from the competition register in procurement procedures. It keeps records regarding undertakings that have been fined for violating the competition rules so that public authorities can take this into account (and 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.

On 6 July 2023, the German Parliament approved the 11th amendment to the German Act Against Restraints of Competition (GWB) and the bill is also expected to pass the second legislative chamber without any major changes in autumn 2023. The cornerstones of the next GWB amendment will be:

- the introduction of new intervention instruments for the FCO in the context of sector enquiries, with a specific focus on structurally encrusted markets;
- 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.

Although the proposed 11th amendment has been partly criticised as a paradigm shift – following a sector inquiry, the FCO is to receive far-reaching powers for 'market design' in structurally very narrow markets that do not require any unlawful conduct on the part of the companies in question – the bill fits neatly into the political agenda that the Federal Ministry for Economics and Climate has set out for the current legislative period.

GLADE MICHEL WIRTZ
CORPORATE & COMPETITION

Markus M Wirtz
Silke Möller

m.wirtz@glademichelwirtz.com

Glade Michel Wirtz

Greece

Victoria Mertikopoulou, **Ifigeneia Argyri**
KYRIAKIDES GEORGOPOULOS Law Firm

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 What is the relevant legislation?

Law 3959/2011 on the Protection of Free Competition (CA), as amended by Law 4886/2022 'on the Modernisation of Competition Law for the Digital Era and other provisions' and in force, constitutes the Greek competition regime. The Greek CA is fully aligned with EU competition law provisions. In particular, articles 1 and 2 CA (ie, the national equivalent of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) are almost identical to the latter. These articles are applicable for national cases, whereas articles 101 and 102 TFEU are directly applicable in the national jurisdiction in cases with an EU dimension.

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 matters are investigated by the Hellenic Competition Authority (HCC) through its Directorate General for Competition (ie, the HCC body that conducts the investigations) and sanctioned through the HCC's Board (ie, the HCC body that takes decisions). Pursuant to article 12 (1) CA, the HCC constitutes an Independent Administrative Authority with legal personality, administrative and financial independence, which is monitored by the Ministry of Development and Investments and is also subject to parliamentary scrutiny according to the Rules of Procedure of the Parliament. Its members enjoy personal and functional independence and in the exercise of their duties they are bound only by the law and their consciousness and the principles of objectivity and impartiality. The HCC, as the national competition authority (NCA) has the exclusive competence of implementing the CA 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 as sectoral NCA, pursuant to article 12 of Law 4070/2012 (Electronic Communications Act).

Pursuant to article 30 (1) CA, HCC decisions are subject to an appeal filed before the Athens Administrative Court of Appeal. The Administrative Court of Appeal of Athens effects a full review on the merits of the case. According to article 32 CA, 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 Greek Law 3959/2011 on Free Competition in the context of the transposition of the ECN+ Directive (EU) 2019/1, empowering national competition authorities, took place in January 2022. Law 4886/2022 radically reformed the CA. The new Law is in general aligned with ECN+ Directive's provisions, but it also adopts certain stricter rules and new competition rules.

The key amendments to the existing legal framework may be summarised as follows:

- The introduction of the innovative provision of article 1A titled 'Invitation to collude and announcement relating to communicating future pricing intentions for products and services between competitors', which aims to tackle two different forms of unilateral practices, as follows:
    - invitation(s) to collude with the object of preventing, restricting or distorting competition in the Greek territory, or
    - announcement(s) relating to communicating mainly future pricing intentions for products or services between undertakings that are competitors ('price signalling') if the disclosure restricts competition in the Greek territory and is not an ordinary business practice. Undertakings with a total turnover of less than €50 million euros and with less than 250 employees are excluded from the application of said article. This new provision entered into effect on 1 July 2022 and in February 2023, the HCC launched its guidelines on the implementation of article 1A.
- The insertion of the new provision on market mapping (article 14(2)(s)), which allows the HCC to assess the conditions of competition in any market or sector of the economy where required for the effective exercise of its powers.
- With reference to the imposition of fines, a stricter approach has been adopted in line with the ECN+ Directive, as the fines 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. In the case of a group of companies, for the calculation of the fine, the total global turnover of the group shall be taken into account.
- Regarding merger control review, the introduction of the possibility for mergers that have gone into a Phase I investigation to undertake commitments. Different minimum thresholds and criteria required by prior notification may be set by virtue of a joint ministerial decision of the Minister of Finance and the Minister of Development and Investment, following a public consultation.
- With respect to settlement procedure, an extension of the said procedure to any infringement of articles 1, 1A and 2 CA or articles 101 and 102 TFEU, and not only to horizontal agreements (article 29A of the CA).
- Regarding the leniency programme, the insertion of separate provisions regarding the general conditions, the form of the statements and the markers that reflect the respective provisions of the ECN+ Directive, as well as the extension of the leniency programme to associations of undertakings.
- The introduction of the 'no-action letter' provision of article 37A, which is related, inter alia, to the promotion of sustainability.

- The introduction of articles 28a to 28c reflecting article 24 and 27 (7) of the ECN+ Directive, which aim to the enhancement of the cooperation between national competition authorities.
- The introduction of article 40 (investigation of algorithmic methods), when suspicions arise in respect of restriction or distortion of competition.
- Other provisions regarding the HCC's organisation and structure, aimed at enhancing the independent status of the authority.

In this vein, in July 2022, the HCC launched its updated guidelines, notices and forms regarding complaints, concentrations, commitments, settlement procedure, leniency programme and treatment of confidential information with its respective decisions.

Following the introduction of article 37A in the CA, the Greek NCA launched its Decision No. 789/2022 on 'no-action letter'. The no-action letter is a tool for assessing the business plans of undertakings operating in the Greek market for reasons of public interest, in particular to achieve sustainable development objectives.

Substantive law

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

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

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, distribution, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent trading transactions, especially the unjustified refusal to sell, buy or otherwise trade, thereby hindering the functioning of competition; and
- make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations that, by their nature or according to commercial use, have no connection with the subject of such contracts.

Article 1 (2) CA provides that 'any agreements and decisions by associations of undertakings that 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 CA, similar to that of article 101 paragraph 3 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 limitation, bid rigging and other types of competitor agreements and, as long as they refer to agreements between horizontal competitors, are per se illegal (not subject to a competitive effects test). Thus, cartels are deemed as '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' (EC, 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 irrespective and without the NCA having to prove whether it had an anticompetitive effect on the market (see the 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).

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 CA or article 101 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) that have cooperative elements, as well as non-full-function joint ventures.

In short, cooperative elements between continuing competitors (eg, parents) may give rise to cartel laws, 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

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

Article 1ofLaw 3959/2011 on the Protection of Free Competition (CA) 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, constituting thus an 'undertaking'. Under article 44 CA criminal sanctions for competition law infringement can be imposed only to individuals participating in cartel activity.

Extraterritoriality

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

Pursuant to article 46 CA, titled 'Scope of the application of the Law', the CA 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.

Export cartels

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

Industry-specific provisions

|

10 | 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

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

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

INVESTIGATIONS

Steps in an investigation

12 | 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 article 1, 1A or 2 CA / articles 101 and 102 of the Treaty on the Functioning of the European Union. 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

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

Articles 38 and 39 CA stipulate the investigative powers of the HCC, which in general mirror the investigative powers of the EC under Regulation (EU) 1/2003. In more detail, according to article 38 CA, the HCC may request in writing information from undertakings, associations of undertakings or other natural or legal persons or public or other authorities. The request for information (RFI) 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 RFI must provide the information requested, accurately, fully and immediately.

Article 38 (2A) provides that the HCC may summon anyrepresentative of a company or association of companies, representatives of companies or associations of companies, representatives of other legal persons, as well as any other natural person to sworn or unsworn witness statements.

Moreover, as per article 38 (2B), the HCC may call to deliberations any representative of a company or association of companies, representatives of companies or associations of companies, representatives of other legal persons, as well as any other natural person, with invitation, which is submitted to the above persons at least five days before the date of the discussion.

In addition, pursuant to article 39 CA, 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 types and categories of books, records and other documents of the undertaking or association of undertakings, including the business emails of the undertaking, the directors, chief executive officers, managers, persons entrusted with the administration or management in general and staff of the undertaking or association of undertakings, regardless of how and where they are stored, and to take copies or extracts of them and have the right of access to all information accessible to the undertaking under inspection;
- to seize, receive or obtain, in any form, copies or extracts of books, documents and other records, and electronic storage and transmission of information relating to professional information and, where they consider it appropriate, continue the investigation for information and select copies or extracts at the premises of the HCC or at any other designated premises;
- to inspect and collect information and data from mobile terminals and portable devices and their servers, on or off the premises of the undertaking;
- to carry out inspections in the offices and other premises and means of transport of the undertaking or association of undertakings;
- to seal any professional premises, books or documents for the period of and to the extent necessary for the inspection;
- to carry out inspections in premises, land and means of transport other than those referred to in subparagraph (d) of paragraph 1 of article 39, including the residencies of the businessmen, directors, chief executive officers, persons entrusted with the management or administration in general and 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 where the purpose of the inspection may be important to establish an infringement; and
- to take, at their discretion, sworn or unsworn witness statements, and ask any representative or member of staff of the undertaking or association of undertakings or any third party for explanations of facts or documents relating to the subject matter of the investigation and record their respective answers.

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. In all cases of inspections of non-business premises, a judge or public prosecutor should be present. Lastly, 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

14 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 3959/2011 on the Protection of Free Competition (CA), the Hellenic Competition Authority (HCC) is responsible for cooperation: (1) 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; (2) with the competition authorities of other countries; and (3) with the competition authorities of other countries bilaterally and within the framework of international and regional cooperation networks. The HCC may conclude memoranda of cooperation with competition authorities of other countries. At European level, the HCC cooperates with the European Commission (EC) and participates actively in the European Competition Network's (ECN) work. 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 for the promotion of policy convergence through dialogue and exchange of views on broader policy and enforcement issues. The President of the HCC was re-elected in November 2022 as a regular member in the Bureau of the OECD Competition Committee for the year 2023 and in the High-Level Group on the Digital Markets Act, representing the European Competition Network.

According to article 24 CA, the HCC cooperates with regulatory or other authorities that monitor specific sectors of the national economy, and assists such authorities, upon request, on matters of application of articles 1 and 2 CA and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in the relevant sectors. Thus, the HCC cooperates with sector- and industry-specific regulators. In this context, the HCC signed memoranda of understanding with the Regulatory Authority for Energy, the Regulatory Authority for Ports, the Hellenic Capital Market Commission and the Hellenic Data Protection Authority, with a view to consolidating and enhancing cooperation between the respective authorities.

Aspiring to foster cooperation with other national competition authorities (NCAs) and enhance its international presence in shaping competition policies, the HCC has signed a series of memoranda of partnership with other NCAs.

Interplay between jurisdictions

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

Within the framework of article 11 of Regulation EC 1/2003, the 2004 Commission Notice on cooperation within the Network of Competition Authorities and the provisions of article 28 CA, the most significant interplay of the HCC with other jurisdictions in cross-border cases is with the EC and other NCAs. In particular, there is a significant interplay between the HCC and other NCAs within the framework of the ECN network, especially regarding the exchange of information about cases and decisions taken by the competition authorities

of the network, mutual assistance with investigations and exchange of evidence or other information. In this vein, per article 28A of the CA, the HCC may request a competition authority of a member state to take any investigative measure on its territory, in accordance with its national law, in the name and on behalf of it, to determine the extent to which undertakings or associations of undertakings do not comply with investigative measures ordered or decisions issued by the HCC. Article 28C CA foresees the enforcement of decisions from competition authorities of member states. It provides that at the request of the NCA of another member state, the HCC shall take all necessary actions for the enforcement of decisions imposing fines or periodic penalty payments adopted during procedures for the implementation of articles 101 or 102 TFEU, provided that the decision is final and the undertaking liable for the payment of the fine does not have sufficient resources in the member state of the requesting authority to pay the fine or penalty. The HCC can also enforce a decision by a competition authority of a member state if the undertaking concerned does not have an establishment in that member state. The HCC can also request the competition authorities of other member states to enforce its final decisions imposing fines or periodic penalty payments in proceedings for the application of articles 101 or 102 TFEU.

The HCC has established a Directorate of International Relations and Communication with a view to enhance the strategic cooperation with the European Commission, NCAs, international organisations and agencies of other countries.

CARTEL PROCEEDINGS

Decisions

16 | How is a cartel proceeding adjudicated or determined?

The Hellenic Competition Authority (HCC) both investigates (through its Directorate General) and adjudicates (the final decision is taken by its Board, sitting in Chamber or in Plenary formation) on cartel matters. In particular, under article 15 (6) of Law 3959/2011 on the Protection of Free Competition (CA), cases concerning inter alia the implementation of article 1, unless otherwise stated in the same Law, 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 discretion. In the other instances, cases shall be brought directly before the HCC Plenary. The Plenary session of the Competition Commission convenes at least once a month.

Burden of proof

17 | 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 to an infringement of competition law and its duration. According to article 4 CA, each party shall bear the burden of proof of their claims during proceedings before the HCC for the purposes of articles 1 and 2 CA. 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 the EU pertinent case law. The HCC, as a matter of principle, decides the action on the basis of its members' belief, as formed based on the evidence adduced by the Directorate General of Competition and by the parties and in general follows the principle of free consideration of evidence.

Circumstantial evidence

18 | 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 the member states, the HCC's decisional practice follows the European Commission's practice and established EU case law on the basis also of the settled principle of effectiveness of EU law. In this vein, given the secretive nature of cartels and ensuing difficulty to gather evidence, given 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 and circumstantial evidence may be accepted in appropriate cases, in the sense of evidence consisting in a number of coincidences and indicia that, taken together and in 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 (*cf*. CJEU Case C 74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, paragraph 37).

Appeal process

19 | What is the appeal process?

Pursuant to article 30 (1) of the CA, HCC decisions are subject to appeal before the Administrative Court of Appeal of Athens within a period of 60 days from 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 execution of the HCC decision, unless the Court issues a relevant order (in cases where an appeal is

filed against a decision by the HCC imposing a fine, the Administrative Court of Appeal of Athens may, by a reasoned judgment, order the suspension of a part of the fine, which cannot exceed 80 per cent).

Article 32 CA 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

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

Article 44 (1) of Law 3959/2011 on the Protection of Free Competition (CA) 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 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 Authority (HCC). ccording to article 44 paragraph 3A CA, criminal liability for the former and current directors, executives and other staff members and responsible persons and the crimes that are linked to them is waived, provided that the persons in question have actively cooperated with the HCC and are actively cooperating with the public prosecutor, and that the application for entry in a leniency programme or dispute settlement procedure was submitted before they were duly informed of the criminal prosecution against them, or the possibility of criminal prosecution. This provision also applies for facilitatory partial payments of the fine for as long as the arrangement is in force and the debtor is diligent with its terms. In practice, criminal sanctions are very rare.

Civil and administrative sanctions

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

Article 25 of the CA 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 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 on undertakings and associations of undertakings that committed an infringement intentionally or negligently;
- threaten a fine pursuant to article 25B (1) or (2), or both, where the infringement is continued or repeated; and
- impose the fine of article 25B (1) or a financial sanction according to paragraph 2 of the same article, or both.

Moreover, per article 25D, the HCC has the exclusive competence to take interim measures on its own initiative where an infringement of articles 1 or 2 CA or articles 101 and 102 of the TFEU is suspected and there is an urgent risk of serious and irreparable harm to competition. The HCC may also order an undertaking or association of undertakings that infringed the CA 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 (art. 27 (2) CA)). Civil actions before Greek civil courts are provided under the provisions of Law 4529/2018, transposing Directive 2014/104/EU (the Damages Directive), the Greek Civil Code and the Greek 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 and primary consumer goods.

Cartel damages actions have been adjudicated by the courts in Greece in several cases. The EU Antitrust Damages Directive was transposed into Greek national law by Law 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

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

According to article 25B (1) CA, the fine for cartels (and, in general, for infringements of articles 1, 2 and 11 CA or articles 101 and 102 TFEU may be up to 10 per cent of the total worldwide turnover of the undertaking for the financial year in the business year preceding the decision. This provision is aligned with article 15 of the ECN+ Directive. In the case of a group of companies, calculation of the fine shall take account of the total worldwide 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 the resulting economic benefit to such undertaking. 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 7 July 2022, the HCC adopted its new Guidelines on the method of setting fines on undertakings that infringe both national and EU competition rules (the Guidelines). In general, the Guidelines reflect the wording of the respective EU Guidelines on the method of setting fines imposed further to Regulation No. 1/2003. The HCC follows a two-step procedure in calculating fines. First, it sets a basic amount of the fine for each undertaking or association of undertakings considering the gravity, duration and geographic scope of the infringement, and the duration and the type of participation in the infringement of the specific undertaking. Secondly, it may adjust that basic amount upwards (in the case of aggravating circumstances) or downwards (in the case of mitigating circumstances). 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.

The HCC may reduce the basic amount in the case of mitigating factors, for example:

- 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 following 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 Programme and beyond its legal obligation to do so.

Paragraph 19 of the HCC Guidelines provides that the Commission will pay particular attention to ensuring fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings that have a particularly large turnover beyond the sales of goods or services to which the infringement relates. Article 25B (3) provides that, when determining the amount of the fine to be imposed, the HCC shall take into account as a mitigating circumstance any compensation paid to the parties injured by the anticompetitive practice in question, or to a significant number of them, in the context of a consensual settlement. If the consensual settlement is pending, the HCC may suspend the adoption of the decision imposing the fine for a period not exceeding three months.

Compliance programmes

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

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

Director disqualification

24 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 in Greek jurisdiction.

Debarment

25 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 4412/2016 (transposition of Directives 2014/24/EU and 2014/25/EU), (Greek 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. According to article 44 (3C) CA, exclusion from public procurement procedures or concessions is waived (except in the case of repeated infringement or recidivism) in the case of leniency or settlement, provided 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, special circumstances.

Parallel proceedings

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

Even though administrative and criminal sanctions can be pursued in parallel with respect to the same conduct, article 44 (5) CA provides that if the 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.

However, so far, the 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 the administrative sanctions are in most cases undertakings. To that end, it has been held (see Council of State Judgment 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 natural person is absent.

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

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

Private damage claims for cartel infringements are available in the Greek jurisdiction and are governed by Law 4529/2018 transposing Directive 2014/104/EU (the Damages Directive). Under article 3 (1) of Law 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 the Law. For quantification of harm, article 14 of the Law provides that 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 precisely to quantify the harm suffered on the basis of the evidence available (article 14 (1) Law 4529/2018). There is a presumption that cartel infringements cause harm, however the infringer has the right to rebut that presumption.

Article 11 (1) of Law 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 a passing-on to them occurred in accordance with the provisions of article 11 (2 -6). 'Umbrella purchaser claims' in line with Case C – 557/12 *Kone*, may be also brought (see article 10 (7) of Law 4529/2018).

Article 11 (2) of the same Law 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

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

Law 4529/2018 regulating private actions for cartel infringements does not contain any provisions concerning class actions.

COOPERATING PARTIES

Immunity

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

Article 29B to 29Z of Law 3959/2011 on the Protection of Free Competition (CA), as well as Hellenic Competition Authority (HCC) Decision 791/2022, set out the national legal framework under which exemption from the payment of fines or fine reduction shall be granted to undertakings and associations of undertakings that participated independently in a horizontal cartel and to persons who contribute to the investigation of horizontal restrictive practices (cartels). The national leniency programme (LP) is in general modelled after the EU and ECN respective LPs and it is only applicable to horizontal cartels laid down by article 1 CA and 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 article 25 and 25B CA.

Under the national LP there are two types of immunity, full or partial.

Full immunity from fines refers to Type 1A and Type 1B applications. In particular, complete exemption from fines shall be granted to the applicant that:

- discloses its participation in a horizontal cartel;
- has not sought to coerce other undertakings to join or to remain in a secret cartel;
- is the first to submit evidence that either:

    1. provides, at the time of the application, the HCC with the possibility to carry out a targeted investigation in relation to a possible horizontal cartel for which the Competition Commission did not previously have sufficient evidence to carry out such an investigation or had not already carried out such an investigation 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; or
    2. at the discretion of the HCC, is sufficient to establish a horizontal cartel as per article 1 CA or article 101 TFEU, for which the HCC did not, by the time of the application, have sufficient evidence allowing it to establish such an infringement and no other undertaking meets, at the time of the application,

the conditions for an exemption under (1) above regarding the infringement; or

- fulfils the general leniency conditions set out in article 29C of the CA.

Pursuant to article 44 (3A) as in force, in cases where the undertaking is granted full immunity, no criminal sanctions will be imposed on natural persons who have been involved in the cartel.

In March 2021, the HCC introduced a whistleblowing mechanism, (ie, a secure digital environment for the reporting or submission of anonymous information), following the standards of the whistleblowing mechanisms used by the European Commission, as well as other National Competition Authorities (NCAs) in the EU.

Subsequent cooperating parties

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

Article 29E of the CA provides partial immunity (Type 2 immunity: reduction of fines) for subsequent applicants that do not fulfil the conditions for granting immunity from fines. In this case a reduction from the fine that would otherwise have been imposed may be granted to the applicant (undertaking, association of undertakings 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 at the time of the request. Significant added value for Type 2 applications shall not be rewarded with a reduction of any fine of more than 50 per cent (70 per cent for natural persons). Furthermore, partial immunity is regarded as a mitigating circumstance in itself, resulting in the imposition of a reduced sanction pursuant to article 83 of the Penal Code.

Going in second

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

Regarding the third or subsequent cooperating party, lower reductions from the fine that would otherwise be imposed are provided and the possibility for reduction of fines is diminished on the basis of the significance of the added value of the evidence of the alleged cartel they can provide with respect to the evidence already in the HCC's possession.

Approaching the authorities

32

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

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

Article 29F of the CA 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 in order 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 names and addresses of all other undertakings that participate or have participated in 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 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

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

To be granted full immunity, leniency applicants should fulfil the cumulative conditions as stipulated in article 29C of the CA and HCC Decision 791/2022. In particular, the undertaking, association of undertakings or natural person:

- 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 Commission'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 Commission;
- 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 Commission has issued a statement of objections in the case, unless otherwise agreed (this does not prohibit disclosure to the European Commission and other NCAs).
- Must have ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections.
- When contemplating making its application to the Commission, 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.

The above general requirements for full immunity also apply to partial immunity.

Confidentiality

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

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

Settlements

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

A settlement procedure is foreseen in article 29A CA and HCC decision 790/2022. According to article 29A CA, by decision of the HCC Plenary, a procedure for settlement may be established for undertakings that admit their participation in the horizontal restrictive practices attributable to them in violation of articles 1, 1A and 2 of the

CA or articles 101 and 102 of the TFEU (or both). 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 anticompetitive agreements (either horizontal or vertical, or unilateral practices, such as abuse of dominance, invitation to collude and announcements relating to communicating future pricing intentions for products and services between competitors) and the subsequent breach of articles 1, 1A and 2 CA or article 101 TFEU and 102 TFEU (or both). As an exchange for the cooperation with the HCC, the undertakings 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 includes an acknowledgement of the parties' participation and liability for the infringement, and also a waiver of the right to challenge the HCC's jurisdiction and the validity of the procedure followed. On this basis, judicial review of the settlement decision is unlikely. Settlement procedures commence on the parties' initiative at any stage of the investigation and a court approval is not required.

Corporate defendant and employees

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

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 in itself, resulting in the imposition of a reduced sanction according to article 83 of the Greek Penal Code.

Dealing with the enforcement agency

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

Before 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 LP to the particular case by presenting, on a hypothetical basis, the evidence at its disposal.

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 791/2022. 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 for 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 President, who shall immediately inform the Director-General and the Rapporteur as the case may be. The Director-General shall keep the confidential record of the leniency protocol. 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.

DEFENDING A CASE

Disclosure

38 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 provisions of article 15 of the Regulation on the Internal Operation and Management of the Hellenic Competition Authority (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 (2022). 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, in order 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 (eg, 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 on-site inspection.

Representing employees

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

There is nothing expressly provided for in Law 3959/2011 on the Protection of Free Competition on this issue, thus, in general, counsel may represent employees under investigation in addition to the corporation, unless a conflict of interest arises.

Multiple corporate defendants

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

Counsel may represent multiple corporate defendants, irrespective of whether they are affiliated, unless a conflict of interest arises.

Payment of penalties and legal costs

41 | 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

42 | 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.

Compensations 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

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

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, whereas it constitutes a principle mainly concerned with due process. Administrative sanctions imposed in non-member states' jurisdictions shall not be taken into account when determining cartel sanctions.

With respect to private damage claims, article 3 (3) of the Damages Directive 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

44 | 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. Under the settlement procedure a reduction of the imposed fine 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, or compliance initiatives undertaken after the investigation has commenced, affect the nature or magnitude of the sanctions.

UPDATE AND TRENDS

Recent cases

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

The Hellenic Competition Authority (HCC) shows a continuous focus on combatting bid-rigging and market allocation/price fixing. Interestingly, most of the HCC decisions issued in 2022 and 2023 concerned bid-rigging cases. More specifically, by its unanimous settlement decision 793/2022, the HCC imposed reduced fines of €135,236 on three companies operating in the provision of coastal shipping services referred to a local ferry connection regarding a concerted practice of setting prices and allocating markets, defining the framework of their joint action in relation to their commercial policy.

Also, by its unanimous settlement Decision 767/2022, the HCC imposed a total fine of €304,428 on four companies active in the markets for the provision of catering services to migrants and refugees, through tendering procedures, on the islands of the North and East Aegean Sea regarding participation in a horizontal agreement with the object of restricting the provision of catering services on the islands of Lesvos and Chios.

The HCC, by its settlement Decision 828/2023, following an ex officio investigation into the supply of medical devices (rapid tests) through a public tender, imposed a reduced fine of €373,943 on the members of the cartel for their participation in three separate bids with the same price per unit of the product and with quantities aggregated between them for the total quantity requested, in a tender procedure in which it was possible to submit separate bids for parts of the contract and without that agreement having the form and substance of a consortium or an association.

In the context of stepping up the fight against bid-rigging, the HCC published a Manual for Contracting Authorities, regarding manipulation and bid-rigging practices in public procurement tenders.

2023 was also characterised by the initiation of dawn raids in multiple sectors of the Greek economy. More specifically, during the first half of 2023, the HCC, with a view to tackling cost-of-living concerns fuelled by inflation rises, carried out five dawn raids in 16 undertakings active inter alia in the sectors of beer and other alcoholic beverages sector, poultry, pharmaceuticals, currants and products for babies and toddlers, Reportedly, the HCC is the first among national competition authorities in the number of dawn raids conducted in the period 2018–2023 (year to date). In 2022, the HCC carried out 16 dawn raids in 68 undertakings active in the following sectors: pasta products; cosmetics and personal care; eyewear; transport; children's toys; electricity; breast pumps; white goods;

and the manufacturing, import and distribution of aluminium, PVC and iron-processing machines.

The HCC also delivered Opinion 40/2022 on competition-related issues raised by the 'household basket' initiative (ie, an initiative of the Ministry of Development, which served as an 'attention market' for consumers aiming to enhanced competition in the retail market for basic consumer goods).

The HCC continues to prioritise regulatory interventions aimed at creating conditions of competition in a sector under investigation in the absence of effective competition. In this context, in November 2022, the HCC launched a (currently ongoing) regulatory intervention in the petroleum sector, whereby the conditions of competition in the three production and distribution stages (refining, wholesale, retail) of petroleum products (unleaded petrol, diesel and heating oil) in the Greek market will be examined in depth. Said regulatory intervention is based on the findings of the HCC's mapping study on the conditions of competition in the petroleum industry, which examined the phenomenon of asymmetric adjustment of fuel prices in relation to costs.

With regards to procedural amendments, on 21 March 2023, the HCC's new Regulation on the Internal Operation and Management (RIOM)entered into force.

Regime reviews and modifications

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

There are no announced ongoing or anticipated reviews or proposed changes to the legal framework.

KYRIAKIDES GEORGOPOULOS Law Firm

Victoria Mertikopoulou v.mertikopoulou@kglawfirm.gr
Ifigeneia Argyri i.argyri@kglawfirm.gr

KYRIAKIDES GEORGOPOULOS Law Firm

Read more from this firm on Lexology

India

Harman Singh Sandhu, **Manika Brar**, **Yaman Verma**, **Nitika Dwivedi**
Shardul Amarchand Mangaldas & Co

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Competition law in India is governed by the Competition Act 2002 (the Act), and related rules and regulations. On 11 April 2023, the Competition (Amendment) Bill 2023 received assent from the President of India and became the Competition (Amendment) Act 2023 (the Amendment Act). The Amendment Act seeks to amend various provisions of the Act. Several amended provisions have recently come into effect through government notifications dated 18 May 2023 and 18 July 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?

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?

In 2022, the CCI 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; and

- if the CCI considers it necessary or expedient, it may establish confidentiality rings, which will comprise a limited group of authorised representatives of the parties who will have access to the entire case records in an unredacted form.

Key changes impacting the cartel regime under the Amendment Act are as follows:

- effective as of 18 May 2023, 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 participate or intend to 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;
- turnover will include global turnover derived from all the products and services by the infringing parties (relevant for multinational companies); and
- regulations by the CCI to calculate turnover and income for penalty assessment and guidelines as to the appropriate amount of penalty for contraventions of the Act will be published by the CCI.

Substantive law

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

Section 3 of the Act prohibits 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 '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.

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.

Section 3(3) of the Act creates a presumption of an AAEC for 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.

Once an agreement of any of the types described in section 3(3) of the Act is established, it is presumed to cause an AAEC. This presumption is however rebuttable by the parties to the agreement.

The Amendment Act broadens the scope of anticompetitive horizontal agreements to cover agreements that involve an entity or association of entities that are not engaged in identical or similar trade but that participate or intend to participate in furtherance of such agreements. This can include enterprises that facilitate cartelisation by enabling exchange of information among competitors (ie, hub and spoke cartels).

In determining whether an agreement causes an AAEC in India, the CCI is required to consider several negative and positive factors. These are:

- the creation of barriers to entry;
- driving existing competitors out of the market;
- foreclosing competition;
- benefits or harm to customers;
- an improvement in production or distribution; and
- the promotion of technical, scientific and economic development.

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

7 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

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

Section 32 of the Competition Act 2002 (the Act) empowers the Competition Commission of India (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, 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

9 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

10 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;
- the Semiconductor Integrated Circuits Layout-Design Act 2000; and

- any other law for the time being in force relating to the protection of other intellectual property rights.

Recently, in *Telefonaktiebolaget LM Ericsson (Publ) v CCI and Anr* and*Monsanto Holdings Private Limited, v CCI and Ors* (LPA No. 247/2016), the Delhi High Court ruled that disputes relating to allegations of anticompetitive conduct in the licensing of patents should be examined under the Patents Act 1970 and not under the Act. Notably, this has effectively barred the jurisdiction of the CCI in examining disputes relating to the licensing of patents.

Government-approved conduct

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

The Act exempts sovereign functions carried out by the government, and activities undertaken by the space, atomic energy, defence and currency departments of the central government. Notably, if an enterprise performs both sovereign and non-sovereign functions, only the sovereign function will be exempt from the scope of competition law.

The Supreme Court of India, in *Coal India Limited and Anr v Competition Commission of India and Anrm>* (*Coal India*), affirmed that state monopolies or statutory monopolies are subject to competition laws, unless they perform sovereign functions related to atomic energy, currency, space or defence.

Section 54 of the Act empowers the central government to exempt:

- an enterprise or class of enterprises from the application of the Act or specific provisions of the Act in the interest of security of the state or public interest; or
- any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.

Other than these exemptions, no other state action, government-approved activity or regulated conduct is expressly exempt from competition laws. The Supreme Court of India, in *Coal India*, affirmed that unless an enterprise performs a sovereign function or is exempt under the provisions of section 54 of the Act, it will be subject to competition law.

INVESTIGATIONS

Steps in an investigation

12 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 2002 (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.

Prior to the Competition (Amendment) Act 2023 (the Amendment Act), the CCI was required to provide a prima facie view in every case. The Amendment Act enables the CCI to not inquire into cases where the same or substantially the same facts and issues have already been decided by the CCI in its previous order.

Moreover, recently, in *Shyam Steel Industries v Union of India and Ors* (WPA No. 10107 of 2023), the Calcutta High Court held that the DG's investigation may be triggered by an order of a high court directing the DG to investigate, even when the CCI has not passed a prima facie order under the Act. The Calcutta High Court held that a high court may 'subsume the sequential steps' for the CCI's inquiry in the prima facie stage. The court also held that proceedings under section 26(1) are merely an internal handing over of a charge to the DG, and not an adjudicatory process. This judgment affirms the existing position of law that orders passed under section 26(1) are merely administrative, and the process by which the requirement for a prima facie view by the CCI is eliminated.

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 (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 that the DG conduct such investigation or proceed with such inquiries on its own.

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

13 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.

Courts in India have also upheld the flexibility in the scope of the DG's investigation. For instance, the Gujarat High Court, in *JK Paper Limited v Competition Commissioner of India* (R/Special Civil Application No. 12932 of 2019) dismissed a challenge to the expansion of the scope of the DG's investigation. The court observed that CCI's prima facie opinion in the case pertained to cartelisation in the paper industry and was not restricted to specific varieties of paper. Through this judgment, the Gujarat High Court affirmed the position taken by other high courts on this issue.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Competition Act 2002 (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 (MOUs) 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.

The CCI is in the process of signing similar MOUs with other key jurisdictions, and the central government has recently approved the signing of an MOU between the CCI and the Egyptian Competition Authority.

The MOUs, which are general in nature, are intended to increase cooperation and communication between international competition authorities. The CCI has stated that it has reached out to other competition authorities during the review process in several cases. It regularly seeks waivers from parties to share information with other authorities in large global transactions.

Interplay between jurisdictions

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

Engagement between the CCI and the regulators of other jurisdictions is not a matter of public record.

CARTEL PROCEEDINGS

Decisions

16 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

17 | 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

18 | 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

19 | 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. The Competition (Amendment) Act 2023 (Amendment Act) provides that in cases where the CCI has imposed a penalty on the party appealing before the NCLAT, the party must deposit 25 per cent of the penalty amount in a manner directed by the NCLAT for their appeal to be entertained. This marks a significant change in law, as there was previously no deposit requirement to file an appeal. However, previously the NCLAT granted interim relief on the payment of penalties, generally subject to the appellant depositing 10 per cent of the penalty amount.

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

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

There are no criminal sanctions for cartel activities under the Competition Act 2002 (the Act).

Civil and administrative sanctions

21 | 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. The Competition (Amendment) Act 2023 (the Amendment Act) empowers the CCI to levy a penalty based on the global turnover of the infringing parties.

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 repeat offences an aggravating factor that justifies higher levels of penalty.

Guidelines for sanction levels

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

While the Act and its corresponding regulations do not at present contain any specific guidelines for the calculation of the penalty, the CCI has applied the principle of proportionality when imposing penalties. Penalties have usually been 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. The Amendment Act empowers the CCI to levy penalties on the global turnover of an infringing 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.

When determining whether to impose a penalty or not, the CCI typically considers the following factors (in addition to the aggravating and mitigating factors set out above):

- exigent economic circumstances, such as the outbreak of the covid-19 pandemic and its impact on businesses and the relevant industry, especially for those enterprises that have a small annual turnover or an unstable financial position;
- the size of the enterprise, particularly whether the enterprise concerned is a micro, small or medium enterprise;
- continued cooperation during the investigation and, in some cases, parties admitting their infringing conduct (which helps expedite the investigation);
- low or no turnover including the parties' submissions that they do not hold any funds;
- whether the contravening enterprise has taken steps to cease the conduct; and
- whether parties are habitual offenders or first-time offenders.

However, these factors are not exhaustive, and are applied by the CCI considering the facts and circumstances of each individual case. Further, the CCI considers a combination of the above factors, and may not consider a stand-alone factor as a basis to refrain from imposing a penalty.

More clarity on the calculation of penalties is expected as the Amendment Act requires the CCI to publish guidelines on the methodology for calculating turnover and income. The Amendment Act also requires the CCI to publish guidelines on the appropriate amount of penalty to be imposed for contraventions of the Act.

Compliance programmes

23 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

24 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

25 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

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

The Act only contemplates civil penalties for cartel activities.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

Any enterprise or person who has suffered loss or damage due to a contravention of the Competition Act 2002 (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

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

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 into or opt out of the proceedings with the NCLAT's prior permission.

COOPERATING PARTIES

Immunity

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

The Competition Act 2002 (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.

The Competition (Amendment) Act 2023 (the Amendment Act) also introduces a 'leniency plus' regime, allowing an enterprise that files for leniency in relation to one cartel and that also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartels. The provisions relating to the leniency plus regime are yet to be brought into force through a government notification.

Subsequent cooperating parties

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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.

The Amendment Act has introduced a 'leniency plus' regime whereby an enterprise that files for leniency in relation to one cartel and that also helps in exposing a separate cartel receives a reduction in penalty for both the existing and the newly revealed cartel.

Approaching the authorities

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

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

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

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

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

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 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

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

The 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. While the Amendment Act introduces a regime of settlements and commitments, the regime does not apply to cartel cases.

Corporate defendant and employees

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

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

37 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

38 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

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

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, such 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

40 | 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

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

There is nothing in the Competition Act 2002 (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

42 | 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

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

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

44 | 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.

However, the factors provided above are not exhaustive and are applied by the CCI considering the facts and circumstances of each individual case.

In certain cases, the CCI has found that enterprises have cartelised but has not imposed a penalty, based on factors such as the parties having limited or no turnover, the parties having ceased or tried to rectify anticompetitive conduct, and the parties being first-time offenders. Further, the CCI considers a combination of the above factors, and may not consider a stand-alone factor as a basis to refrain from imposing a penalty.

UPDATE AND TRENDS

Recent cases

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

Hith Impex Private Limited v CCI and Ors (Competition Appeal (AT) No. 21 of 2022)

The National Company Law Appellate Tribunal (NCLAT) recently upheld the Competition Commission of India's (CCI) position that even tacit understandings, where parties may act based on a nod or a wink, can constitute anticompetitive agreements under section 3(3) of the Competition Act 2002 (the Act). In this particular case, the NCLAT disposed of an appeal against the CCI's order imposing a penalty in relation to allegations of bid rigging and cartelisation in tenders for the supply and installation of signages. Hith Impex (the appellant) approached the NCLAT arguing that it was not involved in the bidding process as it only submitted a technical bid and did not participate in the final bid. Further, Hith Impex argued that there was no direct evidence indicating that it was a bidder in the relevant tenders. The only evidence was the usage of an abbreviation, in certain emails between the bidders, that could be attributed to the director of Hith Impex. Based on this, Hith Impex contended that they could not have been a part of the alleged cartel and the CCI could not have imposed a penalty.

The CCI, however, held the evidence on record to be indicative of a tacit understanding. The NCLAT did not interfere with the findings of the CCI, as the evidence indicated that Hith Impex and its director were, in one way or another, involved in the cartel. The NCLAT upheld the CCI's observations that an agreement under section 3(3) of the Act includes tacit understanding, such as parties acting based on a nod or a wink. This judgment reinforces

the stance of the CCI that the existence of a cartel is to be determined based on the evidentiary standard of 'preponderance of probabilities'.

Solar Life Sciences Medicare Private Limited and others (Case No. 20 of 2020)

The informant alleged that chemist associations had collectively boycotted pharmaceutical products of certain manufacturers and suppliers. The informant alleged that the associations collectively decided and imposed margins and incentive schemes on the manufacturers and suppliers of pharmaceutical products. In the event of failure to offer such margins and incentive schemes to the chemists, the pharmaceutical products of such manufacturers and suppliers were boycotted; in other words, the purchase and supply of such manufacturers and suppliers of pharmaceutical products was limited by the associations. The CCI found that the notices issued by the associations used terms such as 'boycott' and 'non-cooperation'. The CCI held that the associations had violated section 3 of the Act.

Notably, the CCI did not impose a penalty on the associations, observing that they were district level associations and first-time offenders. The associations had also argued before the CCI that they do not have funds, receive no fees or membership payments, and work for the welfare of chemists. The stockist of the informant's products also submitted that the anticompetitive resolutions were withdrawn. This judgment reaffirms the past precedent, where the CCI has taken a relatively lenient approach (depending on the facts and circumstances of the case) when steps are taken to rectify anticompetitive conduct, parties are first-time offenders, or contravening parties have no turnover.

Regime reviews and modifications

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

On 11 April 2023, the Competition (Amendment) Bill 2023 received assent from the President of India and became the Competition (Amendment) Act 2023 (the Amendment Act). Several amended provisions have recently come into effect through government notifications dated 18 May 2023 and 18 July 2023.

Key changes impacting the cartel regime under the Amendment Act are:

- facilitators of cartels, including hub-and-spoke cartels, shall be presumed to be part of anticompetitive agreements and will be treated as infringing parties if they participate or intend to 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 that 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;
- 'turnover' will mean global turnover derived from all the products and services by the infringing parties (relevant for multinational companies); and
- regulations to calculate turnover and income for penalty assessment and guidelines as to the appropriate amount of penalty for contraventions of the Act will be published by the CCI.

** The authors would like to thank Abhishek Hazari, Sanjana L B, and Aryika Dadhwal for their contributions to the preparation of this chapter.*

Harman Singh Sandhu harman.sandhu@amsshardul.com
Manika Brar manika.brar@AMSShardul.com
Yaman Verma yaman.verma@AMSShardul.com
Nitika Dwivedi nitika.dwivedi@amsshardul.com

Shardul Amarchand Mangaldas & Co

Japan

Kaoru Hattori, **Yoshitoshi Imoto**, **Ryohei Tanaka**
Nagashima Ohno & Tsunematsu

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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

7 | 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

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

The 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

9 | 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

10 | 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

11 | 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

12 | 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

13 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

14 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

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

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

16 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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

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

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

23 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

24 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

25 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

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

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

27

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

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

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

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

29

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

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

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

The 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

36 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

37 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

38 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

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

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

40 | 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

41 | 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

42 | 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

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

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

44 | 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

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

In March 2023, the Japan Fair Trade Commission (JFTC) issued cease-and-desist orders and surcharge payment orders in connection with a market allocation cartel case in the electricity retail sector. Four of the former regional giant power companies and their subsidiaries, who used to be given regional monopoly in their respective regions before the deregulation of the electricity retail sector, were involved. Chugoku Electric Power Co was fined approximately ¥70.7 billion, which is the highest ever fine to be charged to one company. Chubu Electric Power Co and its subsidiary Chubu Electric Power Miraiz Company were fined approximately ¥27.5 billion in total, and Kyushu Electric Power Co was fined approximately ¥2.8 billion. Kansai Electric Power Co was not fined as it was the first leniency applicant. Chugoku, Chubu and Kyushu have announced that they will file a lawsuit to challenge the JFTC's orders. This case has drawn much attention not only because the amount of administrative surcharges charged was very high, but also because those companies and their executives now face serious shareholders' derivative lawsuit risks.

In February 2023, the JFTC announced that it filed an accusation with the Prosecutor General regarding alleged bid rigging concerning the Tokyo 2020 Olympics and Paralympics and their respective test matches, and Tokyo Public Prosectuor's Office then indicted six companies including the advertisement giant Dentsu, six individuals who handled tendering of bids in the respective six companies, and one individual who placed orders at Tokyo Olympic and Paralympic Organisation Committee. Major advertisement company ADK Marketing Solution is reported to be the leniency applicant. This case is important because the case moved to criminal prosecution, which is not common in Japan.

Regime reviews and modifications

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

No.

NAGASHIMA OHNO & TSUNEMATSU

Kaoru Hattori kaoru_hattori@noandt.com
Yoshitoshi Imoto yoshitoshi_imoto@noandt.com
Ryohei Tanaka ryohei_tanaka@noandt.com

Nagashima Ohno & Tsunematsu

Malaysia

Nadarashnaraj Sargunaraj, **Nurul Syahirah Azman**
Zaid Ibrahim & Co

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 12 September 2023, 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

7 | 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

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

Yes. The Competition Act applies to commercial activity transacted outside Malaysia that has an effect on competition in any market in Malaysia.

Export cartels

9 | 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

10 | 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

11 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

12 | 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 sub-sectors 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

13 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

14 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

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

The 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

16 | 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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. In February 2023, on appeal, the CAT confirmed MyCC's decision to fine the warehouse operators.

Guidelines for sanction levels

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

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

23

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

24 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

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

No.

Parallel proceedings

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

The competition law provisions in the Competition Act are not punishable as criminal offences.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

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

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

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

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

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

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

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

36 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

37 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

38 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

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

The 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

40 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

41 | 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

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

No.

International double jeopardy

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

No.

Getting the fine down

44 | 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

45 | 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

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

In June 2022, it was reported that the proposed amendments to the Competition Act 2010 were expected to be tabled in Parliament by the end of 2022. The amendments include merger control provisions. If the proposed amendments come into effect, the Malaysia Competition Commission (MyCC) will have the power to review and enforce against mergers, except those excluded under the purview of sector-specific regulators.

From April 2022 to May 2022, MyCC launched an online public consultation to invite the public and relevant stakeholders to provide their views and feedback on the proposed amendments to the Competition Act (Competition Act 2010). The amendments include provisions relating to MyCC's investigation and enforcement powers and procedures, appeal provisions, and the introduction of a merger control regime. The proposed merger control regime involves both mandatory and voluntary notification of mergers and anticipated mergers. Anticipated mergers that exceed the prescribed threshold must be notified to MyCC. Mergers or anticipated mergers that do not exceed the prescribed threshold may be notified voluntarily to MyCC either before or after the merger or anticipated merger has been concluded.

Nadarashnaraj Sargunaraj nadarashnaraj@ziclegal.com
Nurul Syahirah Azman nurul.syahirah@ziclegal.com

Mexico

Rafael Valdés Abascal, **Enrique de la Peña Fajardo**
Valdes Abascal Abogados

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 leg
al 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 for
eseen 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 illegal per se. 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.

Per the Regulatory Provisions of the LFCE, 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 merger:

- 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 merger. 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

7 | 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

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

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

9 | 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

10 | 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

11 | 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

12 | 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 Board of Commissioners an indictment 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 Board of Commissioners. Once this proceeding is concluded, COFECE's Board of Commissioners issues its final decision.

At any time, the Investigative Authority may ask the Board of Commissioners to issue a precautionary measure. The investigated party or defendant may ask the Board of Commissioners 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

13 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, the Supreme Court determined that the principle of presumption of innocence is applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by COFECE's Investigative Authority without the approval of COFECE's Board of Commissioners or any court.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

Interplay between jurisdictions

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

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 sharing of their data and the information provided under this programme. The Investigative Authority of the Federal Economic Competition Commission may ask some economic agents under the leniency programme to grant authorisation or a waiver to share information with other agencies.

CARTEL PROCEEDINGS

Decisions

16 | How is a cartel proceeding adjudicated or determined?

The Investigative Authority of the Federal Economic Competition Commission (COFECE) issues an indictment of probable responsibility describing the charges when the investigation is concluded. Afterwards, Board of Commissioners of COFECE, which consists of seven commissioners, decides by a simple majority whether cartel conduct was configured.

Burden of proof

17 | 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 indictment 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. However, it should not 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.

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

18 | 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

19 | What is the appeal process?

The parties can initiate an *amparo* trial against a decision of COFECE before a federal district judge, who will rule on violations of fundamental rights during the administrative proceeding or in the decision of the Board of Commissioners. 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

20 | 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 indictment 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.

Civil and administrative sanctions

21 | 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 who represent or collaborate with the company in committing anticompetitive practices are liable to receive fines of up to 20.7 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 18.6 million Mexican pesos.

Guidelines for sanction levels

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

According to 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

23 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 the Regulatory Provisions of the LFCE 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

24 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

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

Debarment from government procurement procedures is not explicitly covered by competition law. Notwithstanding, if cartel conduct (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

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

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

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

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

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

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

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

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

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

agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

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

36 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

37 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

38 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 indictment 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

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

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

40 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

41 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

42 | 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

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

Mexican competition law does not contemplate cases of double jeopardy and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, sanctions for non-compliance with local legislation can 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

44 | 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

45 | 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.

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.

Finally, in early September 2023 COFECE issued a decision that determined that a non-compete agreement executed with a former partner (when its exit from the company was negotiated) may be interpreted as cartel conduct.

Regime reviews and modifications

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

We do not expect that the current regime will be subject to any modification soon.

VALDES ABASCAL

Rafael Valdés Abascal rafael.valdes@vaasc.com
Enrique de la Peña Fajardo enrique.delapena@vaasc.com

Valdes Abascal Abogados

Read more from this firm on Lexology

Netherlands

Stijn de Jong, **Roos Elemans**
Stibbe

Summary

PRIVATE RIGHTS OF ACTION

COOPERATING PARTIES

DEFENDING A CASE

UPDATE AND TRENDS

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

The most relevant legislation for Dutch cartel regulation is the Competition Act, which is inspired by the EU competition rules. The Dutch cartel prohibition is laid down in article 6 of the Competition Act and resembles article 101 of the Treaty of the Functioning of the European Union (the TFEU), except for the effect on interstate trade criterion. If the effect on interstate criterion is satisfied, both the Dutch and the EU cartel prohibition 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?

The Authority for Consumers and Markets (ACM) is in charge of the public enforcement of the Competition Act. The ACM deals with both the investigation and the sanctioning of cartels. ACM decisions may be subject to internal administrative review by an independent committee of the ACM and are (subsequently) open to appeal before the Rotterdam District Court and to further appeal before the Trade and Industry Appeals Tribunal.

In addition, the Minister of Economic Affairs and Climate can issue policy rules on the general practice of the ACM and on the assessment of non-economic interests under the exception in article 6(3) of the Competition Act (which is similar to article 101(3) TFEU).

Changes

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

In July 2022, the ACM published new Guidelines on arrangements between suppliers and buyers to take account of the European Commission's revised Vertical Block Exemption Regulation and Guidelines.

On 1 January 2023, an explicit exception under the cartel prohibition for cooperation in the agricultural sector and fishing industry entered into force. In line with article 42 of the TFEU, this exception excludes certain cooperative conduct under the Common Agricultural Policy and the Common Fisheries Policy from the cartel prohibition. In this context, the ACM published Guidelines on collaborations between farmers for further guidance on the cooperation options for farmers under (1) the specific EU agricultural sustainability exemption; (2) the EU's general agricultural policy (without sustainability objectives); and (3) 'regular' competition rules.

Also on 1 January 2023, an amendment of the Dutch Civil Code on private enforcement of competition law entered into force. The amendment establishes that the provisions

implementing Directive 2014/104/EU on antitrust damages actions similarly apply to purely national competition law infringements.

In May 2023, the ACM published a new prioritisation policy rule setting out how it prioritises enforcement investigations. The new policy rule includes a broader interpretation of the consumer welfare prioritisation criterion, enabling the ACM to also include other public interests (such as sustainability goals, harm to quality and innovation or long-term or indirect harm) in its assessment.

The ACM has stated that it will align its draft Sustainability Guidelines – originally published in 2020 and amended in 2021 – with the finalised European Commission's Guidelines. It is currently assessing the leeway between the two guidelines and expects to provide more clarity in late 2023 on how to resolve any discrepancies.

Substantive law

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

Article 6 of the Competition Act resembles article 101 of the TFEU, except for the effect on interstate trade criterion. Article 6 prohibits agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition on (part of) the Dutch market. There are no specific provisions for distinct types of infringements and the prohibition covers both horizontal and vertical behaviour. Article 6(3) of the Competition Act is identical to the exception provided in article 101(3) of the TFEU. European Commission decisions, and the case law of the General Court and the European Court of Justice on European competition law, are generally followed when interpreting article 6.

Article 7 of the Competition Act contains a de minimis exemption, which also applies to hardcore cartels. Article 7(1) contains an exception for anticompetitive agreements with fewer than eight participants where the combined turnover does not exceed €5.5 million if the participants are mainly concerned with the supply of goods, and €1.1 million in all other cases. In addition, article 7(2) of the Competition Act exempts horizontal agreements between undertakings, whose combined market share does not exceed 10 per cent and provided interstate trade is not appreciably affected.

Joint ventures and strategic alliances

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

Cooperation agreements are subject to scrutiny under the cartel prohibition. The ACM published guidelines in 2019 on collaborations between competitors, which follow the principles of the European Commission's guidelines on the applicability of article 101 of the TFEU on horizontal cooperation agreements. According to the ACM's guidelines, competing undertakings may cooperate if it enables them to operate more efficiently, innovate more or compete better to the benefit of customers. Cooperation agreements

resulting in, for instance, price-fixing, market sharing, bid-rigging, boycotts or restrictions of output are almost never allowed, because they severely restrict competition.

If the cooperation qualifies as a full-function joint venture and thus constitutes a concentration, the merger regime applies. Article 10 of the Competition Act embodies an ancillary restraints exception for agreements that are directly related to and necessary for the implementation of a concentration. The undertakings concerned must assess whether these conditions are satisfied. If the concentration must be notified, the undertakings can ask the ACM if the relevant restrictions fall under the scope of article 10 of the Competition Act.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

Article 6 of the Competition Act applies to undertakings and associations of undertakings. The undertaking concept is similar to its EU counterpart. An undertaking is defined as every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Both individuals and corporations can qualify as an undertaking and various entities can also be seen as one single undertaking for the purpose of the cartel prohibition.

The Authority for Consumers and Markets (ACM) can also fine managers (including de facto managers) of undertakings for infringing the cartel prohibition. It is not required that the ACM fines the undertaking itself, but it must establish that the undertaking infringed the cartel prohibition.

Extraterritoriality

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

Article 6 of the Competition Act applies to restrictive behaviour that affects competition on (part of) the Dutch market. It is not required that the restrictive agreement is concluded in the Netherlands or that the parties are active on the Dutch market.

Export cartels

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

There is no such specific exemption or defence. As long as competition on (part of) the Dutch market is affected, the Competition Act applies.

Industry-specific provisions

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

There are no industry-specific infringements, but two national (non-industry-specific) block exemptions apply to:

- agreements offering temporary protection from competition in new shopping centres; and
- certain cooperation agreements in the retail sector.

The European block exemptions also apply under national cartel law.

In addition, article 11a of the Competition Act contains an explicit exception under the cartel prohibition for cooperation in the agricultural sector and fishing industry (applicable as of 1 January 2023).

Government-approved conduct

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

Article 6 of the Competition Act only relates to economic activity. Tasks that are part of a governmental prerogative and activities of a social nature are generally not considered an economic activity. If the conduct does qualify as an economic activity, article 11 of the Competition Act provides for an exemption for agreements involving at least one undertaking entrusted with the operation of services of a general economic interest, which were delegated to it by law or an administrative agency. The exemption only covers restrictive practices necessary for the operation of the assigned service of general economic interest.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

The Authority for Consumers and Markets (ACM) can launch an investigation after a third-party complaint, a leniency application or on its own initiative. The ACM will start gathering information and, if necessary, it will send out requests for information and carry out on-the-spot inspections. Whereas the European Commission generally selects the relevant data during the inspection, the ACM will make a further selection of the relevant data at its own premises.

When conducting investigations, the ACM follows its Procedure for the inspection of digital data as well as its Procedure regarding the legal professional privilege of lawyers. If, on

the basis of the collected information, the ACM finds there is a reasonable suspicion of an infringement, it will issue a report, comparable to a statement of objections under EU competition law. This report is sent to the ACM's legal department. The report's addressees are given the opportunity to access the file and to comment on the report in writing and possibly through an oral hearing. If the ACM conducts a dawn raid, there may also be an opportunity to access all documents in the ACM's investigation dataset through a data room procedure. The ACM's legal department will include the addressees' comments in its recommendation to the ACM's board on whether to impose a fine and the suggested fine level. The ACM's board will subsequently issue a decision.

The ACM has 13 weeks from the issuing of the report to decide whether or not to impose a fine. This period can be extended once by another 13 weeks. In addition, the ACM can suspend the period by 30 days. In August 2022, the Rotterdam District Court recently ruled that the preparation of a supplementary report does not lead to a suspension of the decision period until the ACM issued the supplementary report. Failure to comply with these time limits does not preclude the ACM from imposing a fine, as long as the ACM is not time-barred from doing so.

Investigative powers of the authorities

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

The ACM's investigative powers are similar to those of the European Commission. Among other things, the ACM can request information, conduct interviews, copy data and documents, seal objects and premises, and enter premises. In exercising its powers, the ACM must adhere to the principle of proportionality. Due to the implementation of Directive (EU) 2019/1 (the ECN+ Directive), the ACM will require prior judicial authorisation not only to enter private homes but also to enter private premises, land or means of transport.

The ACM is not authorised to tap phones when investigating suspected antitrust violations. However, the European Court of Human Rights recently ruled that the ACM may lawfully use evidence collected from telephone taps installed by other agencies during criminal investigations for its own antitrust probes.

Every legal and natural person must cooperate with the ACM. A breach of this duty can lead to fines of up to €900,000 or 1 per cent of the total worldwide turnover, whichever is higher. The ACM, for instance, imposed a record fine of €1.84 million on an undertaking because employees deleted messages and exited WhatsApp groups during a dawn raid. The fine underlines the importance of adequate training for employees on the ACM's investigatory powers. Employees should also know that they are not required to answer questions that could incriminate their employer. This right to remain silent exists as soon as there is a reasonable expectation that an administrative fine could be imposed. In addition, it is important to note that, in contrast with EU law, legal professional privilege under Dutch cartel law extends to Dutch in-house lawyers.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Authority for Consumers and Markets (ACM) cooperates with other authorities in various international networks. The ACM has published an overview on international cooperation on its website, which is available in English. Within the European Union, the ACM cooperates with the European Commission and the other national competition authorities in the European Competition Network. The legal basis for this cooperation can be found in Regulation (EC) No. 1/2003 and in national competition law, specifically in the amendments to the Competition Act resulting from the implementation of Directive (EU) 2019/1 (the ECN+ Directive).

Interplay between jurisdictions

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

There is close cooperation between the ACM and other competition authorities. For example, the ACM has cooperated with the German competition authority in investigating the towage sector. The ACM and its German counterpart coordinated the investigation and exchanged information. The ACM also cooperated with the French competition authority in an apple sauce cartel in which a Dutch company was granted immunity. The ACM assisted the French authorities in dawn raids in the Netherlands, and assisted the Belgian competition authority in dawn raids regarding the tobacco sector in Belgium. The ACM can supply information to foreign competition authorities, but the receiving authorities must safeguard the confidentiality of the information (where relevant) and can only use it for competition law purposes.

Furthermore, as a result of the implementation of the ECN+ Directive, national competition authorities can investigate undertakings on behalf of other competition authorities and can be requested to enforce fining decisions or periodic penalty payments issued by other competition authorities.

CARTEL PROCEEDINGS

Decisions

16 How is a cartel proceeding adjudicated or determined?

The Authority for Consumers and Markets (ACM) oversees the investigation and public adjudication of cartels. Within the ACM, there is a strict separation between the department conducting the investigation and issuing the report, and the department advising the ACM board on the possible fine. The ACM adjudicates cases by decisions, which are governed by national administrative law.

Burden of proof

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

The ACM must prove that an infringement took place, by precise and consistent evidence and beyond reasonable doubt. However, if an undertaking invokes the exception under article 6(3) of the Competition Act, the undertaking must prove that the exception applies. The same is true if an undertaking contends that there is no appreciable effect on competition.

High standards of proof apply when the ACM seeks to establish an infringement. In 2019, for instance, the Rotterdam District Court quashed an ACM decision fining an undertaking for participating in a price-fixing cartel for forklift truck batteries. The ACM failed to prove that the undertaking participated in a single continuous infringement as there was insufficient evidence of the undertaking's intention to contribute to the common objectives of the cartel.

Circumstantial evidence

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

As stipulated under EU law and confirmed by the District Court of Rotterdam in July 2023 regarding an alleged cartel in the tobacco sector, the principle of effectiveness requires that an infringement may be proven through direct evidence and indicia, provided that they are objective and consistent. In the absence of any coherent statement, circumstantial evidence can support an infringement decision. In addition, as under EU law, in the absence of clear indications of an actual agreement there may still be sufficient evidence to prove a concerted practice.

Appeal process

19 | What is the appeal process?

Administrative law governs ACM decisions. As is customary under Dutch administrative law, ACM decisions are subject to a three-stage appeal procedure as follows.

- An addressee of the ACM's decision can file for administrative review by the ACM within six weeks of the decision being sent. The decision will be re-examined by a team within the ACM that was not involved in the initial decision. During the review, it is possible to take part in a hearing. The administrative review is concluded with a decision on objections. The addressee can request the ACM to skip the administrative review and to allow direct appeal before the Rotterdam District Court. If another addressee files an objection and does not request direct appeal, the ACM will reject the request.
- The decision on objections can be appealed before the administrative law chamber of the Rotterdam District Court within six weeks of the decision being issued.

- Further appeal against the Rotterdam District's Court's ruling can be made to the Trade and Industry Appeals Tribunal.

Both administrative courts will reassess the earlier decision in full and may consider new facts and circumstances.

SANCTIONS

Criminal sanctions

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

A breach of the Competition Act does not constitute a criminal offence under Dutch law.

Civil and administrative sanctions

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

The Authority for Consumers and Markets (ACM) can impose administrative fines for infringements of the cartel prohibition. The undertaking concept plays an important role in the attribution of the fine. Usually, the ACM jointly and severally fines both the entity that committed the infringement and its parent company. As under EU law, this requires that the parent company exercised decisive influence over its subsidiary.

In 2019, the Trade and Industry Appeals Tribunal upheld an ACM decision fining a private equity company for an infringement committed by its portfolio company. The judgment provides a useful overview of liability attribution. Among others, the Trade and Industry Appeals Tribunal determined that it is not possible to sanction parent companies that are merely investors and not concerned with the management of its subsidiaries. In addition, it confirmed that attributing liability to parent companies is not contrary to the presumption of innocence or the double jeopardy principle.

The fine for undertakings is subject to a maximum amount according to article 57 of the Competition Act. In principle, the fine can reach up to €900,000 or 10 per cent of the undertaking's annual turnover, whichever is higher. Where a violation lasted for more than a year, these amounts will be multiplied by the number of years that the infringement continued to exist, with a maximum of four years (which could result in a fine of up to 40 per cent of the annual turnover). In addition, the maximum fine will be increased by 100 per cent if the undertaking previously infringed article 6 of the Competition Act or a similar provision in a five-year period before the statement of objections (SO) was issued. In the worst case, the maximum fine can amount to either €7.2 million or 80 per cent of the annual turnover, whichever is higher.

The ACM can also fine (de facto) managers of undertakings for infringing the cartel prohibition. It is not required that the ACM fines the undertaking itself, but it must establish that the undertaking infringed the cartel prohibition. Depending on the company's turnover, this fine can amount to up to €900,000, which can be doubled in case of recidivism. The

ACM further takes into account the gravity of the violation, the role of the (de facto) manager and the manager's financial capacity.

In addition to administrative fines, the ACM may also sanction infringements by imposing orders under threat of periodic penalty payments. This sanction can be imposed in addition to the fine, or separately. The ACM can also impose a preventive order under threat of periodic penalty payments if there is an appreciable risk of an infringement. The ACM makes limited use of the possibility to impose orders under threat of periodic penalty payments. In this regard, it is important to note that the ACM can also accept commitments, which does not require an infringement to be established. Since the implementation of Directive (EU) 2019/1 (the ECN+ Directive), the ACM is also able to impose interim measures if, upon first examination, there is suspicion of an infringement and risk of serious and irreparable harm to competition.

The Netherlands is considered an attractive jurisdiction for claimants and claim organisations, as it is known for having a judiciary that over the years has built up an extensive track record in competition litigation cases. Under Dutch civil law, there are no sanctions for cartels in the true sense of the word. Infringements of the cartel prohibition can lead to damages claims, but only to compensate for the loss suffered. In practice, antitrust damages litigation is prevalent and is increasingly initiated by claim vehicles (in combination with ligation funders) that actively acquire and pursue antitrust compensation claims from consumers and businesses in return for a percentage of the claim. In addition, agreements in breach of the cartel prohibition are void. The Dutch Supreme Court has ruled that it is not possible to convert anticompetitive provisions to provisions that are compatible with the cartel prohibition.

Guidelines for sanction levels

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

The ACM Fining Guidelines 2014 (the Guidelines) lay down the ACM's fining policy. In accordance with the Guidelines, the ACM will first determine a basic fine. This basic fine varies between zero per cent and 50 per cent of the turnover that is related to the infringement. The ACM will adapt this percentage to the characteristics of the cartel. Among other things, it will consider the nature, gravity and duration of the infringement and the potential effect on competition. After the determination of the basic fine, the ACM can raise the fine if there are additional aggravating circumstances, for example, if an undertaking had a leading role in the cartel, previously infringed the prohibition or hindered the ACM's investigation. Conversely, the ACM can also lower the fine in the case of mitigating circumstances, for example, if an undertaking cooperated beyond its statutory obligation or provided full compensation to the parties injured by the violation of his or her own accord. Subsequently, the ACM must check whether the resulting fine does not exceed the maximum fine amount as stated in article 57 of the Competition Act.

An undertaking can submit a hardship request for mitigation of the fine by filling out a questionnaire for 'inability to pay'. It is up to the undertaking to substantiate its request with recent data that provides a reliable and complete insight into its financial position.

Compliance programmes

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

The ACM encourages the use of compliance programmes, but it will not consider this as a specific reason to reduce the fine. The ACM does stress that having a well thought-out compliance programme can limit the scope of an infringement and thus lower the amount of turnover that is relevant in determining the basic fine.

In 2021, the ACM published a Paper on Compliance Culture in four companies from different regulated sectors. The paper aims to explain how undertakings can ensure that they comply with consumer law, sector specific regulation and competition law. It discusses both the structure of compliance programmes and how these programmes are dealt with in practice, and concludes with some practical recommendations for a successful compliance programme.

Director disqualification

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

Dutch competition law does not provide for an order to disqualify directors of undertakings that infringed the cartel prohibition.

Debarment

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

Article 2.87 of the Procurement Act enables the exclusion of undertakings that violated the cartel prohibition from a procurement procedure. This is a discretionary power that lies with the contracting authority. Article 2.87(d) explicitly allows debarment if there is a final and binding decision of the ACM or the European Commission establishing that the undertaking concluded an agreement that aimed to distort competition. In addition, participating in anticompetitive agreements can also qualify as serious professional misconduct according to article 2.87(c) of the Procurement Act.

If the ACM or the European Commission establish an infringement, the undertaking can be debarred any time within three years of the decision becoming final and binding. If not, this period begins to run from the moment the anticompetitive behaviour took place.

Parallel proceedings

26

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

Violations of the cartel prohibition in the Netherlands are only sanctioned with administrative penalties. A breach of the Competition Act does not constitute a criminal offence under Dutch law. Potential civil damages are decided by the national courts.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

Damage caused by anticompetitive behaviour can be recovered through tort law, under article 6:162 of the Dutch Civil Code (DCC), and actions for unjust enrichment, governed by article 6:212 of the DCC. These actions are only compensatory. It is not possible to claim for punitive damages under Dutch civil law. A binding and final decision of the Authority for Consumers and Markets (ACM) or the European Commission establishing that an infringement took place constitutes irrefutable evidence of the infringement in civil proceedings. If the ACM has not (yet) issued a decision on the matter, the burden of proof lies with the party that claims that the cartel prohibition is infringed. For a judgment to be given, the claimant must support its allegation with relevant (economic) facts and circumstances to enable an adequate and well-founded party debate.

Following the implementation of Directive 2014/104/EU on antitrust damages actions, Dutch tort law contains a rebuttable presumption that a violation of the cartel prohibition caused harm. In addition, it explicitly allows the pass-on defence and provides a lighter burden of proof for indirect purchasers. The provisions implementing the Directive explicitly refer to infringements of article 101 of the Treaty of the Functioning of the European Union, but also apply if the national cartel prohibition was violated in parallel. As of 1 January 2023, the implementing provisions similarly apply to purely national competition law infringements.

In recent years, there have been several far-reaching judgments of the European Court of Justice (ECJ) on the scope of liability in private damages actions for infringements of competition law (including *Kone* (C-557/12), *Skanska* (C-724/17) and *Sumal* (C-882/19). Although the exact implications of these judgments on civil damages claims remain undecided, it appears that the right to compensation in follow-on cases can be more extensive than in regular private damages actions.

Class actions

28

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

Class actions can be organised in different ways in the Netherlands. Under the Act on Redress of Mass Damages in a Collective Action, enacted in 2019, claim organisations can initiate collective actions to claim monetary compensation on behalf of an entire class of persons with similar interests. Before implementation of this new regime, claim organisations initiating a collective action could only request a declaratory judgment. Unless the representative entity could reach a collective settlement under the Act on the Collective Settlement of Mass Damages, claimants were required to go to court individually to obtain compensation. The new regime applies to events that happened on or after 15 November 2016.

In December 2020, the Amsterdam District Court declared a foundation inadmissible in a collective action under the old regime. The court ruled that that it had not been shown that effective or efficient legal protection could be achieved through collective action. In short, the declaratory judgments, if granted, would be too unspecific to be of any real help to the individual members of the class. The judgment provides useful guidance in determining whether a group of claims can be bundled in a collective action, which will remain a key issue under the new regime.

As an alternative to collective action, it is possible to bundle claims by assigning them to a claim vehicle. Claim vehicles are involved in follow-on proceedings in the air cargo, truck and lift cartels, for example.

COOPERATING PARTIES

Immunity

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

As part of the implementation of Directive (EU) 2019/1 (the ECN+ Directive), a new Decision on leniency (Leniency decision) was issued, applicable to leniency applications submitted from February 2021. The Leniency decision aligned the wording of the conditions for obtaining leniency with the wording used in the Directive. Moreover, the Authority for Consumers and Markets (ACM) can no longer deny leniency to ex-employees when the conditions for leniency are satisfied.

The leniency programme is similar to the programme of the European Commission. Both undertakings and (de facto) managers can file a leniency application with the ACM for immunity or a significant reduction of the fine for a violation of the cartel prohibition.

A successful request to obtain full immunity requires that:

- the leniency applicant:

- has not destroyed, falsified or concealed relevant information about the cartel during the contemplation of making a leniency application and did not share the

contemplated application or its content with other parties, other than to any other competition authorities;

- has ended its involvement in the alleged secret cartel immediately following its leniency application, at the latest, except for what would, in the ACM's view, be reasonably necessary to preserve the integrity of its investigation;
- cooperates genuinely, fully, on a continuous basis and expeditiously with the ACM and refrains from any conduct that might impede the investigation or proceedings until the decision to impose an administrative fine has become final or until the ACM has terminated its enforcement proceedings;

- the leniency applicant has disclosed its participation in a secret cartel;
- the leniency applicant did not take steps to coerce other undertakings to join a secret cartel or to remain in it; and
- the leniency applicant is first to submit evidence, which:

1. enables the ACM to carry out a targeted inspection in connection with the secret cartel, provided that it did not yet have sufficient evidence in its possession to carry out such an inspection; or
2. in the ACM's view, is sufficient for it to find an infringement covered by the leniency programme, provided that the ACM did not yet have sufficient evidence in its possession to find such an infringement and that no other undertaking has previously qualified for immunity from fines under (1) in relation to that secret cartel.

The ACM will inform the leniency applicant of whether it will grant conditional immunity, at the latest, by the time it issues its statement of objections. If a leniency applicant does not fulfil its obligations under leniency programme, the ACM may revoke the leniency grant. In the event that the ACM rejects a request for immunity, the applicant may ask the ACM to treat its request as an application to reduce the fine. The first party to request such a reduction is eligible for a reduction between 30 per cent and 50 per cent.

Leniency does not prevent liability under civil law. However, as part of the implementation of Directive 2014/104/EU, a leniency recipient enjoys a limited form of joint and several liability. An immunity recipient is only liable for the claims of its own direct and indirect customers, as long as this does not mean that the customers of other cartelists will not receive full compensation. This does not apply to other categories of damage, such as umbrella pricing. In addition, the immunity recipient has limited contributory obligations towards the other cartelists.

Subsequent cooperating parties

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

Subsequent parties may still benefit from a significant reduction of the fine. However, the parties must provide information with significant added value and meet all the conditions that apply for obtaining immunity, except for being the first to share information and the requirement not to have taken any steps to coerce other undertakings to join a secret cartel or to remain in it.

Depending on the timing, there are three categories of fine reduction:

- the first party to follow the initial leniency applicant is eligible for a reduction of between 30 per cent and 50 per cent;
- the second party to request leniency can obtain a reduction of between 20 per cent and 30 per cent; and
- any subsequent party can receive a maximum reduction of 20 per cent.

The ACM will inform the leniency applicant of whether or not it will grant conditional reduction of the fine by the time it issues its statement of objections, at the latest. If a leniency applicant does not fulfil its obligations under the leniency programme, the ACM may revoke the grant of leniency.

In addition, if the leniency applicant submits compelling evidence that the ACM uses to prove additional facts that lead to an increase in fines (compared to the fines that otherwise would have been imposed), the ACM will not consider these additional facts when determining the fine to be imposed on the leniency applicant.

Going in second

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

Subsequent parties may still benefit from a significant reduction of the fine. However, the parties must provide information with significant added value or compelling evidence that the ACM uses to prove additional facts that lead to an increase in fines. There is no leniency or amnesty plus programme available.

Approaching the authorities

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

The parties must approach the ACM before it starts an investigation or, at the latest, before it issues a statement of objections. Markers are available to secure a place in the line. The ACM may grant a marker if the applicant shares basic information on the cartel (such as the duration, the participating parties and the associated behaviour) that offers a specific basis for a reasonable suspicion of involvement in a secret cartel. In the marker, the ACM sets a deadline to complete the leniency application. The supplemented leniency application is considered to have been submitted at the time when the marker was granted.

Cooperation

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

The same cooperation obligations apply to the initial applicants for leniency and the parties that come forward afterwards. The applicant must fully cooperate with the ACM, which means that the applicant:

- remains at the ACM's disposal to answer any request that may contribute to the establishment of facts;
- if applicable, makes employees and, as far as reasonably possible, former employees available for interviews with the ACM;
- does not destroy, falsify or conceal relevant information or evidence;
- does not disclose the fact of, or any of the content of, its leniency application before the ACM has issued a statement of objections, unless otherwise agreed; and
- submits a leniency application in accordance with requirements set out in the leniency programme.

Confidentiality

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

The ACM will not disclose the identity of the leniency applicant until the issuance of the statement of objections. The investigated undertakings will then have access to the file, including a non-confidential copy of the leniency application. In addition, the ACM will not use any information shared in an exploratory consultation, or any information shared for a leniency application that is turned down, unless the undertaking agrees to it or if the ACM obtained the same information in a different way. In general, the ACM will not publicise any confidential information, such as business secrets.

The ACM will only share a leniency application with competition authorities of other EU member states if the applicants have given permission to do so or if the other EU competition authority has received an application from the same applicant for the same cartel (provided that the applicant can no longer withdraw the provided information).

Settlements

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

The ACM can decide to simplify the procedure, which is similar to the European Commission's settlement programme. This procedure is available to both cartel as well as non-cartel cases. The undertaking or individual must acknowledge and terminate its involvement in the infringement, in exchange for a 10 per cent reduction of the fine and accelerated completion of the procedure. The ACM will only proceed to a simplified procedure if it expects that it will result in sufficient efficiency gains. The ACM's guidelines for a simplified resolution describe the procedure in detail. If several companies are involved in an investigation, it is usually only possible to simplify the procedure if all undertakings agree.

In addition, undertakings could offer commitments to the ACM, promising to change their behaviour. If the ACM accepts the commitments, it can no longer impose an administrative fine or an order under threat of periodic penalty payments.

Corporate defendant and employees

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

In general, a violation of the cartel prohibition does not lead to the sanctioning of employees. However, it is possible to fine (de facto) managers who can be linked to the infringement. On request, these individuals can be considered as co-applicants in a leniency procedure. Co-applicants must adhere to the same conditions as a company that applies for leniency.

Dealing with the enforcement agency

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

An undertaking that considers applying for leniency can contact the ACM's leniency office for an exploratory consultation. The leniency programme stipulates that undertakings can only inquire whether full immunity is still available through a lawyer. The leniency application can be submitted to the leniency office by email, fax, regular mail, telephone or in person.

DEFENDING A CASE

Disclosure

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

The Authority for Consumers and Markets (ACM) will inform the investigated undertakings of the scope of the infringement and the alleged conduct in the statement of objections. Thereafter, the undertakings can access the (non-confidential) documents in the ACM's file.

In July 2023, the Rotterdam District Court confirmed the 2020 ruling by the preliminary relief judge of the Rotterdam District Court that, in view of the rights of defence, the investigated undertaking should also have access to datasets of the other undertakings investigated in respect of the alleged cartel. In that particular case, the court ruled that the ACM could grant this access by setting up a physical data room at the premises of the ACM. In 2021, the ACM announced that such a data room procedure will be standard practice in cases where the ACM intends to impose a fine. In this announcement, the ACM also gave a short description of the set-up of this procedure.

In the July 2023 ruling, the District Court of Rotterdam agreed with the ACM that the data room procedure was the most effective method of granting access to all selected documents (with confidential data being blacklined). The court also confirmed that the ACM's Procedure for the inspection of digital data and its Procedure regarding the legal professional privilege of lawyers provided the undertakings at hand with sufficient safeguards.

Representing employees

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

A lawyer may represent multiple parties under investigation, as long as there is no conflict of interest. This follows from the Act on Lawyers and the Rules of Conduct of Members of the Bar. A lawyer must withdraw from a case if a conflict of interest arises, unless prior consent was given by the represented parties, who must be sufficiently equal. If a lawyer needs to withdraw from a case, he or she can no longer represent other former counterparties in the same conflict.

Irrespective of the legal obligations to which a lawyer is bound, it also advisable for employees to seek independent counsel if a conflict of interest is likely to arise.

Multiple corporate defendants

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

A lawyer may represent multiple parties under investigation, as long as there is no conflict of interest. This follows from the Act on Lawyers and the Rules of Conduct of Members of the Bar. A lawyer must withdraw from a case if a conflict of interest arises, unless prior consent was given by the represented parties, who must be sufficiently equal. If a lawyer needs to withdraw from a case, he or she can no longer represent other former counterparties in the same conflict.

Payment of penalties and legal costs

41

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

It is disputed whether undertakings can indemnify their employees for fines imposed by the ACM. This arrangement could be considered contrary to good morals or public policy, and could be declared null and void as it could undermine the deterrent effect that fines should have. A similar discussion exists regarding the insurance of fines. In a past case, the ACM raised the basic fine to 5 per cent, because the undertaking declared that it would pay the fines imposed on managers.

Taxes

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

Administrative fines imposed by the ACM are not deductible under Dutch tax law. In general, private damages payments are deductible if there is a sufficient link with the activities of an undertaking where a boundary is drawn for activities that are carried out in the capacity of a private person. There is no case law as of yet on the tax deductibility of private damages for violations of the cartel prohibition specifically.

International double jeopardy

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

If anticompetitive behaviour is already sanctioned in other jurisdictions, the ACM can still impose a fine. The ACM may choose to limit itself to the effects on the Dutch market and only take into account the turnover in the Netherlands in setting the fine. In addition, cross-border cartels will often trigger the parallel application of article 101 of the Treaty of the Functioning of the European Union.

Regarding private damages, it is important to observe international private law. If a competent foreign court was seized first concerning the same cause of action and the same parties, the Dutch court must decline jurisdiction in favour of the first-seized court under the Brussels I-bis regulation. If the national regime applies, the judgment must be capable of recognition and, where applicable, enforceable in the Netherlands. In addition, Dutch tort law does not allow punitive damages actions, only compensatory damages actions. Damages actions aim to provide the claimant full compensation, but it does not go beyond that. The courts must consider previously awarded claims or settlements in other jurisdictions when deciding on whether a claimant is entitled to compensation. Overlapping liability should, therefore, not result in overcompensation.

Getting the fine down

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

Apart from the leniency procedure, the attitude of the undertaking under investigation may justify a reduction of the basic fine. The ACM Fining Guidelines 2014 explicitly state two factors that are relevant in this regard. First, an undertaking whose cooperation goes beyond what is legally required may be eligible for a reduction of the fine. Second, the ACM takes into account whether an undertaking deliberately compensates for the damage suffered. The ACM may consider other circumstances in its assessment. In addition, undertakings could discuss with the ACM the possibility of a simplified procedure. If the ACM deems it appropriate, this will lead to a 10 per cent reduction of the fine.

UPDATE AND TRENDS

Recent cases

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

Vertical restraints

Resale price maintenance is still high on the Authority for Consumers and Markets' (ACM) priority list. In September 2023, the ACM imposed a fine of nearly €8 million on LG Electronics for alleged vertical price-fixing of online prices for televisions with seven large retailers. The fine comes two years after the first-ever fine for this type of violation: in September 2021, the ACM imposed a fine of nearly €40 million on Samsung Electronics for vertical price coordination. In both cases, the ACM found that the television manufacturers used online price monitoring systems to keep an eye on retail prices. The suppliers would subsequently contact retailers who deviated too much from these prices. In addition, they would follow up on complaints of diverging prices from competitor retailers. It is noteworthy that in both cases, the ACM considered the absence of threats or incentives in the price persuasions as a mitigating factor when determining the level of the fines.

These vertical restraints fines may not be the last, given the campaign the ACM launched in October 2022 to raise awareness among retailers that they are free to set their own prices. The ACM has warned various companies to refrain from resale price maintenance. Warning letters were, for instance, sent to suppliers active in animal feed, hobby supplies, toys and special shoes in May 2022, to suppliers of smart sports devices, food supplements and portable television receivers in March 2023 and to suppliers of baby and children's products in July 2023.

Sustainability

In addition, the ACM's push for companies to come forward for an antitrust blessing of their sustainability solutions has paid off. The ACM recently applied its draft Sustainability Guidelines to various sustainability arrangements between companies:

- In February 2022, the ACM used the draft guidelines for its assessment of two sustainability collaborations in the energy sector. The joint purchasing of sustainable

energy from a single wind farm by members of VEMW, an association for business energy and water users, was considered to raise no competition concerns: sufficient opportunities remained for companies and wind farms to buy and sell sustainable energy elsewhere. Furthermore, an initiative by regional grid operators to use a fixed purchase price per tonne of CO2 in their calculation models to reduce CO2 emissions was found to fall under the national equivalent of the individual exemption of article 101(3) of the Treaty of the Functioning of the European Union. According to the ACM, the sustainability benefits emanating from the initiative outweigh the possible costs for users. In fact, all energy users will benefit from the initiative if CO2 emissions are reduced.

- In its June 2022 informal opinion, the ACM considered the collaboration between Shell and Total in the field of CO2 storage to potentially fall under the competition rules due to the joint setting of prices, capacity and quality. However, this potential restriction of competition was presumed to be justifiable and therefore allowed as a result of the (sustainability) efficiencies, generated for customers of both companies and for society as a whole, for instance through reduced CO2 emissions.
- In July 2022, the ACM endorsed the agreements between soft drink suppliers to discontinue plastic handles on their packaging. Coca-Cola approached the ACM for an opinion on whether the arrangements negatively affect competition and harm consumers. Relevant aspects in the ACM's assessment were that the handles play no role in the competitive process and that each participant remains free to decide for itself when and how to discontinue the plastic handles of the multipacks.
- In early September 2022, the ACM provided an informal opinion on sustainability agreements between garden centres to exclude suppliers that use illegal pesticides. Growers who are currently using illegal pesticides have an advantage because their means of production are cheaper and the growing requires less effort. This constitutes illicit competition since the advantage is brought about through illegal means. The ACM concluded that the agreements provided a necessary and proportional elimination of illicit competition. It did require that the arrangements excluding these suppliers are to be open and transparent, and that due process is in place and followed before such exclusions are applied.
- In June 2023, the ACM considered that there was currently no need for a collective fixed surcharge for plastic packaging among supermarkets. As of 1 July 2023, supermarkets and other retailers are banned from giving their customers disposable plastic cups or food containers for free due to new rules regarding single use plastics. The Dutch Food Retail Association (CBL) had asked the ACM whether supermarkets could decide collectively on fixed surcharges to avoid them from charging a too low a fee for consumers to be stimulated to opt for a sustainable alternative. The ACM has asked CBL to adopt a wait-and-see approach. Even though the ACM agrees that there may be risk of the measure's sustainability goal becoming jeopardised if each business is able to set its own fee, it is not yet clear what the reaction of businesses will actually be when they can set their own fees.

Regime reviews and modifications

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 anticipation of the European Commission's revised Guidelines for the assessment of horizontal cooperation agreements, the ACM issued draft Sustainability Guidelines – originally published in 2020 and amended in 2021 – to promote sustainability collaborations between companies. The European Commission's Guidelines were published in July 2023. The ACM has stated that it will align its draft Sustainability Guidelines with the finalised European Commission's Guidelines. Finalised Sustainability Guidelines are likely to be published by the end of 2023.

Stijn de Jong stijn.dejong@stibbe.com
Roos Elemans roos.elemans@stibbe.com

Stibbe

Portugal

Mário Marques Mendes, **Pedro Vilarinho Pires**
Gomez-Acebo & Pombo Abogados

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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 further 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; and the AdC's decisions in recent hub-and-spoke cases (eg, Case No.11/2017, Case No. 3/2017 and Case No. 4/2017).

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

7 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

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

The Competition Act 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

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

No.

Industry-specific provisions

10 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

11 | 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

12 | 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 impose on the concerned undertaking a deadline of at least 30 working days to: (1) 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 (2) 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 an 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

13 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

14 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

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

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, also participated in the joint statement by the European Competition Network on the application of competition law in the context of the war in Ukraine.

According to the AdC Achievements 2022 report, the AdC maintains good relations – through bilateral, multilateral or other forms of cooperation – with other authorities, such as the Norwegian, Spanish and Mozambican competition authorities, the latter of which signed a Cooperation Agreement with the AdC.

The AdC also attended the annual meeting of the Portuguese-speaking competition network.

Furthermore, the AdC 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.

The AdC is a member of the European Competition Authorities Association and cooperates with the United Nations Conference on Trade and Development.

CARTEL PROCEEDINGS

Decisions

16 | 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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

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

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

23 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

24 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. 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

25 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

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

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

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

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

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

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; Ius Omnibus v Sony*). 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

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

There 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

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

An 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

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

The 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

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

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

36 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

37 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

38 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

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

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

40 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

41

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

42 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

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

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

44 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

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

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 €5.67 million.

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.

October 2022

In October 2022, the AdC applied its second sanction against an undertaking in the teleradiology cartel. The applicable fine was €5.04 million.

November 2022

In November 2022, the AdC issued a statement of objections against three other undertakings in the teleradiology cartel.

The AdC also issued a statement of objections against three undertakings for price fixing and market sharing in public procurement procedures launched by the domestic electricity infrastructure manager for the supply of cables for electricity transmission.

December 2022

In December 2022, the AdC issued a statement of objections against a business association and seven private laboratory groups for their involvement in a cartel for the provision of clinical analysis and covid-19 tests.

The AdC also sanctioned in the amount of €1.26 million a supplier of food supplements and healthy food products for fixing and imposing retail prices on its distributor.

February 2023

In February 2023, the AdC concluded its investigation, using the settlement procedure, of the three undertakings involved in the cartel for the supply of cables for electricity transmission, the undertakings having admitted their participation. The total applicable fine was in the amount of €2.06 million.

April 2023

In April 2023, the AdC imposed fines totalling €16.9. million against three supermarket chains and their joint supplier of beauty, cosmetics, and personal care products for having participated in a consumer price-fixing scheme in respect of the supplier's products.

May 2023

In May 2023, the AdC issued a statement of objections against a health food supplier for preventing its distributors from freely setting retail prices.

Regime reviews and modifications

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

As a result of the legal changes introduced by Law no. 17/2022, which transposed into national law Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, the AdC must approve, within two years of the entry into force of such law, the necessary regulations to ensure the implementation of new guidelines on infringement procedures, including access to files and the protection of confidentiality in sanctioning proceedings and supervisory procedures. A public consultation on the draft guidelines was organised by the AdC.

G A _ P
Gómez-Acebo & Pombo

Mário Marques Mendes marquesmendes@ga-p.com
Pedro Vilarinho Pires pvpires@ga-p.com

Gomez-Acebo & Pombo Abogados

Singapore

Lim Chong Kin, **Corinne Chew**
Drew & Napier LLC

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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;
- bid rigging in tenders for maintenance services for swimming pools, spas, fountains and water features, 14 December 2020; and
- price-fixing of warehousing services at Keppel Distripark, 17 November 2022.

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 20 July 2023, the CCCS sought public feedback on a proposed Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives (Environmental Sustainability Collaboration GN). This latest Environmental Sustainability Collaboration GN seeks to provide guidance on the following:

- clarification on what are considered environmental sustainability objectives;
- examples of collaborations pursuing environmental sustainability objectives that would typically not be harmful to competition;
- conditions under which competition concerns are less likely to arise from such collaborations;
- how the CCCS would assess the economic benefits of collaborations and whether such collaborations may nevertheless qualify for the Net Economic Benefit exclusion even if there are competition concerns; and

- a proposed streamlined notification process in relation to assessments of collaborations pursuing environmental sustainability objectives, for businesses who notify their agreements to the CCCS.

The Environmental Sustainability Collaboration GN should be read with CCCS's Business Collaboration Guidance Note issued on 28 December 2021.

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

7 | 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

8 |

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

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

9 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

10 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

11 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

12 | 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

13 | 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

14 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. More recently, Singapore was also involved in the 54th ASEAN Economic Ministers Meeting in September 2022, where negotiations for the ASEAN Framework Agreement on Competition (AFAC) were launched. The AFAC serves as a formal cooperation agreement that would facilitate cross-border cooperation and coordination on competition policy and law matters among the ASEAN member states.

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

.

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

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

16 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

17 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

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

Yes.

Appeal process

19 | 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 20 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

20 | 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

21 | 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 amended in late 2021 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

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

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

23 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

24 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

25 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, 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

26

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

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

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

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

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

The 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

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

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

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

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

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

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

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

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

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

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

The 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

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

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 2020, 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

36 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

37 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

38 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

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

Cartel involvement does not give rise to liability for individuals or employees. Accordingly, representation is at the corporation level.

Multiple corporate defendants

40 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

41 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

42 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

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

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

44 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

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

On 17 November 2022, the Competition and Consumer Commission of Singapore (CCCS) issued an infringement decision against warehouse operators for fixing the price of warehousing services. The parties were found to have engaged in price fixing conduct by imposing in a coordinated manner an additional charge for warehousing services. A combined total of $2,799,138 in financial penalties was imposed on the infringing parties.

Separately, on 9 December 2022, the CCCS launched a public consultation on the proposed expansion of a joint venture between Singapore Airlines Limited and Deutsche Lufthansa AG. The proposed joint venture arrangement is currently pending the CCCS's consideration.

Regime reviews and modifications

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

Currently, there are no specific proposed changes to the legal framework relating to cartels or the immunity and leniency programmes.

DREW & NAPIER

Lim Chong Kin chongkin.lim@drewnapier.com
Corinne Chew corinne.chew@drewnapier.com

Drew & Napier LLC

South Korea

John H Choi, **Jooyoung Park**, **Changhun Lee**, **Hyunah Kim**, **Jae-Hyuk Choi**
Shin & Kim

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

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;
- KFTC Notice on the Operations of the Leniency Guidelines for Voluntary Disclosure of Unfair Collusive Acts;
- the Guidelines for Examination of Cartels Involving Administrative Guidance; and
- the Guidelines for Review of Cartels Involving Information Exchange between Business Entities.

Another guideline to note is one issued by the Prosecutors' Office titled 'Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures,' which officially implemented a criminal leniency programme for cartel cases.

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

7 | 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

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

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

9 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

10 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

11 | 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

12 | 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 investigation, a limitation period of five years from the date of the initial investigation applies.

By contrast, the statute of limitations for the KFTC to impose remedial orders or administrative fines for violations other than a cartel is seven years from the end date of the alleged violation, regardless of whether the KFTC commenced investigation.

Investigative powers of the authorities

13 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.

However, with recent changes to the KFTC's case and investigative procedure rules (effective 14 April 2023), the procedural rights of companies subject to dawn raids have become better protected. For example, the KFTC should specify in its notice of investigation both the duration of the investigation and the particular transaction or conduct subject to the investigation, thereby reducing uncertainty concerning its scope. If the duration needs to be extended, the KFTC should issue an additional notice that specifies the new period and the rationale underlying the extension. Moreover, to better protect the right to counsel provided under the MRFTA, the KFTC will no longer prioritise the legal team or the compliance department of an investigated company as a target of its dawn raid, unless there are reasons to believe that those departments were directly involved in an illegal activity or destruction of evidence. Furthermore, if an investigated company believes that the materials submitted during a dawn raid are irrelevant to the overall investigation, it may request either the return or disposal of such materials within seven days of their submission. If the investigating officials agree (or if, upon their disagreement, a separate review committee within the KFTC agrees), the materials must be processed accordingly.

As for criminal investigations by the Prosecutors' Office, 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

14 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

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

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

16 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.

Recently, in an effort to allow for more comprehensive deliberation for cases with a significant market-wide impact, the KFTC amended its case and investigative procedure rules (effective 14 April 2023) such that parties, upon request, can secure a deliberation period of at least two days, so long as the case they are implicated in: (1) has five or more respondents who are business operators (or 15 or more in a cartel case); or (2) involves

an estimated maximum amount of fine of at least 100 billion won (or at least 500 billion won in a cartel case).

Burden of proof

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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

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

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

23 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

24 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

25 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

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

Criminal 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

27 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have

the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

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

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

The 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.

COOPERATING PARTIES

Immunity

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

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 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 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.

In addition to the leniency programme administered by the KFTC (the KFTC Leniency Programme), there is one administered by the Prosecutors' Office (the Criminal Leniency Programme), first introduced on 10 December 2020 via issuance of the Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures.

The requirements and criteria for recognition under the Criminal Leniency Programme largely overlap with those under the KFTC Leniency Programme (first to provide evidence, cooperating in good faith, stopping cartel activities, etc). However, the scope of the Criminal Leniency Programme is different from that of the KFTC's programme, as the former applies only to hardcore cartels, as defined under the MRFTA (eg, price fixing, output restrictions, and market allocation), and certain bid-rigging conducts. Moreover, unlike the KFTC Leniency Programme, which allows only businesses to file for criminal leniency, the Criminal Leniency Programme allows both individuals (including former officers and employees) and businesses to do so.

Under the Criminal Leniency Programme, first-priority leniency applicants are eligible for exemption from indictment. Moreover, applicants, regardless of their priority status, are shielded from search and seizure, arrest, detention, and other compulsory investigations, unless circumstances dictate otherwise. Furthermore, the Prosecutors' Office, like the KFTC, offers an amnesty plus programme in which it reduces the penalty for leniency applicants that enjoy first-priority leniency status with another cartel case.

At this point, it remains unclear how exactly the Criminal Leniency Programme will operate in conjunction with the KFTC Leniency Programme. For example, discrepancies can easily arise between the KFTC's and the Prosecutors' Office's criminal leniency rankings when companies file leniency applications with both the KFTC and the Prosecutors' Office for the same conduct but in a different order, or when individuals file applications with the Prosecutors' Office but not with the KFTC (as they are barred from doing so with the latter); in such situations, the Prosecutors' Office would determine its own leniency ranking independently of the KFTC. However, currently there are no guidelines or regulations that address how the differences between the rankings should be reconciled, if at all. Therefore, until the law is further developed, companies should carefully consider whether it would be in their best interests to simultaneously apply for leniency with both the KFTC and the Prosecutors' Office.

Subsequent cooperating parties

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

Under the KFTC Leniency Programme, a second-priority leniency applicant is afforded 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 or committed illegal cartel conduct during a certain period; and
- the applicant must be the second applicant to exclusively provide 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.

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 referral to second-priority leniency applicants.

If there are only two companies that participated in the cartel, it is not possible for a company to obtain second-priority leniency status.

Under the Criminal Leniency Programme, second-priority leniency applicants, unlike their first-priority counterparts, are not exempt from indictment. Nonetheless, for these applicants, the Prosecutors' Office will recommend to the court a 50 per cent reduction in penalty, although the court is not bound by such request.

Going in second

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

If 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 of 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.

Under the Criminal Leniency Programme, the fact that the Prosecutors' Office revokes leniency status of a first- or second-ranking applicant has no impact on that of any subsequent applicants.

Approaching the authorities

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

Under the KFTC Leniency Programme, 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 to supplement its application and an extra 60 days may be provided if a valid reason for extension is presented. An extension by 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.

The Criminal Leniency Programme is similarly characterised by both the absence of a statutory deadline and the availability of markers. As under the KFTC Leniency Programme, a second-priority applicant must submit its application within two years of the Prosecutors' Office's receipt of application from the first-priority applicant. However, when it comes to supplementation of a marker, an applicant will be provided with a 30-day (rather

than a 15-day) period, which may be extended upon the finding by the Prosecutors' Office of its necessity, such as where an international cartel is concerned.

Cooperation

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

Under the KFTC's Leniency Programme, 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.

The standards under the Criminal Leniency Programme are largely identical.

Confidentiality

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

The 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 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.

Similarly, the Prosecutors' Office must not provide or divulge information and materials pertaining to the leniency application (identity of the applicant, substance of the reported information, etc) to any unrelated third party, except with the consent of the applicant.

Settlements

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

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

36 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 by the KFTC, its current and former employees as well as the corporate defendant will not be referred to the Prosecutors' Office for criminal prosecution.

Under the Criminal Leniency Programme, a corporate defendant is required to provide in its application a list of current officers and employees who should be granted leniency along with the corporation itself. Former officers and employees, however, are not protected under this arrangement, thereby heightening their incentives to individually file for criminal leniency.

Dealing with the enforcement agency

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

Given that under the KFTC's Leniency Programme full or partial immunity is granted to first- and second-ranking applicants only, submitting the application to the enforcement agency

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

38 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

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

Unless there is a conflict of interest, counsel may represent both employees and the corporation that employs them.

Multiple corporate defendants

40 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

41 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

42 | 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

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

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

44 | 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

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

In July 2023, the Korea Fair Trade Commission (KFTC) announced that it decided to impose a total surcharge of approximately 2.6 billion won (tentative) with remedial orders on the operators of South Korea's two largest job search platforms for colluding to suppress competition in the part-time job search market, where the two companies hold dominance as a duopoly. According to the KFTC's press release, the two operators, between May 2018 and March 2019, allegedly colluded to adopt policies that reduced the availability of free

services, steered customers toward paid services, and increased the prices charged for the latter. In particular, both operators curtailed the number, types, and duration of free job postings on their respective platforms. The KFTC found that the collusion was prompted by a competitive concern that a unilateral move would result in a loss of users to the rival operator.

This case is the first instance in which the KFTC has taken action against online platform operators for colluding to modify the terms and conditions that apply to free services. It has set the precedent that the KFTC is willing to sanction collusions that could occur in the process of limiting the availability of free services while inducing customers to purchase the paid counterparts.

In August 2022, the Supreme Court of South Korea (the Supreme Court) rendered an important decision regarding determination of when the conduct ended in an international cartel case for purposes of the statute of limitations. The facts and procedural history of the case are as follows:

Three non-Korean automotive component suppliers allegedly colluded to rig bids after having reached an understanding on which of them would supply auto parts to which carmakers. The KFTC imposed remedial orders and a surcharge on the companies in August 2019. One of the cartel participants, supplier A, appealed the KFTC's decision to the Seoul High Court. Supplier A filed for leniency with the KFTC in December 2014. The other cartel participants, suppliers B and C, filed for leniency with the European Commission (EC) in February 2011 and July 2011, respectively. In August 2020, the Seoul High Court invalidated the KFTC's decision, on the grounds that it was issued after the statute of limitations on the authority's action had already expired. The court reasoned that under the pre-2012 amendment of the MRFTA, the statute of limitations was five years from the end date of the alleged violation. Given that the cartel ended in July 2011, after both suppliers B and C had filed for leniency with the EC, thereby breaking the trust necessary for sustaining the collusion, the KFTC's decision, issued in August 2019, was issued more than five years later.

The Supreme Court, however, reversed and remanded the Seoul High Court's decision, on the grounds that contrary to the Seoul High Court's views, the filing of a leniency application with a foreign competition authority cannot unambiguously signal that the participant completely ceased the collusive conduct. The Supreme Court's rationale is as follows: 1) the requirements and criteria for recognition of leniency status vary across the leniency regimes, which leaves open the possibility that a cartel participant may continue its illegal conduct in Korea even after having filed for leniency with a foreign authority; 2) the KFTC may be unaware of the fact that a cartel participant has filed a leniency application with a foreign authority, and even if the KFTC were aware of such fact, that alone does not provide the authority with a sufficient evidentiary basis to render an informed decision; and 3) the cartel participants could have filed a leniency application with the KFTC as well.

Regime reviews and modifications

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

On 26 January 2023, the KFTC announced its enforcement plan for the year under the slogan ‘Fair Market Economy with Upright Principles’, expressing its commitment to establishing a clear, reasonable, and trustworthy regulatory framework under which innovation and creativity can be fostered through free and fair competition – in line with President Yoon Suk-Yeol and KFTC Chairperson Han Ki-Jeong's economic philosophy. The KFTC pointed out that it has a particular interest in addressing cartel-related issues, especially where consumer goods (energy, household goods, communication equipment, apartment maintenance and repair, etc), intermediate goods (construction-related raw materials, industrial parts, materials, equipment, etc) and service platforms are concerned.

SHIN&KIM

John H Choi	jhchoi@shinkim.com
Jooyoung Park	jyoungpark@shinkim.com
Changhun Lee	chlee@shinkim.com
Hyunah Kim	hahkim@shinkim.com
Jae-Hyuk Choi	jhyukchoi@shinkim.com

Shin & Kim

Switzerland

Mario Strebel, **Fabian Koch**
CORE Attorneys Ltd

Summary

PRIVATE RIGHTS OF ACTION

COOPERATING PARTIES

DEFENDING A CASE

UPDATE AND TRENDS

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 Octobe
r 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 (14 currently and until 1 January 2024; 12 thereafter) 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. Based on a public consultation carried out in 2022, the Swiss Federal Council published its dispatch on the partial revision of the Swiss Cartel Act on 24 May 2023. In addition, the Federal Council has appointed a commission of experts to put forward proposals for reform of the Swiss competition authorities (institutional reform). A corresponding report by the expert commission is to be submitted to the Federal Council by the end of 2023.

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 revised its Vertical Agreements Communication, published on 12 December 2022. The revised Vertical Agreements Communication reflects changes in 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 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, unwritten 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

7 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

8

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

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

9 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

10 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. Importantly, communications of the Commission are not binding upon Swiss courts, but rather reflect its practice.

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. It will expire on 31 December 2023 and be replaced by an ordinance of the Swiss Federal Council on the treatment of vertical agreements in the motor vehicle sector under competition law. Unlike the Commission's Commission, the Ordinance of the Federal Council will be binding for the Swiss courts and authorities.

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.

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

11 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

12 | 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

13 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

14 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. Switzerland recently concluded a comparable cooperation agreement with Germany, which entered into force on 1 September 2023. Under this agreement, the German Federal Cartel Office, which is the German competition authority, may under certain conditions also disclose information obtained in cooperation with the Swiss competition authorities to the European Commission to comply with its reporting obligations.

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 for 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

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

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

16 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

17 | 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

18 | 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

19 | 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

20 | 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

21 | 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

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

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

23 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 anticompetitive 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

24 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

25 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

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

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

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

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

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

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, as at the time of writing, still pending.

COOPERATING PARTIES

Immunity

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

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

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

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).

Even in the absence of a leniency application, parties may bring down the fine if they do any of all of the following:

- cooperate in the proceeding;
- sign an amicable settlement; and
- if provided for, acknowledge the facts established by the competition authorities.

Going in second

31 How is the second cooperating party treated? Is there an 'immunity plus' or 'mnesty 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

'

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

There are no 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

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

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. This view has recently been supported by the *Engadin IV* ruling of the Swiss Federal Administrative Tribunal. According to this, full immunity from fines is usually precluded if a leniency applicant raises legal or factual objections to the existence of the relevant inadmissible agreement affecting competition. In our view, however, it must be admissible to object to the legal appraisal of the competition authorities and courts without risking a reduction of the leniency bonus. The ruling of the Swiss Federal Administrative Tribunal can still be appealed to 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

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

The 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

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

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.

In some of its most recent cases, the Secretariat of the Commission also offered a fine reduction of up to 20 per cent if the parties acknowledge the facts established by the Secretariat. Also such a fine reduction needs to be approved by the Commission as the decision-making body.

Corporate defendant and employees

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

There 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

37 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

38 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

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

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

40 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

41 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

42 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, as at the time of writing, 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

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

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

I

44 | 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 or, if provided for, the voluntary acknowledgment of facts (or both) may result in an additional reduction of the potential fine of up to 40 per cent in total (up to 20 per cent for the amicable settlement and up to 20 per cent for the acknowledgment of facts).

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

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

There have been several important decisions in the past year concerning collusion, including the following:

- On 30 June 2022, the Commission fined seven dealers of Volkswagen Group-branded motor vehicles in the canton of Ticino who formed an inadmissible cartel 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.
- In January 2023, the Swiss Federal Administrative Tribunal published its long-awaited ruling in the *Ascopa* matter. Therein, the court had for the first time the opportunity to provide a ruling concerning information exchange between competitors. It concluded that the exchange of information concerning gross prices, turnover data and advertising investments as well as the jointGTC recommendations have to be deemed a significant restriction of competition in the sense of article 5, paragraph 1 of the Swiss Cartel Act, and therefore inadmissible.

- In early September 2023, the Swiss Federal Administrative Tribunal published its *Engadin IV* ruling, a bid rigging case. In this ruling, the court set forth that full immunity from fines is usually precluded if a leniency applicant raises legal or factual objections to the existence of the relevant inadmissible agreement affecting competition. This view is very far-reaching and highly contested. In our view, a leniency application exclusively concerns the relevant facts and evidence, but not the legal assessment. Therefore, it must be admissible to object to the legal appraisal of the competition authorities and courts without risking a reduction of the leniency bonus.

Besides these decisions, the Swiss competition authorities have opened several noteworthy investigations in the past year, with examples as follows:

- In December 2022, the Secretariat of the Commission opened a preliminary investigation concerning the labour market in the banking sector. According to the Secretariat, several banks in German-speaking Switzerland have exchanged salary information. This preliminary investigation could be ground-breaking as it is the first time in Switzerland that the labour market is being scrutinised from a competition law perspective.
- In March 2023, the Swiss competition authorities opened an investigation concerning possible collusion between producers in the fragrance sector. According to the Swiss competition authorities, there are suspicions that the undertakings concerned have coordinated their pricing policy, prohibited their competitors from supplying certain customers and limited the production of certain fragrances. Dawn raids were conducted at various locations. The Swiss competition authorities carried out these dawn raids in consultation with other competition authorities, namely the European Commission, the US Department of Justice Antitrust Division and the UK Competition and Markets Authority. This international cooperation makes the investigation particularly noteworthy.

Regime reviews and modifications

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

Partial revision of the Swiss Cartel Act

In May 2023, the Swiss Federal Council published the dispatch for a partial revision of the Swiss Cartel Act.

The core element of the planned partial revision is the switch from the current qualified dominance test to the significant impediment to effective competition test in merger control.

Besides this and further elements, the partial revision also encompasses three parliamentary motions of which, in particular, the motion by Olivier Français (18.4282) is significant in the context of this publication. With this motion, a quantitative test for all agreements affecting competition shall be reintroduced. If adopted, this motion would

reverse the case law of the Swiss Federal Supreme Court, according to which agreements affecting competition pursuant to articles 5(3) and (4) of the Cartel Act impede competition in such a significant manner due to their qualitative nature that the quantitative effects of such agreements must not be assessed.

It remains to be seen whether the partial revision of the Cartel Act will be successful, as earlier attempts have failed.

Potential reform of the institutional framework

In parallel to the planned revision of the Swiss Cartel Act, the Swiss Federal Council instructed the Federal Department of Economic Affairs, Education and Research (EAER) to submit a proposal for institutional reform of the competition authorities and courts in the first quarter of 2024. Currently, an independent commission appointed by the EAER is evaluating various reform options, to be presented by the end of 2023.

CORE Attorneys

Mario Strebel mario.strebel@core-attorneys.com
Fabian Koch fabian.koch@core-attorneys.com

CORE Attorneys Ltd

United Kingdom

Samantha Ward, **Elizabeth Morony**, **Ben Jasper**, **Bethany Downey**
Clifford Chance

Summary

PRIVATE RIGHTS OF ACTION

Private damage claims
Class actions

COOPERATING PARTIES

Immunity
Subsequent cooperating parties
Going in second
Approaching the authorities
Cooperation
Confidentiality
Settlements
Corporate defendant and employees
Dealing with the enforcement agency

DEFENDING A CASE

Disclosure
Representing employees
Multiple corporate defendants
Payment of penalties and legal costs
Taxes
International double jeopardy
Getting the fine down

UPDATE AND TRENDS

Recent cases
Regime reviews and modifications

LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

Cartel conduct can lead to both civil and criminal enforcement in the United Kingdom. The civil offence is set out in Chapter I of the Competition Act 1998 (CA 1998) and article 101 of the Treaty on the Functioning of the European Union (TFEU) and prohibits certain conduct by undertakings. Following the United Kingdom's withdrawal from the European Union, the Competition and Markets Authority (CMA) can no longer enforce article 101 of the TFEU.

The criminal offence, which applies to individuals, not undertakings, is set out in section 188 of the Enterprise Act 2002 (EA 2002).

Relevant institutions

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

The CMA investigates and enforces breaches of Chapter I of the CA 1998. There are also certain sectoral regulators such as Ofgem (gas and electricity), the Financial Conduct Authority and the Payment Systems Regulator that have equivalent powers to the CMA to apply and enforce Chapter I of the CA 1998 for conduct that takes place in their respective sectors. The Competition Appeal Tribunal hears appeals against cartel decisions taken by the CMA or sectoral regulators.

In England, Wales and Northern Ireland, the CMA and the Serious Fraud Office (SFO) prosecute the criminal offence under section 190(2) of the EA 2002. The CMA can refer criminal cartel cases to the SFO, but will only do so if a case involves serious or complex fraud. To date, criminal prosecutions have only been pursued by the CMA. The criminal cartel offence is tried either before a jury in a Crown Court or before a magistrate.

In Scotland, the CMA and the Crown Office and Procurator Fiscal Service (COPFS) cooperate to enforce the criminal offence, with the COPFS bringing prosecutions.

Changes

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

Brexit

The United Kingdom formally left the European Union on 31 January 2020 and the transition period in which EU law continued to apply ended on 31 December 2020.

Before its departure, the United Kingdom issued a series of statutory instruments that brought an end to the direct jurisdiction of the EU institutions in the United Kingdom at the end of the transition period. As a result, the European Commission no longer enforces breaches of EU competition law in the United Kingdom unless it formally commenced its investigation (issued a statement of objections) before 31 December 2020 and gave notice that it would continue its jurisdiction in those investigations. Likewise, the CMA was only able to investigate breaches of article 101 of the TFEU until 31 December 2020 unless the relevant conduct occurred before that date. Investigations into conduct that took place from 1 January 2021 are restricted to breaches of Chapter I of the CA 1998.

Another change is that section 60 of the CA 1998, which requires UK competition law to be interpreted consistently with EU law, has been repealed. This has been replaced with a new section 60A of the CA 1998 from the end of the transition period, which requires UK competition authorities and courts or tribunals to ensure that UK competition law is interpreted consistently with EU law as at 31 December 2020, but allows the departure from EU case law and principles that predate the end of the transition period where it is considered appropriate in light of certain specified circumstances. Section 60A of the CA 1998 applies to all UK competition authority investigations. In addition, the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 provide that both the UK Supreme Court and the Court of Appeal can overturn established EU case law after the end of the transition period.

EU Damages Directive

The EU Damages Directive was implemented in the United Kingdom on 9 March 2017 through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the Regulations). These provisions continue to apply post-Brexit. Schedule 1 of the Regulations introduces certain changes, which include:

- the granting of protection over leniency materials, settlement submissions and competition authorities' investigation materials (Schedule 1, sections 28 and 29 of the Regulations);
- confirmation of the rebuttable presumption that cartels cause harm (Schedule 1, section 13 of the Regulations); and
- benefits to immunity applicants in subsequent damages claims through exemption from the general rule that cartelists will be jointly and severally liable for harm caused by the cartel (Schedule 1, section 15 of the Regulations) for conduct that has taken place wholly on or after 9 March 2017.

CMA guidance

Following a consultation process from August to September 2020, the CMA released an updated guidance note – CMA8 (Investigation Procedures Guidance) – on the CMA's investigation procedures in CA 1998 cases regarding:

-

investigation procedure: the Investigation Procedures Guidance provides further detail on commitments and the CMA's streamlined access to file approach;

- director disqualification orders: for example, the guidance clarifies that directors' written representations that relate to an investigation under the Company Directors Disqualification Act 1986 will only be disclosed to addressees of a statement of objections in exceptional circumstances;
- penalties: the draft penalty statement will now be sent at the same time as the statement of objections; and
- leniency: the CMA will not mention publicly whether any undertaking involved in a suspected cartel has applied for leniency at the opening of its investigation.

In January 2022, the CMA issued updated guidance on its approach to penalties in CA 1998 cases. The guidance allows the CMA to take account of turnover generated outside the UK in certain circumstances. The guidance has removed two mitigating factors so that companies can no longer obtain a discount for effective compliance policies or where there was genuine uncertainty as to whether the conduct infringed competition law. The guidance also places greater emphasis on specific deterrence (ie, deterring the company subject to the decision as opposed to general deterrence) and states that penalties may need to be increased where companies are large.

Substantive law

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

The CA 1998 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that:

- may affect trade within the United Kingdom; and
- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (the Chapter I prohibition).

The Chapter I prohibition is based on article 101 of the TFEU.

Chapter I provides a non-exhaustive list of prohibited conduct. This includes agreements to fix prices; limit or control production, markets, technical development or investment; and share markets or sources of supply. The Office of Fair Trading's applications for leniency and no-action in cartel cases guidance (which has been adopted by the CMA) states that, by definition, cartel activities have as their object the prevention, restriction or distortion of competition and, therefore, there is no need to assess the effects of the cartel activity. The guidance also makes clear that cartel activity includes direct or indirect communication of specific, not publicly available, information regarding future pricing intentions between two or more competitors in a market.

An agreement may be exempt from the Chapter I prohibition if an undertaking can prove that the agreement improves production or distribution, promotes technical or economic progress and offers consumers a fair share of the resulting benefit (section 9 of the CA 1998). However, this is highly unlikely to be the case in relation to cartel activity.

The criminal cartel offence is a separate offence to the Chapter I prohibition that applies to individuals and not undertakings, and is set out in section 188 of the EA 2002. Section 188 of the EA 2002 relates only to horizontal agreements and provides that an individual is guilty of an offence if he or she agrees (with one or more other persons) to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings that involve direct and indirect price-fixing, limitation of supply or production, market sharing and bid rigging. This offence will be committed regardless of whether the agreement was implemented.

When considering whether to bring a prosecution under section 188 of the EA 2002, the CMA will follow the Code for Crown Prosecutors, which requires the CMA to consider whether a case has sufficient evidence for a realistic prospect of success. The CMA must then consider whether a prosecution is required in the public interest, taking into account factors such as the seriousness of the offence and whether prosecution is a proportionate response.

In April 2014, the scope of the criminal cartel offence was broadened with the removal of the requirement that an individual must have acted dishonestly in agreeing to engage in cartel activity. Since April 2014, the CMA is only required to demonstrate that an individual intended to enter into, or operate, an agreement.

Section 188A of the EA 2002 states that an individual does not commit an offence in various circumstances including:

- if customers are provided with relevant information about the arrangements before they enter into an agreement for the supply of the affected product or service;
- in bid rigging cases, if the person requesting bids is given relevant information about the arrangements at or before the time a bid is made; and
- if relevant information is published in a specified manner before the arrangements are implemented.

Section 188B of the EA 2002 provides three defences to the criminal cartel offence:

- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from customers at all times before they entered into agreements for the supply to them of the product or service;
- at the time of the making of the agreement, the individual did not intend that the nature of the arrangements would be concealed from the CMA; or
- before making the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers to obtain advice about them before making or implementing them.

Joint ventures and strategic alliances

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

Section 22 of the EA 2002 provides that if a joint venture or strategic alliance constitutes a relevant merger situation under section 23 of the EA 2002, it must be notified to the CMA. The parties to a joint venture or a strategic alliance will need to determine whether they are in a relevant merger situation and, if so, notify the CMA on a voluntary basis. The CMA's mergers guidance on the CMA's jurisdiction and procedure states that until a merger (or in this case, a joint venture) is completed, the parties will still be subject to the Chapter I prohibition and should ensure that they continue to operate as separate undertakings while the CMA considers approval of the arrangement.

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

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

Chapter I of the Competition Act 1998 (CA 1998) applies to undertakings that are broadly defined as any natural or legal person engaged in economic activity, regardless of its legal form or how it is financed. The Competition and Markets Authority (CMA) guidance as to the appropriate amount of a penalty confirms that this includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings, non-profit-making organisations and, in certain circumstances, public entities that offer goods or services on a given market.

The criminal cartel offence under the Enterprise Act 2002 (EA 2002) only applies to individuals.

Extraterritoriality

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

Section 2(3) of the CA 1998 states that the prohibition in Chapter I of the CA 1998 (the Chapter I prohibition) governs agreements that are implemented or are intended to be implemented, in the United Kingdom. If an agreement is entered into outside of the United Kingdom, but implemented, or intended to be implemented in the United Kingdom, the Chapter I prohibition will apply. The qualified effects doctrine set out by the European Court of Justice in *Intel v Commission* [2017] Case C-413/14P provides that article 101 of the Treaty on the Functioning of the European Union will apply not only to agreements implemented in the European Union but also to agreements that have immediate, substantial and foreseeable economic effects within the internal market. This principle, arising from retained EU case law, remains applicable in the United Kingdom post-Brexit.

Section 190(3) of the EA 2002 also states that the criminal offence will apply to agreements entered into outside the United Kingdom if the agreement, or part of the agreement, is implemented, or intended to be implemented, in the United Kingdom.

The Digital Markets, Competition and Consumers Bill 2023 proposes to extend the reach of the Chapter I prohibition to arrangements that are implemented outside the UK but that are likely to have an effect on trade within the UK.

Export cartels

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

Under section 2(1)(a) of the CA 1998, the Chapter I prohibition only applies to agreements if they may affect trade within the United Kingdom. Section 190(3) of the EA 2002 requires that agreements must also be implemented, or intended to be implemented, in the United Kingdom.

Industry-specific provisions

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

Agreements that are subject to exemptions under the Financial Services and Markets Act 2000 (Schedule 2 of the CA 1998), the Broadcasting Act 1990 or the Communications Act 2003 (Schedule 2 of the CA 1998) are excluded from the scope of the Chapter I prohibition. Agreements relating to the production or trade of an agricultural product are also excluded from the Chapter I prohibition (Schedule 3 of the CA 1998).

There are no industry-specific defences or exemptions for the criminal cartel offence.

Government-approved conduct

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

There is no general defence or exemption, but if there are exceptional and compelling public policy reasons (Schedule 1, section 7(1) of the CA 1998), a conflict with laws or international obligations (Schedule 1, section 6(1) of the CA 1998), the Secretary of State can exclude a particular agreement from the scope of Chapter I. In May 2020, the Secretary of State issued five statutory instruments that grant exemptions to the Chapter I prohibition in response to the covid-19 pandemic. These exemptions were granted to address issues such as excess demand for grocery supplies, logistics services and healthcare, excess supply in dairy farming and production, and ferry services. There were limits to these exemptions. For example, the dairy exemption allows farmers and producers to share information on surpluses, stock and capacity (among other things) but does not permit them to share information on prices and costs. These exemptions have since been revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (SI 2021/773), which brought the exemptions to an end.

INVESTIGATIONS

Steps in an investigation

12 | What are the typical steps in an investigation?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act 1998 (CA 1998) guidance.

Sources of the CMA's investigations

The CMA's CA 1998 guidance explains that the CMA obtains information from several sources that may result in it opening an investigation. These include:

- businesses that have been involved in a cartel (and want to take advantage of leniency); individuals with information about a cartel who apply for leniency;
- complaints from individuals or businesses; the CMA's own research; and
- evidence gathered through other CMA work (eg, mergers or market investigations).

Initial assessment phase

To open a formal investigation, section 25 of the CA 1998 requires that the CMA has reasonable grounds for suspecting that competition law has been breached. Generally, before the CMA forwards a case to its Enforcement Directorate, it is likely to request further information from parties on a voluntary basis. However, this is less likely in a suspected cartel case owing to concerns that this may prejudice the investigation.

Opening a formal investigation

If a complaint is likely to progress to a formal investigation, the case is allocated a designated case team responsible for the daily running of the case and a senior responsible officer who authorises the opening of a formal investigation and, where the senior responsible officer considers there is sufficient evidence, authorises a statement of objections.

After the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter setting out brief details of the conduct that the CMA is investigating, the relevant legislation, the case-specific timetable, and contact details for the case team. The CMA will also generally publish a notice of investigation on its website at this point. However, in cartel investigations, the CMA is unlikely to include details of the investigation at this stage to avoid any impact on its ongoing investigation.

Investigative powers

The CMA has a range of powers under the CA 1998 to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach, criminal offences also apply where an individual interferes with the CMA's investigatory powers.

Investigation outcomes

CMA investigations can be resolved in several ways.

If the CMA considers that the case gives rise to competition concerns, instead of continuing its investigation, the CMA may accept commitments from businesses on future conduct. The CMA must be satisfied that the commitments offered address its competition concerns.

The CMA can issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law. After allowing the businesses under investigation an opportunity to make written and oral representations on the statement of objections, if the CMA still considers that there has been an infringement, the CMA can issue an infringement decision and impose fines or directions, or both, to end any ongoing anticompetitive conduct.

A case decision group will be appointed by the Case and Policy Committee if the CMA decides to issue a statement of objections. The General Counsel and Chief Economic Adviser will ensure that there has been a thorough review of the legal and economic analysis (and the supporting evidence) and will inform the case decision group of any significant legal risks or risks on the economic analysis. The case decision group will then decide whether, based on the facts and available evidence, the CMA can establish that the legal test under the prohibition in Chapter I of the CA 1998 has been met. If a draft penalty statement has been issued, the case decision group will also decide whether a financial penalty should be imposed and the appropriate amount of that penalty.

The CMA can decide to close an investigation on grounds of administrative priorities. The CMA can also publish a reasoned no-grounds-for-action decision if it has not found sufficient evidence of an infringement of competition law.

Investigative powers of the authorities

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

The CMA has a range of powers under the CA 1998 to obtain information to help it establish whether an infringement has been committed. Under section 40A(1) of the CA 1998, the CMA can impose administrative penalties on undertakings for any failure to comply with investigatory requirements imposed on them through the CMA's exercise of its powers. As set out in the CMA's Administrative penalties: Statement of Policy on the CMA's approach,

criminal offences also apply where an individual interferes with the CMA's investigatory powers.

These powers include the following.

Written information requests

Under section 26(1) of the CA 1998, the CMA has the power to require any person to produce a specified document or to provide specified information, which the CMA considers relates to any matter relevant to the investigation. The CMA will send formal information requests in writing (a section 26 notice). This will indicate the subject matter and purpose of the CMA's investigation, specify or describe the documents or information, or both, that the CMA requires, and set out the offences or sanctions, or both, that may apply if the recipient does not comply.

The CMA may ask for documents such as internal business reports, copies of emails and other internal data. The definition of a document under section 59(1) of the CA 1998 also allows the CMA to ask for information that is not in written form (eg, market-share estimates based on knowledge or experience).

In February 2023, the CAT clarified that the CMA's powers under section 26 of the CA 1998 extend only to those entities with a UK territorial connection (*Bayerische Motoren Werke AG v Competition and Markets Authority* [2023] CAT 7). In this judgment, the CAT ruled that the CMA had acted outside its powers when it asserted that the German company, BMW AG, had an obligation to respond to an information request sent by the CMA in the course of its investigation into anticompetitive conduct relating to take-back, dismantling and recycling of end-of life vehicles. BMW AG did not have any branch or office in the UK nor any connection with the UK, other than a UK subsidiary to whom the notice was also addressed. The CAT ruled that addressees of a section 26 notice are only obliged to respond if they have a UK territorial connection, so BMW AG was not required to respond. However, the Digital Markets, Competition and Consumers Bill 2023 proposes to reverse this position by granting the CMA the ability to seek information and documents from companies and people outside the UK in the course of UK competition law investigations.

Power to require individuals to answer questions

Under section 26A(1) of the CA 1998, the CMA can require any individual who has a connection with a business that is a party to the investigation to answer questions on any matter relevant to the investigation after giving formal written notice. Section 26A(6)(a) of the CA 1998 provides that an individual is considered to have a connection with a business if he or she is or was:

- concerned in the management or control of the undertaking; or
- employed by, or otherwise working for, the undertaking.

This may be a current connection or a former connection, for example where the individual used to work for the undertaking under investigation (section 26A(6)(a) of the CA 1998).

The CMA's CA 1998 guidance states that it will give formal notice to anyone it wishes to interview, informing them that it intends to ask questions under formal powers. Where an individual has a current connection with the relevant undertaking at the time the formal notice is given, the CMA must also give a copy of the notice to that undertaking. The CA 1998 guidance states that it will be generally inappropriate for a legal adviser who only represents the undertaking to attend this interview.

Power to enter premises (dawn raids with or without a warrant)

In some cases, the CMA will visit premises to obtain information. The CMA has separate powers under the CA 1998 that allow it to enter premises with or without a warrant. The power that the CMA uses will depend on whether it intends to inspect business premises (eg, offices) or domestic premises (eg, employees' homes). The CMA can enter business premises without a warrant but cannot enter domestic premises without one.

Power to enter premises without a warrant

Under section 27(1) of the CA 1998, any CMA officer who is authorised in writing by the CMA to do so has the power to enter business premises without a warrant. Section 27(2) of the CA 1998 requires that the investigating officer give the occupier of the premises written notice indicating the subject matter and purpose of the CMA's investigation, setting out the offences or sanctions, or both, that may apply if the recipient does not comply.

In certain circumstances, as set out in section 27(3) of the CA 1998, the CMA need not give advance notice of entry. For example, the CMA need not give advance notice if it has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement that the CMA is investigating or a business whose conduct the CMA is investigating, or if a CMA-authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to do so.

When an inspection without a warrant is being conducted, section 27(5) of the CA 1998 permits CMA officers to require any person to:

- produce any document that may be relevant to the CMA's investigation (CMA officers can take copies of, or extracts from, any document produced);
- explain any document produced; and
- tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

Power to enter premises with a warrant

The CMA can apply to the court for a warrant to enter and search business premises (section 28(1) of the CA 1998) or domestic premises (section 28A(1) of the CA 1998).

The CMA generally seeks warrants if it has concerns that information relevant to the investigation may be destroyed or otherwise interfered with if requested through a written request (sections 28(1)(b) and 28A(1)(b) of the CA 1998).

Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary but only if they are prevented from entering the premises (sections 28(2) and 28A(2) of the CA 1998). The CMA's CA 1998 guidance states that CMA officers cannot use force against any person.

The warrant also authorises CMA officers to search the premises for documents that appear to be of the kind covered by the warrant and take copies or extracts from them (sections 28(2)(b) and 28A(2)(b) of the CA 1998). The CMA's CA 1998 guidance states that at the end of the inspection, the CMA officer will provide, where practicable, a list of documents and extracts that have been taken.

Criminal cartel offence

Under section 190(2) of the Enterprise Act 2002 (EA 2002), proceedings relating to the criminal cartel offence may only be instituted by the Director of the Serious Fraud Office (SFO) (section 190(2)(a) of the EA 2002) or by, or with, the consent of the CMA (section 190(2)(b) of the EA 2002).

The CMA and SFO both have investigation powers relating to the criminal cartel offence. The CMA's powers are set out in sections 193 and 194 of the EA 2002, whereas the SFO's powers are set out in section 2 of the Criminal Justice Act 1987 (CJA 1987). The 2020 memorandum of understanding between the CMA and SFO sets out the presumption that if the SFO accepts a criminal cartel investigation, the powers under the CJA 1987 will be used rather than those under the EA 2002. In joint investigations, the SFO and CMA will consider which powers to use on a case-by- case basis.

Under section 193(1) of the EA 2002 and section 2(2) of the CJA 1987, the CMA and Director of the SFO respectively may require a person under investigation, and any other person whom they have reason to believe has relevant information to answer questions or provide information relevant to the investigation. Notice of this will be sent to the person under investigation in writing.

Under section 193(2) of the EA 2002 and section 2(3) of the CJA 1987, the CMA and the Director of the SFO respectively may require the person under investigation, or any other person, to produce specified documents that relate to the investigation. The CMA and Director of the SFO are permitted to take copies of documents or require the person producing them to explain them (section 193(3)(a) of the EA 2002 and section 2(3)(a) of the CJA 1987). Under section 193(4) of the EA 2002 and section 2(3)(b) of the CJA 1987, if documents are not produced, the CMA or Director of the SFO can require the person who was ordered to produce them to state, to the best of their knowledge and belief, where the documents are.

Under section 194(1) of the EA 2002 and section 2(4) of the CJA 1987, the CMA and the Director of the SFO respectively have the power to request the grant of a warrant. This warrant is exercisable by any officer of the CMA (section 194(2) of the EA 2002) or any constable (section 2(5) of the CJA 1987) and enables them to enter premises using reasonable force, and to take possession of, or take steps to preserve, documents. Section

2(6) of the CJA 1987 states that a constable exercising a warrant under section 2(5) of the CJA 1987 will be accompanied by a member of the SFO or a person whom the Director of the SFO has authorised.

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

The Competition and Markets Authority (CMA) was a member of the European Competition Network (ECN), through which it cooperated with other member states' national competition authorities (NCAs). However, the cooperation ceased when the Brexit transition period ended on 31 December 2020. The EU–UK Trade and Cooperation Agreement 2021 made provision for a competition cooperation agreement between EU enforces and the CMA hopes that negotiations for cooperation will begin during 2023.

The CMA is permitted, under section 243(1) of the Enterprise Act 2002 (EA 2002), to disclose information to overseas authorities for certain purposes that include supporting overseas authorities with their cartel investigation (section 243(2) of the EA 2002). The CMA has stated that, as part of its expanded role post-Brexit, it plans to enhance its relationships with other NCAs both closer to home and further afield. In September 2020, the CMA became a signatory to the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, which aims to improve inter-agency cooperation between five countries: Australia, Canada, New Zealand, the United Kingdom and the United States. In March 2023, the CMA launched an investigation into suspected anticompetitive conduct concerning the supply of fragrances and fragrance ingredients in coordination with authorities in the United States, EU and Switzerland.

Interplay between jurisdictions

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

Section 2(3) of the Competition Act 1998 (CA 1998) states that the prohibition in Chapter I of the CA 1998 (the Chapter I prohibition) governs agreements that are implemented, or are intended to be implemented, in the United Kingdom. If an agreement is entered into outside of the United Kingdom, but is implemented or intended to be implemented in the United Kingdom, the Chapter I prohibition will apply. The qualified effects doctrine set out by the European Court of Justice in *Intel v Commission* [2017] Case C413/14P provides that article 101 of the Treaty on the Functioning of the European Union will apply not only to agreements implemented in the European Union but also to agreements that have immediate, substantial and foreseeable economic effects within the internal market. This principle, arising from retained EU case law, remains applicable in the United Kingdom post-Brexit.

CARTEL PROCEEDINGS

Decisions

16 | How is a cartel proceeding adjudicated or determined?

The key steps in a Competition and Markets Authority (CMA) investigation are set out in detail in the CMA's Competition Act (CA 1998) guidance.

In relation to the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 2002). The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's cartel offence prosecution guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Burden of proof

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

Regarding the prohibition in Chapter I of the CA 1998, in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 (*Napp*), the Competition Appeal Tribunal (CAT) confirmed that the Office of Fair Trading (OFT) had the burden of proof in civil cartel cases. The standard of proof is the civil standard, so the CMA must prove its case on the balance of probabilities. In *Napp*, the CAT held that the OFT Director must satisfy the CAT that, based on strong and compelling evidence, taking account of the seriousness of what is alleged, the infringement is duly proved. This approach was confirmed in *JJB Sports plc and Allsports Ltd v OFT* [2004] CAT 17 (*JJB Sports*). However, the CAT held that 'strong and compelling' evidence should not be interpreted as meaning that something akin to the criminal standard applies to cartel proceedings.

Concerning the criminal cartel offence, the burden of proof is on the CMA if it proceeds with a prosecution under the criminal cartel offence under section 188 of the EA 2002. The standard of proof required in a criminal trial is proof beyond reasonable doubt, a higher standard than in civil investigations. If an individual wishes to plead a defence under section 188B of the EA 2002, then the burden of proof will shift to the defendant. The CMA's cartel offence prosecution guidance states that the standard of proof required of the defendant to prove one of the defences is the balance of probabilities.

Circumstantial evidence

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

In *Napp*, the CAT confirmed that the OFT was able to rely on inferences and presumptions about a certain set of facts (absent the existence of any contradictory facts) to discharge the burden of proof. In *JJB Sports*, the CAT further confirmed that wholly circumstantial evidence could be sufficient to meet the required standard in certain circumstances.

Appeal process

19 | What is the appeal process?

The CAT hears appeals against decisions of the CMA and sectoral regulators. Appeals in the CAT are on the merits and heard before a tribunal consisting of three members: either the president or a chair and two ordinary members. The chairs are generally judges of the High Court of England and Wales (and the equivalent courts in Scotland and Northern Ireland), and other senior lawyers. The two ordinary members will likely be senior lawyers or economists, or those with expertise in business, accountancy or related fields.

To appeal a CMA or sectoral regulator's decision, an appellant must file a notice of appeal that must satisfy certain format requirements. The CAT registrar will send an acknowledgement of receipt to the appellant and a copy of the notice to the respondent. The registrar will then schedule a case management conference to discuss such items as timing, procedural issues, and whether and when the parties should file a disclosure report.

The notice of appeal must be filed by the appellant with the registrar within two months of being notified of the regulator's decision, under Rule 9 of the Competition Appeal Tribunal Rules 2015. These two months are counted from the day after the undertaking is notified of the regulator's decision. Rules 15(1) and 15(6) provide that a respondent must file the defence and its annexes within six weeks after the date it receives the notice of appeal. The CAT will only grant extensions to any of these deadlines in exceptional circumstances (see *Vodafone v Ofcom* [2008] CAT 4), although extensions of two weeks were granted in the *Liothyronine* and *Hydrocortisone* appeals on the basis that the CMA decisions were lengthy and complex (in some cases over 1,000 pages) and that the extensions were modest. Hearing dates will be fixed at a case management conference.

Appellants and the CMA also have a right to appeal CAT judgments either on a point of law or, in penalty cases, the amount of any penalty, with the permission of the CAT or the Court of Appeal.

SANCTIONS

Criminal sanctions

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

Criminal sanctions for individuals are set out under section 190 of the Enterprise Act (EA 2002), and include custodial sentences (including a term of up to five years) and fines.

The Competition and Markets Authority (CMA) has pursued only a handful of criminal convictions, with the most recent prosecution in 2017. All successful CMA criminal

prosecutions detailed below related to conduct before April 2014, when the CMA was required to demonstrate that an individual acted dishonestly in agreeing to engage in cartel activity. The CMA is now only required to demonstrate that an individual intended to enter into or operate an agreement, making the requirements of section 188 of the EA 2002 easier for the CMA to satisfy.

There have been several successful criminal prosecutions. An individual was sentenced to two years imprisonment (suspended), made the subject of a six-month curfew order and disqualified from acting as a company director in relation to the supply of precast concrete drainage products (2017). In relation to the supply of galvanised steel tanks (2015), three individuals were charged, with one pleading guilty (receiving a suspended sentence of six months and 120 hours of community service) and two others being acquitted following a jury trial. In relation to the Marine Hose cartel (2008), three defendants were sentenced to terms of between two-and-a-half and three years in prison, disqualified from acting as directors for between five and seven years, and, in some cases, ordered to pay costs.

The CMA has also pursued unsuccessful prosecutions. In 2010, four individuals involved in the Airline Passenger Fuel Surcharge cartel were charged under section 188 of the EA 2002, but proceedings were withdrawn one month into the criminal trial.

Civil and administrative sanctions

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

Civil sanctions for cartel activity include fines of up to a maximum of 10 per cent of the worldwide turnover of the undertaking. In July 2021, the CMA imposed fines totalling £260 million for competition law breaches (including market sharing and excessive and unfair pricing) concerning the supply of hydrocortisone tablets. In March 2023, the CMA fined 10 construction firms a total of nearly £60 million for illegally colluding to rig bids for demolition and asbestos removal contracts involving both public and private sector projects. The CMA may also impose directions or a declaration that the agreements in question are void.

The CMA can also apply to the High Court for a competition disqualification order that can result in a director being disqualified for up to 15 years.

If an undertaking fails to comply with a CMA investigation order, the CMA can issue directions to ensure an undertaking's compliance with the relevant order.

Guidelines for sanction levels

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

The CMA sets out its approach to penalties in its penalty guidance, which details its six-step approach to calculating financial penalties, namely:

- calculation of the starting point (of up to 30 per cent of the turnover in the relevant product market and the relevant geographic market in the last financial year

preceding the date when the infringement ended) having regard to the seriousness of the infringement and for general deterrence;

- the starting point may be increased or, in certain circumstances, decreased to reflect the duration of the infringement – typically, the starting point will be multiplied by the number of years (or part years) of an infringement;
- the penalty may then be adjusted based on aggravating or mitigating factors – aggravating factors include continuing the infringing behaviour after the commencement of the CMA's investigation, whereas a mitigating factor may be an undertaking partaking in the infringement under severe duress or pressure;
- the penalty may next be adjusted for specific deterrence and proportionality (eg, the amount may be increased to discourage the undertaking from engaging in future breaches of competition law);
- the penalty will then be adjusted downwards if it exceeds the maximum penalty of 10 per cent of the worldwide turnover of the undertaking, and to avoid double jeopardy; and
- there may be discounts for leniency, settlement or the CMA's approval of a voluntary redress scheme, or all of the foregoing.

Compliance programmes

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

The CMA could previously issue discounts of up to 10 per cent if an undertaking can demonstrate that it has taken adequate steps appropriate to the size of its business concerned to achieve a clear and unambiguous commitment to competition law compliance. However, this was removed in the updated guidance issued in January 2022.

Director disqualification

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

If a company has infringed Chapter I of the Competition Act 1998 (CA 1998), its directors can be disqualified for up to 15 years if they knew of, or ought to have known about, the arrangements. The CMA, and sectoral regulators, can either seek a competition disqualification order from the High Court (or Court of Session in Scotland or Northern Ireland High Court) or accept a competition disqualification undertaking from the director that has the same effect as a competition disqualification order. To date, the CMA has disqualified over 20 directors primarily by way of competition disqualification undertakings.

Debarment

25 |

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

Debarment from government procurement procedure is not automatic; however, sections 57(8)(d) and 57(12) of the Public Contracts Regulations 2015 set out that a contracting authority has the discretion to exclude economic operators from procurement procedure for three years from the date of the relevant event if it has sufficiently plausible indications to conclude that the economic operator has entered into agreements aimed at distorting competition. The CMA's annual plan for 2023–2024 noted 'cartels in public procurement' as an area of focus.

Parallel proceedings

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

Sanctions for criminal and civil activity can both be pursued for the same conduct; however, only undertakings can be pursued for breach of the prohibition in Chapter I of the CA 1998 and only individuals can be pursued under section 188 of the EA 2002.

PRIVATE RIGHTS OF ACTION

Private damage claims

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

Any natural or legal person who has suffered loss or damage as a result of an infringement or alleged infringement of the prohibition under Chapter I of the Competition Act 1998 (CA 1998) or article 101 of the Treaty on the Functioning of the European Union (TFEU) prior to the United Kingdom's departure from the European Union has the standing to bring a claim in the High Court or the Competition Appeal Tribunal (CAT) (section 47A of the CA 1998), whether a direct or indirect purchaser. Claims can be brought on a follow-on basis after an infringement decision under Chapter I of the CA 1998 (or article 101 of the TFEU prior to the United Kingdom's departure from the European Union in respect of damage occurring prior to 31 December 2020) has been issued or on a stand-alone basis where no infringement decision has been issued.

Follow-on actions are based on the tort of breach of statutory duty and damages are awarded on the tortious basis of the amount of the loss, plus interest. Defendants can use the passing-on defence, which allows damages suffered by the purchaser of a cartelised product to be reduced if the defendant can prove that the purchaser passed on the overcharge to his or her customers. For claims where the loss or damage suffered was wholly on or after 9 March 2017, under section 36 of the Claims in respect of Loss

or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, a court or tribunal may not award exemplary damages in competition proceedings. However, for claims where loss or damage was suffered before, there are circumstances in which exemplary damages may be awarded.

Costs generally follow the event, with the unsuccessful party paying the costs of the successful party (Part 44.2 of the Civil Procedure Rules). However, the CAT has a broader discretion in awarding costs and will consider a range of factors. Generally, a successful party is only likely to recover around two-thirds of its costs. The English courts have a wide discretion to order simple interest and have also awarded compound interest.

Class actions

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

High Court

In the High Court, there is no equivalent in England and Wales of the US-style (opt-out) class-action procedure, nor is there a similar certification process. While it is possible to bring representative actions in the High Court, this is difficult to do. In *Emerald Supplies Limited v British Airways plc* [2009] EWHC 741 (Ch), the claimants attempted to bring a quasi-class action in the High Court. They alleged that they had paid inflated air freight prices as a result of a price-fixing cartel to which British Airways and other airlines were a party, and claimed damages for themselves and other importers of cut flowers who they purported to represent. The claim was rejected at first instance, on the basis that the class of direct and indirect purchasers was too ill defined, and the direct and indirect purchasers would not all benefit from the relief sought by the claimant because of the need for direct purchasers to pass on the overcharge to indirect purchasers for the latter to benefit from damages awarded. This decision was upheld by the Court of Appeal.

Competition Appeal Tribunal

The Consumer Rights Act 2015 (CRA 2015) introduced collective actions in the CAT for both follow-on and stand-alone claims on an opt-in or opt-out basis.

There is a certification process in the CAT. Under section 47B of the CA 1998 (as amended by the CRA 2015), any collective proceedings will only be continued if the CAT makes a collective proceedings order. It is possible to bring either opt-in or opt-out collective proceedings; that is, brought on behalf of each class member without specific consent unless a class member elects to opt out by notifying the representative that his or her claim should not be included in the proceedings.

The CAT will make this order if the person bringing the proceedings is someone it could authorise to act as the representative and it is satisfied that the claims are eligible for inclusion in collective proceedings. To be eligible, claims must raise the same, similar or

related issues of fact or law and be suitable to be brought in collective proceedings. The collective proceedings must:

- authorise the person who brought the proceedings to act as the representative;
- describe the class of persons whose claims are eligible for inclusion; and
- specify whether the proceedings are on an opt-in or an opt-out basis.

The test that the CAT applies was subject to an appeal to the Supreme Court (*Mastercard and others v Merricks* [2020] UKSC 51) and, as a result of that judgment, the threshold for ordering a collective proceedings order is now considerably lower. The CAT refused to issue a collective proceedings order on the basis that there was no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated. The Supreme Court found that the CAT had made various errors of law. In particular, the Supreme Court found that, if the forensic difficulties had been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings. In addition, the incompleteness of data and the difficulties of interpreting what survives are frequent problems with which courts wrestle. However, this was not a good reason for a court to refuse a trial. In addition, the CAT was wrong to require Mr Merricks' proposed method of distributing damages to take account of the loss suffered by each class member. A central purpose of the power to award damages in collective proceedings is to avoid the need for individual assessments of loss.

COOPERATING PARTIES

Immunity

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

The Competition and Markets Authority (CMA) offers three types of leniency, based on the time at which an undertaking applies.

To be offered Type A or B leniency, an applicant must:

- accept that it participated in cartel activity in breach of the law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

To be offered Type C leniency, an applicant must satisfy all the above conditions, except for the coercion requirement. Further details on Types A, B and C leniency are set out below.

Type A

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

The CMA has also clarified that in resale price maintenance cases in granting Type B leniency (1) immunity will not be granted, and (2) the CMA would not grant a reduction in the level of any penalty of more than 50 per cent.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals and protection from director disqualification proceedings.

Subsequent cooperating parties

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

Type B and Type C leniency are available for parties that cooperate after an immunity application has been made.

Type B

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

Type C

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Going in second

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

Parties that cooperate with the CMA after a leniency application has already been made may be eligible for Type C leniency. Type C applicants will be eligible for discretionary reductions in corporate penalties of between 25 and 50 per cent, discretionary criminal immunity to specific individuals and protection from director disqualification proceedings. The leniency guidance provides that, once an applicant becomes eligible only for Type C leniency, their position in relation to other Type C applicants will not be decisive as to the level of discount they are awarded. However, it is likely that the further ahead in the queue an applicant is, the easier it will be to provide greater value to the CMA and receive a greater discount.

The CMA also offers leniency plus if an undertaking is cooperating with the CMA in relation to its cartel activity in one market and chooses to cooperate with the CMA in relation to cartel activity in a second market. In this circumstance, an undertaking can receive a larger reduction in financial penalties for its cartel activities in the first market.

Approaching the authorities

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

There are no set deadlines for initiating or completing a leniency application; however, the CMA will not accept leniency applications from undertakings once it has issued a statement of objections in relation to the reported cartel activity. Also, if applicants would like to receive Type A leniency, they will need to approach the CMA before the CMA launches a Chapter I of the Competition Act 1998 (CA 1998) investigation and before other members of the cartel approach the CMA.

Cooperation

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

The leniency guidance sets out that applicants must first confirm their acceptance that their activity amounts to an infringement of Chapter I of the CA 1998 and article 101 of the Treaty on the Functioning of the European Union.

Once applicants have confirmed this, the leniency guidance emphasises that applicants must maintain continuous and complete cooperation with the CMA throughout the CMA's investigation and any subsequent proceedings brought by the CMA. If an applicant fails to cooperate with the CMA continuously, they could lose the protections offered to them. The CMA expects applicants to genuinely assist them in effectively investigating and taking enforcement action against the cartel conduct. This requires that applicants take such steps as providing the CMA with documents and other evidence when they submit leniency applications.

Confidentiality

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

The CMA will not generally disclose that an undertaking has made a leniency application until it issues its statement of objections.

Settlements

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

The CMA has the discretion to offer an undertaking an opportunity to enter into a settlement process on the condition that the undertaking admits that it breached the prohibition contained in Chapter I of the CA 1998, ceases the infringing behaviour immediately from

the date that it enters into settlement discussions with the CMA (where it has not already done so), and confirms it will pay a penalty set at a maximum amount. The undertaking must also confirm that, among other things, it accepts that there will be an infringement decision made against it and that the streamlined administrative procedure will govern the remainder of the CMA's investigation. An undertaking will still be able to appeal the CMA's infringement decision, but if it does so, it will lose its settlement discount.

The amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

The CMA may, at its discretion, choose to accept commitments from an undertaking on its future conduct instead of proceeding with an investigation. These could be structural or behavioural, or a combination of both, but an undertaking's compliance with them must not be too difficult for the CMA to monitor. If commitments address all of the CMA's concerns, the CMA cannot proceed with the investigation. If the commitments only partially address the CMA's concerns, it can continue its investigation into the elements that have not been addressed.

Corporate defendant and employees

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

The CMA offers three types of leniency, based on the time at which an undertaking applies.

Type A

An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B

The grant of any form of leniency or reductions in penalties to Type B applicants is always discretionary but current and former employees who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Type C

The grant of any form of leniency or reductions in penalties to Type C applicants is always discretionary, but specific individuals who cooperate with the CMA may be eligible for discretionary criminal immunity and protection from director disqualification.

Dealing with the enforcement agency

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

Before making a leniency application, an applicant or its legal adviser can phone the CMA's leniency enquiry line on a confidential basis to ascertain whether the CMA has an ongoing investigation or whether Type A immunity is, in principle, available. The legal adviser will need to provide certain details such as the relevant sector and dates to allow the CMA to check the availability of Type A immunity.

Once the CMA officer has made the relevant internal enquiries, they will revert on the availability of Type A immunity. If Type A immunity is available, and the applicant wishes to proceed with its applications, the legal adviser will need to provide the applicant's identity to the CMA. At this point, the CMA will give the applicant a preliminary marker, while the applicant prepares its full leniency package. If Type A immunity is not available, the applicant should discuss with the CMA whether Type B leniency is available.

DEFENDING A CASE

Disclosure

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

The Competition and Markets Authority (CMA) offers addressees of the statement of objections and any draft penalty statement a reasonable opportunity to inspect the CMA's file. The CMA will generally provide addressees with copies of the documents referred to in the statement of objections and any draft penalty statement, and a schedule of documents that sets out all other documents in the CMA's file.

The CMA has made changes to its disclosure process, as reflected in its updated CMA8 (Investigation Procedures Guidance), including a new streamlined access-to-file approach whereby parties are provided with the key documents referred to in the statement of objections and a schedule of other, non-key documents on the file. Addressees can request to inspect the additional documents set out in this schedule, and the CMA will deal with these requests on a case-by-case basis. Where the CMA agrees to disclose these documents, it will likely use a confidentiality ring or data room to facilitate disclosure.

The CMA generally provides addressees with the same time to review the file as to submit its written representations in response to the statement of objections and any draft penalty statement (which will be up to a maximum of 12 weeks).

Representing employees

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

There are no restrictions on counsel representing employees under investigation in addition to the corporation that employs them unless there is a conflict of interest. However, in the Investigation Procedure Guidance, the CMA states that its starting position is that it will be generally inappropriate for an undertaking's legal adviser to attend interviews that it conducts under its powers under section 26 of the Competition Act 1998.

Multiple corporate defendants

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

While there are no restrictions on lawyers representing multiple corporate defendants, there is a risk that conflicts of interest may arise and corporate defendants will usually each have their own, independent representatives.

Payment of penalties and legal costs

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

There are no blanket restrictions prohibiting a company from paying a civil penalty or any associated legal costs imposed on an employee.

Taxes

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

Fines or penalties imposed by the CMA are not tax-deductible on the basis that they are incurred as a result of an undertaking's breach of the law (see *CIR v Alexander von Glehn Ltd* [1920]).

A private damages settlement payment may be tax-deductible if an allegation is neither admitted nor proved. Tax deductions for private damages are not permitted where a payment is punitive but may be permitted where a payment is restitutionary.

International double jeopardy

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

The CMA's penalty guidance used to state that if a penalty or fine has been imposed by the European Commission, or by a court or other body in another EU member state in respect of an agreement or conduct, the CMA must take that penalty or fine into account

when setting the amount of a penalty in relation to that agreement or conduct. However, in its 2021 guidance, the CMA removed its double jeopardy assessment, reflecting the end of the Brexit transition period and the fact that the CMA may seek to impose fines on activity that has also been subject to fine in other jurisdictions. When considering whether a penalty is proportionate, the CMA will consider all relevant circumstances.

Getting the fine down

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

Type A immunity is available for the first undertaking to apply for leniency, in circumstances where there is no pre-existing investigation into the reported conduct and the undertaking did not coerce other undertakings into participating in the cartel. An undertaking that satisfies the criteria will receive guaranteed immunity from civil penalties and, if its current and former employees cooperate with the CMA, they will also receive guaranteed immunity from criminal prosecution and protection from director disqualification proceedings.

Type B leniency is available for the first undertaking to apply for leniency, in circumstances where there is a pre-existing investigation. The undertaking must not have coerced other undertakings into participating in the cartel. The grant of any form of leniency or reductions in penalties to Type B applicants is discretionary in all circumstances, but applicants may be eligible for corporate immunity from penalties or penalty reductions up to 100 per cent, discretionary criminal immunity, and protection from director disqualification proceedings for cooperating current and former employees and directors. Type B leniency will not be available where the CMA has sufficient information to establish the existence of the reported cartel activity.

In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency will be available. The grant of Type C leniency is always discretionary, but applicants will be eligible for discretionary reductions in corporate penalties of up to 50 per cent, discretionary criminal immunity to specific individuals, and protection from director disqualification proceedings.

Regarding settlements, the amount of any reduction will be determined by several factors, including whether the case is settled before or after the statement of objections is issued. However, settlement discounts are capped at 20 per cent (before a statement of objections is issued) and up to 10 per cent after a statement of objections is issued.

UPDATE AND TRENDS

Recent cases

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

Replica football kits

On 27 September 2022, the Competition and Markets Authority (CMA) issued a decision finding that Elite Sports and JD Sports infringed the Chapter I prohibition through a single and continuous infringement of fixing the retail prices of certain Rangers-branded clothing products. The CMA found that Rangers also took part in the collusion for one product. The CMA imposed fines of over £2 million, which took into account a settlement discount to reflect the companies' admissions and their agreement to a streamlined administrative process. Two entities also received a discount under the CMA's Leniency Programme.

Hydrocortisone, liothyronine and prochlorperazine

In July 2021, the CMA imposed fines totalling £260 million for competition law breaches against several companies (including for market sharing and excessive and unfair pricing) in relation to the supply of hydrocortisone tablets. Decisions were also taken against several companies in relation to the supply of liothyronine (imposing fines of over £100 million) and prochlorperazine (imposing fines of over £35 million). The addressees of these decisions appealed them before the Competition Appeal Tribunal. On 8 August 2023, the CAT dismissed the appeal brought on *Liothyronine* but did reduce the fines applicable by £43.4 million. Judgments is pending in *Hydrocortisone*.

UK Bonds

In May 2023, the CMA provisionally found that five banks unlawfully exchanged sensitive information regarding UK government bonds in one-to-one online chats. By unlawfully exchanging competitively sensitive information rather than fully competing, the banks involved in these arrangements could have denied the full benefits of competition to those they traded with – including, among others, pension funds, the UK Debt Management Office (which sells gilts by auction), and ultimately HM Treasury and UK taxpayers. Deutsche Bank alerted the CMA to its participation in the alleged unlawful behaviour under the CMA's leniency policy, and Citi applied for leniency during the CMA's investigation. The CMA's investigation is ongoing and if the CMA concludes that any two or more of the banks engaged in anticompetitive activity, the CMA will publish an infringement decision and may issue fines.

Regime reviews and modifications

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

The Digital Markets, Competition and Consumers Bill 2023

On 25 April 2023, the UK Government introduced the Digital Markets, Competition and Consumers Bill, which proposes to make several fundamental changes to the UK's competition law regime, including in relation to the territorial reach of UK competition law and public enforcement. Under the current Competition Act 1998 legislation, which prohibits anticompetitive agreements and concerted practices, an agreement can only be

investigated and fined under Chapter 1 if it is implemented in the UK. The Bill proposes to extend the reach of this to those implemented outside the UK but likely to have an effect on trade within the UK. This would allow the CMA to investigate contraventions of competition law, such as cartel conduct, which occur outside the UK. The Bill also proposes to grant the CMA the ability to seek information and documents from companies and people outside the UK, contrary to the current position as set out by the CAT following the CMA's BMW and Volkswagen information requests.

The Bill would also grant the CMA stronger evidence-gathering powers during Competition Act investigations, including a new power to seize evidence in order to search through it at a later date when conducting inspections of domestic premises, which is presently only available for investigations at business premises.

The Bill also introduces stronger civil penalties for infringements of procedural aspects of UK competition law. Failures to comply with CMA investigations, such as failure to comply with an information request, would be subject to a fixed civil penalty of up to 1 per cent of global turnover. Daily penalties of up to 5 per cent of daily worldwide turnover could also be imposed. Individuals such as company directors would also be able to be held accountable, facing penalties of up to £30,000 and additional daily penalties of £15,000 for failing to comply with the CMA's investigative powers.

CMA guidance

Following a consultation process from August 2020 to September 2020, the CMA released an updated guidance note on the CMA's investigation procedures in Competition Act 1998 cases. The CMA also updated its penalty guidance in January 2022.

Consultation on reform of competition and consumer policy

In July 2021, the Department of Business, Energy and Industrial Strategy launched a consultation on the reform of competition and consumer policy. In light of responses received, the government has decided to:

- amend the Chapter 1 prohibition so that it applies to agreements, concerted practices and decisions that are implemented outside of the UK, depending on the effect of conduct within the UK. Jurisdictional changes were proposed to the Chapter II prohibition, but these are not to be implemented;
- widen the CMA's power to interview relevant witnesses, beyond just those with a connection to the business;
- adopt proposals to introduce a duty not to destroy evidence, with civil penalties if not complied with, and to include 'seize and sift' powers for domestic premises;
- not proceed with new immunity from private liability for holders of guaranteed immunity from public sanction; and
- allow the CMA greater autonomy to implement a robust and efficient settlement process but not to proceed with making settlement admissions by businesses

binding on them as a matter of law or introduce statutory provisions for previously proposed early resolution agreements.

CLIFFORD
CHANCE

Samantha Ward	samantha.ward@cliffordchance.com
Elizabeth Morony	elizabeth.morony@cliffordchance.com
Ben Jasper	ben.jasper@cliffordchance.com
Bethany Downey	bethany.downey@cliffordchance.com

Clifford Chance